NO. COA22-256 **THIRTEENTH DISTRICT**

NORTH CAROLINA COURT OF APPEALS

****

MAURICE DEVALLE,	)	
Petitioner-Appellee	)	
	)	**From Columbus**
v.	)	
	)	
NORTH CAROLINA SHERIFFS' EDUCATION AND TRAINING STANDARDS COMMISSION,	)	
Respondent-Appellant	)	
	)	

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RESPONDENT-APPELLANT'S BRIEF

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

STATE CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

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RESPONDENT-APPELLANT'S BRIEF

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ISSUE PRESENTED

I. **WHETHER THE SUPERIOR COURT ERRED BY GRANTING DEVALLE'S PETITION FOR JUDICIAL REVIEW.**

STATEMENT OF THE CASE

On 29 January 2019, the North Carolina Sheriffs' Education and Training Standards Commission ("the Commission") sent notice to Maurice Devalle ("Devalle") stating the Probable Cause Committee ("the committee") has found probable cause exists to believe Petitioner's justice officer certification should be denied. (R p. 6) Devalle requested an administrative hearing on the committee's determination to deny his justice officer certification. (Doc. Ex. 5)

On 3 and 4 December 2019, an administrative hearing was held before Administrative Law Judge (ALJ) Melissa Owens Lassiter. (R p. 5) On 3 June 2020, ALJ Lassiter filed her Proposal for Decision in which she concluded 1) substantial evidence supported the committee's finding that Devalle committed the crime of "Willfully Failing to Discharge Duties" and 2) while Devalle was dishonest and untruthful, Devalle had rehabilitated his character. (R pp. 42 and 43) ALJ Lassiter recommended Devalle's justice officer certification be indefinitely denied, but that extenuating circumstances justified the Commission exercising its discretion and reducing the sanction. (R p. 44)

On 6 October 2020, the Commission issued its Final Agency Decision (FAD) ordering Devalle's justice officer certification be denied indefinitely pursuant to his lack of good moral character and, additionally, denying

Devalle's justice officer certification for five (5) years for the commission of the criminal offense of "Willfully Failing to Discharge Duties." [1] (R p. 20)

On 8 December 2020, Devalle filed a Petition for Judicial Review (PJR) in Columbus County Superior Court. (R p. 25) The Commission moved to dismiss the PJR on 22 January 2021, and a hearing was held on 29 October 2021, before the Honorable James G. Bell. (R pp. 47, 76) Following the hearing, Judge Bell issued an order granting Devalle's PJR. (R p. 87)

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW

This Court has jurisdiction over the Superior Court's order granting Devalle's petition for judicial review. N.C. Gen. Stat. §§ 7A-27(b)(1) and 150B-52.

STATEMENT OF THE FACTS

A. Devalle violates Patrol rules, precipitating the termination of his employment.

Devalle was employed as a sergeant by the North Carolina State Highway Patrol ("the Patrol") from 25 November 1998, through 24 April 2017. (R p. 7) In November of 2016, a local news station reported to the Patrol that Devalle spent various days at his home in Wake County when he was supposed to be working at his duty station in Wayne County. (R

[1] The latter sanction, not at issue in this action, was suspended for five (5) years on the condition Petitioner not violate any laws. (R p. 20)

p. 7) The Patrol conducted an Internal Affairs ("IA") investigation into the report. (R p. 7) During 2015 and 2016, Patrol policy was that a trooper must live within 20 miles of his duty station. (R p. 13) Devalle's duty station, for purposes of the Patrol, was Wayne County. (R p. 13) On 15 February 2015, Devalle made a request to reside in Johnston County at 400 Hillside Drive. (R p.13; Doc. Ex. 768) This residence was within the 20 mile requirement and was approved by the Patrol. (R p. 13) Devalle admitted during the IA investigation that he never stayed, resided, or parked his patrol car at this residence. (R p. 13) In fact, Devalle actually resided on Blue Ridge Road, in southern Wake County, approximately 43 miles from his duty station. (R pp. 10, 13)

Pursuant to The State Highway Patrol Policy Manual, Directive H.1, Paragraph XV, in November 2016, Patrol protocol required troopers not to call in as being on-duty until they reached their duty station. (R pp. 9-10; Doc. Ex. 756) On Friday, 11 November 2016, at approximately 2:53 P.M., Devalle signed into the Patrol's computerized automatic dispatch system ("CAD") as being on-duty. (R p. 11) Upon orders from superiors, Captain Christopher Morton ("Morton") went to Devalle's Wake County residence at 7:00 P.M., and found him there, wearing shorts and a t-shirt. (R p. 11) During Morton's exchange with Devalle at that time, Devalle alleged he had attempted to sign off at approximately 5:00

P.M., and acknowledged the CAD showed him as being on-duty. (R p. 11) Devalle also admitted that since the time he had signed in as being on-duty, he showered and laid in bed and had not engaged in any work related activities or left the residence. (R p. 11) During the exchange, Morton ordered Devalle to go to Patrol Headquarters. (R p. 11) Devalle refused Morton's request, stated he was not leaving his home and questioned Morton's leadership and legacy with the Patrol. (R p. 11) Additionally, Devalle never notified his superiors or anyone else on the Patrol he was ill. (R p. 11)

Between 22 September 2016, and 6 October 2016, Devalle signed in to work a total of eight days (R p. 11) and claimed to have driven 767 miles on his Weekly Reports of Daily Activity. (Doc. Ex. 772-801) The Patrol fuel longs, which track Patrol vehicle mileage, indicated Devalle had only driven 292 miles during that period. (R p. 12) Devalle falsified his timesheet for these dates as it was impossible for him to have been on duty during the times he claimed, in light of his home's location in Wake County and the mileage on his vehicle. (R p. 13)

Additionally, Devalle admitted that on occasion he drove home for lunch and stayed at home for extended periods of time. (R p. 12) Devalle admitted that on multiple occasions he returned to his residence prior to the end of his shift and remained there for the remainder of his shift. (R

p. 12) Devalle admitted that he signed on as on-duty and stayed home for his entire shift. (R p. 12) Devalle admitted that on the occasions where he was signed in as on-duty and at his residence, he should have been in Wayne County and that by staying home, he was in violation of Patrol policy. (R p. 12) Devalle also admitted that he claimed the time he spent at home as time worked. (R p. 12)

At all times relevant to this matter, Devalle was responsible for overseeing troopers that were his junior as part of his responsibility as a supervisor. (R pp. 12-13) The public was injured by Devalle's conduct. (R . 13) The State paid Devalle to perform duties in Wayne County during periods of time when he was not in Wayne County and, therefore, deprived Wayne County of his services. (R p. 13) Devalle also failed to provide training and support to the troopers under his command in light of his absence. (R p. 13) Devalle's conduct also created an inherent lack of trust and dispersion of the reputation of the Patrol, which is also a public injury. (R p. 13)

On 24 April 2017, following the internal investigation, the Patrol terminated Devalle's employment for substantiated untruthfulness, neglect of duty and insubordination in violation of the Patrol's policies, including the policy on residency. (R p. 7; Doc. Ex. 132-147)

B. Devalle seeks certification through the Commission, which is denied.

Devalle applied for justice officer certification with the Commission through the Columbus County Sheriff's Office in August 2017. (R p. 6) Following a hearing before the Commission's Probable Cause Committee, Devalle was notified the committee had found probable cause to deny his justice officer certification. (Doc. Ex. 148-150) In opposition to the Committee's finding, Devalle requested a petition for a contested case hearing in the Office of Administrative Hearings ("OAH"). (Doc. Ex. 5)

At Devalle's OAH hearing on 3 and 4 December 2019, evidence pertaining to the contents and conclusions of the Patrol's IA investigation was admitted. (R pp. 7-13) Additionally, Columbus County Sheriff, Steadman Jody Greene ("Sheriff Greene"), and Jeremiah Johnson ("Johnson"), Principal of East Columbus High School in Lake Waccamaw, North Carolina, testified on Petitioner's behalf. (R pp. 14-15) Sheriff Greene testified that he was satisfied Devalle had good moral character and had no hesitation about his ability to tell the truth. (R p. 14) Johnson testified he has no doubts about Devalle's character. (R p. 14)

Devalle testified under oath at his OAH hearing on 3 December 2019. His conduct while testifying demonstrated a lack of candor and veracity with regard to his statements. (R p. 15) Specifically, Devalle

feigned lack of memory or confusion when the Commission's counsel sought answers to questions about Devalle's actions in 2016 while employed by the Patrol. (R p. 15) This was true, even after his recollection was refreshed by his prior statements. (R p. 15) However, Devalle readily recollected circumstances from this period when questioned by his own counsel without having to review any materials. (R p. 15)

Transcripts of Devalle's statements to the Patrol during the IA investigation on 15 November 2016, 18 November 2016 and 27 March 2017, corroborate his former admissions. (Doc. Ex. 813-942) These transcripts also provide substantial statements of Devalle made close in time to the events in question and shed light on facts Devalle claimed to no longer recall.

On 3 June 2020, ALJ Lassiter filed her Proposal for Decision. ALJ Lassiter found, pursuant to 12 NCAC 10B .0201(b), the Commission's employee, Sirena Jones (hereinafter "Jones"), conducted an investigation into Devalle's rule violations which included reading the Patrol's IA file, drafting a summary of said file, reviewing Devalle's applicant/officer profile and the Patrol's Report of Separation (Form F-5B). (R p. 31, Doc Ex. 132-134) ALJ Lassiter found that Devalle knew and understood he was to be within his assigned duty station, Wayne County, when he was working, and was never granted permission to work from home, in Wake

County, by his direct supervisor. (R p. 34, T2[2] pp. 319-321) The Proposed decision went on to find that Devalle claimed to have worked hours for the Patrol when he was in fact at his residence. (R p. 36) ALJ Lassiter determined substantial evidence presented at the OAH hearing supported the Committee's finding that Devalle committed the crime of Willfully Failing to Discharge Duties in violation of N.C. Gen. Stat. § 14-230 and Devalle defrauded the State and falsely claimed to have been actively serving the community which demonstrated a lack of good moral character at the time. (R pp. 42 - 43) However, the ALJ went on to conclude that the testimonies of Sheriff Greene and Johnson established Devalle had rehabilitated his character and proposed the Commission deny Devalle's certification but exercise the discretion granted under 12 NCAC 10B .0502 and give him a sanction less than denial. (R pp. 43-44)

At the Commission's regularly scheduled meeting on 17 September 2020, Devalle's matter was presented for FAD. (R p. 5) After considering the evidence and arguments of counsel, the Commission issued its FAD on 6 October 2020. (R pp. 5-22) Like ALJ Lassiter, the Commission found Devalle committed the crime of Willful Failure to Discharge Duties. (R p.

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[2] References to the transcripts are as follows:
"T1": Transcript of administrative hearing held on 3 December 2019.
"T2": Transcript of administrative hearing held on 4 December 2019.
"T3": Transcript of PJR hearing held on 29 October 2021.

19) However, the Commission found Devalle's profound lack of candor and truthfulness while testifying under oath demonstrated that truthfulness was still a challenge for him and, despite the testimonies of Sheriff Greene and Johnson, Devalle did not possess the good moral character required for certification as a deputy sheriff. (R pp. 19-20) As a result, the Commission indefinitely denied Devalle's certification. (R p. 20)

On 8 December 2020, Devalle filed a PJR in Columbus County appealing the Commission's FAD. (R pp. 25-27) The Commission filed a Motion to Dismiss and Response on 22 January 2021 and a hearing on the pleadings was held on 22 October 2022. (R pp. 47, 76)

C. The Superior Court grants Devalle's PJR.

After denying the Commission's Motion to Dismiss, the Superior Court found that the PJR was adequate and sufficient to constitute a valid Petition for Judicial Review and afforded the Commission with detailed notice of the petition. (R p. 77) The Superior Court went on to adopt the Commission's Findings of Fact ("FOF") and make additional findings pertaining to Devalle's work history and positive testimony about his character by Sheriff Greene and Johnson. (R p. 80) Contrary to the Commission's FAD, the Superior Court found Devalle had restored his character such that he now possesses the good moral character for

certification as a deputy sheriff. (R p. 81) Ultimately, the Superior Court concluded the Commission's investigation into Devalle's rule violations did not comply with 12 NCAC 10B .0201(b) and ordered that Devalle presently had the good moral character to serve as a deputy sheriff and reversed the findings and conclusions in the Commission's FAD to the contrary. (R pp. 84, 87) Pursuant to the Superior Court's order, the Commission was required to issue certification to Devalle retroactively, effective the date he submitted his application. (R p. 87)

ARGUMENT

Standard of Review

The standard of review for a petition for judicial review is set out in N.C. Gen. Stat. § 150B-51 as follows:

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
> (3) Made upon unlawful procedure;
> (4) Affected by other error of law;
> (5) Unsupported by substantial evidence under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
> (6) Arbitrary capricious or an abuse of discretion.

> (c) In reviewing a final decision in a contested case, the court shall determine whether the petitioner is entitled to the relief sought in the petition based upon its review of the final decision and the official record. With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the de novo standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

N.C. Gen. Stat. § 150B-51.

When the assigned error contends that the agency violated §§ 150B-51(b)(1), (2), (3), or (4), the court engages in de novo review. N.C. Dep't of Env't and Nat. Res. v. Carroll, 358 N.C. 649, 659, 599 S.E.2d 888, 895 (2004). "Under the *de novo* standard of review, the trial court consider[s] the matter anew [] and freely substitutes its own judgment for the agency's." Id. at 660, 599 S.E.2d at 895 (2004) (internal quotation marks omitted).

With respect to §§ 150B-51(b)(5) and (6), on the other hand, the reviewing court applies the "'whole record test.'" Id. (quoting Meads v. N.C. Dep't of Agric., 349 N.C. 656,663, 509 S.E.2d 165,170 (1998)). Under the whole record test, the Court is not free to reach its own conclusions on the merits. The "whole record" test is not a tool of judicial intrusion and the Court is not permitted to replace the agency's judgment with its own, even though the court might rationally justify reaching a different conclusion. Floyd v. N.C. Dep't of Com., 99 N.C. App. 125, 392 S.E.2d 660 (1990). Moreover, the mere existence

of conflicting evidence does not permit the reviewing court to weigh the evidence and substitute its determination for that of the administrative agency. Daily v. N.C. State Bd. of Dental Exam'rs, 60 N.C. App. 441, 299 S.E.2d 473, rev'd on other grounds, 309 N.C. 710, 309 S.E.2d 219 (1983). Therefore, under the whole record test, so long as the facts found [by the agency] are supported by the record, they are not to be disturbed on appeal, even if Petitioner's version of the facts could have been supported as well. Carroll, 358 N.C. at 659, 599 S.E.2d at 895 (2004).

If, after the whole record has been reviewed, substantial competent evidence is found which would support the agency ruling, this Court must uphold the ruling. Daily v. N.C. State Bd. of Dental Exam'rs, 60 N.C. App. 441, 444, 299 S.E.2d 473, 476 (1983); Sav. & Loan Ass'n v. Sav. & Loan Comm'n, 43 N.C. App. 493, 497-498, 259 S.E.2d 373, 376 (1979). Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion." Carroll, 358 N.C. at 660, 599 S.E.2d at 895 (2004) (internal quotation marks and citations omitted).

Where the court engages in a *de novo* review, the Petitioner bears the burden of proof by a preponderance of the evidence. N.C.G.S. § 150B-25.1; Overcash v. N. C. Dep't of Env't & Natural Res., 179 N.C. App. 697, 704, 635 S.E.2d 442, 447 (2006); In re Rogers, 297 N.C. 48, 59, 253 S.E.2d 912, 919 (1979); In re Legg, 325 N.C. 658, 672, 386 S.E.2d 174, 182 (1989).

Discussion of Law

I. THE SUPERIOR COURT ERRED BY GRANTING DEVALLE'S PJR.

A. The Superior Court erred by granting the PJR because the PJR failed to provide sufficient notice of the exceptions taken to the FAD.

Devalle's PJR fails to explicitly state what exceptions he takes to the Commission's FAD or identify under which provision(s) of N.C. Gen. Stat. § 150B-51(b) he rests his contentions. Therefore, the Superior Court should have dismissed the petition. To challenge a final decision under the North Carolina Administrative Procedures Act, N.C. Gen. Stat. § 150B-51(b) provides six specific bases. A petition for judicial review "shall explicitly state what exceptions are taken to the decision or procedure..." N.C.G.S. § 150B-46. "Explicit is defined in this context as 'characterized by full clear expression; being without vagueness or ambiguity; leaving nothing implied.'" Gray v. Orange County Health Dept., 119 N.C. App. 62, 70, 457 S.E.2d 892, 898 (1995) (quoting Vann v. N.C. State Bar, 79 N.C. App. 173, 173-74, 339 S.E.2d 97, 98 (1986)). Additionally, this court has held in this context, generalized statements are not adequate to withstand a motion to dismiss. Vann at 174.

North Carolina Gen. Stat. §§ 150A-43 through -52 mirror the provisions of N.C. Gen. Stat. §§ 150B-43 through -52 at issue in the

present case. In Vann v. N.C. State Bar, the Court address N.C. Gen. Stat. §§ 150A-43 through -52, the provisions for judicial review of a final agency decision in a contested case. 79 N.C. App. 173, 339 S.E.2d 97, (1986). In that case, Vann, the Petitioner, pursued review of the Bar's denial of his petition for reinstatement to the Bar and the Bar prevailed on its motion to dismiss in state court. Id. As a result, Vann appealed to this Court for review of the lower court's decision. Id. Vann argued "his allegation that [the Bar] conducted its hearing pursuant to the 'new' Rules of the N.C. State Bar… rather than under the "applicable" or "old" Rules… was explicit enough to merit judicial review." Id. 79 N.C. App. at 174, 339 S.E.2d at 98, (1986). However, this Court pointed out that Vann failed to describe the differences between the two sets of rules or indicate how he had been prejudiced by the alleged faulty application. Id. Ultimately, this Court held where Vann's petition "did not except to any findings of fact or conclusions of law, but made only generalized complaints as to certain procedural aspects of the hearing before [the Bar]… [it] was not sufficiently explicit to allow effective review of [the Bar's] proceedings." Id. 79 N.C. App at 174 -175, 339 S.E.2d at 98.

Analogous to Vann, Petitioner makes a generalized complaint as to a certain finding of the Respondent. (R p. 26) Specifically, under the heading, "Exception.," Petitioner states,

> The Respondent found that the Petitioner lacks the good moral character necessary to be a justice officer… That he was dishonest and untruthful when he reported in 2016 that he was performing duties for the… Highway Patrol… when he was actually working from home… and when he submitted false time and mileage sheets. In addition, the Respondent found that the Petitioner showed a lack of candor and truthfulness while testifying at the contested hearing.

(R p. 26) Petitioner then goes on to cite In re Dillingham, 188 N.C. 162, 124 S.E. 130 (1924) with regard to restoration of character, highlight testimony from Sheriff Green and Johnson that indicated Petitioner had good character and assert that the Respondent found Sheriff Greene and Johnson's testimony credible, honest and believable. (R pp. 26-27)

Devalle's PJR fails to identify any provision of N.C. Gen. Stat. § 150B-51(b) as a basis for the petition. The fact Petitioner's PJR is incomplete and leaves room for implication clearly illuminates the lack of compliance with Section 150B-46's "explicit" requirement. Like Vann's petition, Devalle's petition merely alleges a generalized complaint that is insufficient to allow effective judicial review of the decision in question and therefore, as this Court found in Vann, the Superior Court should have dismissed Devalle's PJR.

Furthermore, the Superior Court determined the Commission "was in no way blindsided by a lack of notice or detail." (R p. 77) However, this is inaccurate, as demonstrated by the Commission's language in its Motion

to Dismiss and Response to the PJR. Specifically, the Commission asserted that the lack of clarity in the PJR "frustrated [its] ability to appropriately respond" and, under the "Argument" section that Devalle's "failure to identify the basis of his claim" caused it to "make the assumption" that he is claiming the Commission's findings regarding his "lack of truthfulness and related lack of good moral character were not supported by substantial evidence." (R pp. 56, 59) Additionally, at the 29 October 2021, hearing, the Commission was especially surprised by Devalle's argument that the Commission "did not… attempt to investigate… Devalle's good moral character." (T3 pp. 20-21) This contention was not mentioned, implicitly or explicitly, in the body of Devalle's PJR and was not anticipated by the Commission as a basis for Devalle's petition. See generally, R pp. 27-29. Because the applicable standard of review is determined by the nature of the claim the Petitioner brings and the Commission was not put on notice as to the grounds for his claim, the Commission was undoubtedly limited in its ability to respond and therefore, prejudiced in this case.

B. An FAD may only be reversed or modified pursuant to the provisions of N.C.G.S. § 150B-51(b).

As discussed above, Devalle fails to allege any basis for his PJR under N.C. Gen. Stat. § 150B-51(b). More troubling is the fact that,

though the Superior Court's Order on Judicial Review states it "applied the standard of review from N.C.G.S § 150B-51," the order gives no indication as to which subsection of N.C. Gen. Stat. § 150B-51(b) it applied or relied upon, if at all. (R p.75) See generally, R pp. 75-87.

While Devalle mentioned N.C. Gen. Stat. § 150B-51(b)(1) in his oral arguments, he did not enumerate a specific constitutional protection that has been violated, nor does he put forward any evidence to support such an assertion. (T3 p. 28) Likewise, Devalle does not assert either in his PJR or during his oral arguments that the Commission's actions were in excess of its statutory authority or jurisdiction in violation of N C. Gen. Stat. § 150B-51(b)(2). As such, Devalle has not properly submitted challenges to the Commission's FAD with respect to N.C. Gen. Stat. § 150B-51(b)(1) or (2).

Therefore, assuming arguendo that Devalle's PJR was sufficient to challenge the FAD, the Commission turns its attention to the remaining provisions of N.C. Gen. Stat. § 150B-51(b) the Court could possibly have considered – whether the FAD was made upon unlawful procedure, affected by an error of law, unsupported by substantial evidence, or arbitrary, capricious, or an abuse of discretion.

i. The Commission's FAD was not made upon unlawful procedure under N.C.G.S. § 150B-51(b)(3).

During his oral arguments, Devalle mentioned N.C. Gen. Stat. § 150B-51(b)(3), stating "Prong three, if it was made upon an unlawful procedure… [W]hen the administrative agency has failed to perform its function… that is lack of compliance with lawful procedure." (T3 p. 28) Presumably, as a result, the Superior Court concluded "the Commission failed to comply" with the provision of 12 NCAC 10B .0201 that requires an investigation of an alleged violation of the Commission's Rules. (R p. 84) Devalle did not allege such violation in his PJR and, as stated above, surprised the Commission with this argument during oral argument of his petition. (T3 p. 26) Alleged errors made upon unlawful procedure are reviewed *de novo*. N.C.G.S. § 150B-51(c).

12 NCAC 10B .0201 provides:

> (a) If any criminal justice agency, school, authorized representative acting on behalf of either, or individual is reported to be or suspected of being in violation of any of these Rules, the Commission may take action to correct the violation and to ensure that similar violations do not occur.
> (b) Before taking action against an agency, school or individual for a violation, the Division shall investigate the alleged violation and, when required by the Director, shall present a report of its findings to the Probable Cause Committee of the Commission.

In reaching this conclusion, the Superior Court does not cite to any authority. The investigation requirement of subsection (b) of 12 NCAC 10B .0301 has not yet been interpreted by our courts. According to Merriam-

Webster's Dictionary, the word "investigate" means "to observe or study by close examination and systematic inquiry." *Investigate*, Merriam-Webster's Dictionary (11th ed. 2003). Here, the conduct at issue occurred in 2016 while Devalle was employed with the Patrol. (R pp. 9-15) Jones testified her investigation involved review of Petitioner's Criminal Justice Education and Training Standards Commission file as well as a thorough review of the Patrol's IA file which she summarized in writing for the members of the Probable Cause Committee to consider. (T1 pp. 42, 47, Doc. Ex. 132-147)

Devalle and the Superior Court seem to take issue with the fact Jones did not interview Sheriff Greene or Johnson prior to denying Devalle's certification. (R p. 84, T3 p. 26) Such action was not required by 12 NCAC 10B .0201(b). Especially since their opinions of Devalle's moral character were considered and still were not sufficient to overcome the Commission's concern regarding Devalle's ability to tell the truth in light of the lack of candor and truthfulness he demonstrated while testifying at the OAH hearing on this matter. (R pp. 19-20)

In concluding the Commission had failed to comply with the investigation required by 12 NCAC 10B .0201(b), the Superior Court said, "a reasonable investigation… would have likely disclosed substantial evidence of [Devalle]'s present good moral character. Thus, the violation of this regulation was prejudicial to [Devalle]. The testimony of Sheriff Green and… Johnson are

examples of highly relevant and current good moral character evidence." (R p. 84) Given the lack of law as it relates to investigations in this context and the undisputed evidence as to Jones's close examination of the pertinent materials pertaining to Devalle's conduct with the Patrol, the IA file, on behalf of the Commission, the Superior Court was wrong to conclude the Commission violated this rule.

The Commission clearly considered the opinions and testimony of Sheriff Greene and Johnson in reaching its decision not to grant Devalle certification. (R p. 19 -20) This is evidenced by Conclusion of Law 28 in the Commission's FAD that reads, "[a]lthough Sheriff Greene and Principal Johnson provided credible and persuasive testimonies regarding [Devalle]'s rehabilitation, [Devalle]'s own conduct demonstrates that he currently does not possess the good moral character required to continue certification as a deputy sheriff." (R p. 20) A more in-depth investigation would not have altered the Commission's decision not to certify Devalle.

ii. The Commission's FAD was not based upon an error of law under N.C.G.S. § 150B-51(b)(4).

During oral argument on his PJR, Devalle argued "[t]he Commission has misinterpreted its own rule in this case." (T3 p. 28) Presumably, as a result, the Superior Court found "it was error of law by the Commission to conclude that Petitioner lacks sufficient good moral character to serve as a Deputy

Sheriff now." (R p. 84) The Court elaborated on this point by saying "[t]he evidence demonstrates that Petitioner's moral character is rehabilitated and restored…" (R p. 89) Alleged errors of law are reviewed *de novo*. N.C. Gen. Stat. § 150B-51(c).

12 NCAC 10B .0301 defines the minimum standards for certification as a justice officer. 12 NCAC 10B .0204(b)(2) provides that the Commission shall revoke, deny, or suspend the certification of a justice officer who does not meet these minimum employment standards. Subsection (a)(8) of 12 NCAC 10B.0301 requires justice officers be of good moral character, as defined in:

> In re Willis, 288 N.C. 1, 215 S.E.2d 771, appeal dismissed 423 U.S. 976, 46 L. Ed. 2d 300 (1975); State v. Harris, 216 N.C. 746, 6 S.E.2d 854 (1940); In re Legg, 325 N.C.386 S.E.2d 174 (1989); In re Applicants for License, 143 N.C. 1, 55 S.E. 635 (1906); In re Dillingham, 188 N.C. 162, 124 S.E. 130 (1924); State v. Benbow, 309 N.C. 538 S.E.2d 647 (1983); and later court decisions that cite these cases as authority.

12 NCAC 10B .0301(a)(8).

The United States Supreme Court has recognized the term "good moral character," by itself, can be ambiguous, but, at a minimum, requires "honesty, fairness, and respect for the rights of others and for the laws of the state and nations." In re Willis, 288 N.C. 1, 10, 215 S.E.2d 771, 776-77 (1975) (citing Konigsberg v. State Bar of California, 353 U.S. 252, 262-63, 1 L. Ed. 2d 810 (1957)). It is not the words themselves, but

the "long usage and the case law surrounding that usage" that have given the term definition. In re Willis, 288 N.C. at 11, 215 S.E.2d at 777. Instances of denial of professional certification have "involved instances of misconduct clearly inconsistent with the standards" of the profession. Id. Isolated instances of conduct are generally not enough to demonstrate lack of good moral character. In re Rogers, 297 N.C. 48, 58, 253 S.E.2d 912, 918.

The North Carolina Supreme Court engaged in an extensive discussion about good moral character in In re Willis, citing examples from several other cases to illustrate these concepts. Particularly, the Supreme Court discussed In re Dillingham, 188 N.C. 162, 124 S.E. 130 (1924), and In re Applicants for License, 191 N.C. 235, 131 S.E. 661 (1906), two cases also cited by 12 NCAC 10B.0301 (a)(8) to help define the parameters of good moral character for justice officers. The petitioner in In re Dillingham, was an applicant for admission to the North Carolina State Bar. 188 N.C. 162, 124 S.E. 130 (1924). In that case, affidavits and certified court records indicated in 1919, 1920 and 1921, Dillingham engaged in what amounted to "many instances of violations of the criminal law, including obtaining goods by false pretense, larceny, or conspiracy to commit it, forgery, extortion and others, all to them involving moral turpitude." In re Willis, 288 N.C. at 12, 215 S.E.2d at

778. Dillingham did not deny the bad acts, but instead claimed he had "turned from his evil practices and [] since demeaned himself as a good citizen." Id. In addition to this assertion, Dillingham submitted a certificate signed by many prominent citizens attesting that having interacted and worked with him on a regular basis for 12 months, they were of the opinion that he was "rapidly regaining the position of respect and confidence which he formerly held in the community." In re Dillingham, 188 N.C. 162, 136, 124 S.E. 130, 131 (1924). The court proclaimed "it is of supreme importance... that one who aspires to this high position should be of upright character and should hold, and deserve to hold, the confidence of the community where he lives and works" and denied Dillingham's application. Id. at 165, 124 S.E. at 132.

The North Carolina Supreme Court has long held character and general fitness requirements and good moral character requirements are constitutionally permissible standards. In re Willis, 288 N.C. at 15, 215 S.E.2d at 779. The requirement that justice officers maintain good moral character, therefore, is consistent with the holdings of the Supreme Court. 12 NCAC 10B .0301 provides additional guidance within the rule itself, citing to several cases

that are instructive to justice officers seeking to understand the concept of good moral character as it relates to their certification.[3]

1. The Commission did not misapply 12 NCAC 10B .0301 in Devalle's case.

The Commission did not misapply the law of good moral character to Devalle. "Character... is the slow-spreading influence of opinion arising from the deportment of a man in society, as a man's deportment, good or bad, necessarily produces one circle without another and so extends itself till it unites in one general opinion. Even more is this true when the effort is a *restoration* of character which has been deservedly forfeited. *It then is a question of time and growth*." In re Dillingham, 188 N.C. 162, 165, 124 S.E. 130, 132 (1924) (emphasis added). Interestingly enough, although this is the only case cited by Petitioner in his PJR, In re Dillingham, is nowhere to be found in the Superior Court's Order granting the Petition.

Like the petitioner in In re Dillingham, Devalle's conduct falls so far outside the scope of permissible conduct that it is a clear example of lack of good moral character. Staying at home while one is supposed to be

[3] Although Devalle has not sufficiently alleged or argued the Commission's decision was made in violation of constitutional provisions pursuant to N.C.G.S. § 150B-51(b)(1), this analysis also demonstrates the Commission's good moral character rule is not unconstitutional on its face or as applied to Devalle.

in the field, falsifying timesheet and mileage records, being paid for work that was not done and feigning lack of memory while under oath are all foul actions, especially by a law enforcement professional. (R pp. 10-13)

It is clear from the facts Devalle's conduct in this matter did not evince "honesty, fairness, and respect for the rights of others and for the laws of the state and nations." In re Willis, 288 N.C. at 10, 215 S.E.2d at 776-77. In contrast, his profound lack of respect for his fellow troopers and the taxpayers of the State, as well as his lack of candor and truthfulness while testifying under oath at his administrative hearing demonstrated "a lack of moral perception, or careless indifference," rightly recognized by the Commission in its FAD. (R pp. 15,20) In re Applicants for License, 191 N.C at 238, 131 S.E. at 663. It is clear Devalle was on notice of the required standards, as acknowledged by his colleagues and by he himself during his administrative hearing. (T2 pp. 221-223)

Like Dillingham, Devalle's conduct was not an isolated incident. See Doc. Ex. 805. Devalle repeatedly violated the Patrol's policies. Petitioner lied to the Patrol about his place of residence. (Doc. Ex. 805; T1 pp. 52, 96, 150) Devalle falsely checked in as being on-duty when he was not on numerous occasions. (T1 pp. 215, 216; Doc. Ex. 494) Additionally, Devalle was not candid while testifying under oath at his

administrative hearing. (T1 pp. 187, 189, 193, 198, 201, 209) His actions illustrate a continued course of conduct, and are sufficiently clear and severe that, even if considered an isolated incident, would still demonstrate a lack of good moral character. See generally Mims v. N.C. Sheriff's Educ. & Training Standards Comm'n, No. 02DOJ1263, 2003 WL 22146102, at COL 5 (N.C.O.A.H. June 3, 2003) (holding any suspension or denial of an officer's law enforcement certification based on an allegation of a lack of good moral character should be reserved for clear and severe cases of misconduct; isolated instances of conduct, generally, are insufficient to properly conclude someone lacks good moral character; however, if especially egregious, even a single incident could suffice to find an individual lacks good moral character in cases of clear and especially severe misconduct).

Devalle submitted several cases to the Superior Court for consideration and argued their similarity to the situation at bar. Notably, none of the submitted cases concern the repeated commission of fraud against the State. This is an important distinction. The severity of Petitioner's conduct lies in the nature of his victim. The very entity Devalle was supposed to serve, he undermined. "Good moral character has many attributes, but none are more important than honesty and candor." In re Legg, 325 N.C. 658, 672, 386 S.E.2d 174, 182 (1989).

2. Devalle's character has not been rehabilitated.

While several years had passed since Devalle's initial poor conduct with the Patrol, he showed no evidence of growth in the interim so as to demonstrate a restoration or rehabilitation of his character. The Superior Court's order indicates the testimony of Sheriff Greene and Johnson are "highly relevant" evidence of Devalle's character. (R p. 84) However, In re Dillingham stands for the principle that when the questioned conduct involves crimes and allegations of moral turpitude, even the sworn statements of numerous individuals corroborating a petitioner's good moral character and his own pledge to conduct himself in an upright manner are not sufficient to overcome a lack of good moral character. See In re Dillingham, 188 N.C. 162, 165, 124 S.E. 130, 132 (1924) (upholding denial of admission to the State Bar where petitioner submitted a certificate signed by several community members, some being elected officials, certifying having worked with him over a twelve month period and having formed the opinion that petitioner had regained his respected status in the locale).

Moreover, the sworn testimony of Sheriff Greene and Johnson did not indicate Devalle's character had been rehabilitated. Instead of addressing the contested issue– whether Devalle has been rehabilitated to such a degree that he will tell the truth, not only when it is easy, but when it is difficult. In re

Rogers, 297 N.C. 48, 57, 253 S.E.2d 912, 918 (1979). Sheriff Greene and Johnson merely testified about Devalle's ability or capacity to tell the truth. Although Sheriff Greene testified Devalle possessed the good moral character to be a school resource officer, Greene admitted he did not know the facts and circumstances that precipitated Devalle's dismissal from the Patrol, nor did he endeavor to find out. (T1 pp. 31, 36-37) Nor did Sheriff Greene provide any examples of Devalle's conduct with regard to his alleged rehabilitation as applied to his truthfulness and honesty. See generally T1 pp. 29-39. Likewise, Johnson testified he was not aware of any act that would cause him to doubt Devalle's "capacity to be truthful." (T1 p. 234) But Johnson failed to provide any examples of Devalle's conduct in relation to his alleged rehabilitation as it applies to his truthfulness and honesty. See generally T1 pp. 234-241.

Devalle's conduct during the administrative hearing further undermines any claim to rehabilitation. As both the Commission and ALJ Lassiter found:

> [Devalle]'s conduct while testifying demonstrated a lack of candor and veracity with regard to his statements. In fact, the record demonstrates that [Devalle] feigned lack of memory, or confusion when [the Commission] sought answers to questions about 2016, even after his recollection was refreshed with his prior statements. In contrast, [Devalle] readily recollected circumstances from this period when questioned by his own counsel without having to review any materials. This demonstrates a profound lack of candor and truthfulness on the part of [Devalle].

(R pp. 15 and 39)

On 3 December 2019, during his direct examination by the Commission's counsel, Devalle frequently feigned a lack of recollection of facts related to his case because they occurred four years ago. See e.g., T1 pp. 187, 198, 201. Even after Devalle's recollection was refreshed by reviewing his former statements in writing, he asserted he could not remember these facts. See e.g., T1 198, 193, 209. These assertions that Devalle could not remember the events were not credible, as he was interviewed about these matters in November 2016 and March 2017, was terminated from his job as a result of these matters in April 2017 and challenged the dismissal at every stage following. (Doc. Ex. 813, 849, 891) Devalle filed a grievance with the Patrol and made statements on 6 June 2017. (Doc. Ex. 142) He was engaged in mediation with the Patrol about the facts of this case until February 2018. (Doc. Ex. 142) In late 2018 or early 2019, Devalle attended a hearing before the Commission's Probable Cause Committee pertaining to these facts specifically. (T1 p. 266) Then Devalle appealed the Probable Cause Committee's decision to deny his justice officer certification. (Doc. Ex. 5) Devalle then testified under oath about the facts at issue on 9 April 2019. (Doc. Ex. 505-566) Devalle engaged in regular, repeated activities which required him to know, recall, review and discuss the events of late 2016. Surely, facts related to such a life altering event, pertaining to one's ability to work in their chosen field are not as easily forgotten as Petitioner's theatrics would indicate.

As recognized in Legg, the "purpose of withholding certifications is not to punish the candidate but to protect the public and preserve the integrity" of the profession subject to licensure. In re Legg, 325 N.C. 658, 673, 386 S.E.2d 174, 182 (1989) (recognizing "fundamental attributes of good moral character include the maturity and professional discipline necessary to accept responsibility and perfect the actions required" to carry out professional responsibilities properly). Because of the egregious nature of Devalle's conduct while working for the Patrol, his deceitfulness about his place of residence and being on duty when he was not and the falsified timesheets and mileage reports he submitted to his command, coupled with his lack of candor at his administrative hearing in this case, the Superior Court should have found that he lacks the good moral character required for the minimum standards of certification as a justice officer. *De novo* consideration of this alleged error of law reveals the Commission's FAD accurately reflected the facts in the record and correctly applied the applicable law to those facts.

iii. The FAD was supported by substantial evidence under N.C.G.S. § 150B-51(b)(5).

Devalle takes exception from the Commission's finding he lacks the good moral character to be certified as a justice officer given the testimony presented by Sheriff Greene and Johnson, however, as detailed above, the FAD is supported by substantial evidence. See generally, R p. 26.

"Where no error is assigned... findings are presumed to be supported by competent evidence and are binding on appeal." Overcash v. N.C. Dep't of Env't & Natural Res., 179 N.C. App. 697, 706, 635 S.E.2d 442, 448 (2006). Although, Devalle pleaded no objections to individual FOF contained within the FAD, he did so generally in his oral argument. (T3 pp. 23, 26) "[I]t is well-established that [a] single assignment generally challenging the sufficiency of the evidence to support numerous findings of fact... is broadside and ineffective." Overcash, 179 N.C. App. at 706, 635 S.E.2d at 448 (internal citations omitted).

Assuming, arguendo, that Petitioner has properly challenged the remaining FAD FOF, upon review of the "whole record," including, but not limited to, the transcript of the contested case hearing, the exhibits offered by the parties, the pleadings, and relevant case law, each FOF relied upon by the Commission in issuing its FAD is supported by substantial evidence. Devalle's actions and lack of candor, as detailed above, constitute "relevant evidence a reasonable mind might accept" to support the denial of his certification. N.C. Dep't of Env't & Natural Res. v. Carroll, 358 N.C. 649, 660, 599 S.E.2d 888, 895 (2004). Devalle's failure to provide any competent evidence he is currently of good moral character further supports this conclusion.

1. Devalle knowingly filed a false residency form.

Devalle was required to live within 20 miles of his duty station pursuant to Patrol regulations. (R p. 13) However, he actually lived 43 miles away in Wake County, in violation of this policy. (T1 pp. 52, 96, 150) On or about 7 January 2015, Devalle filed a residency form claiming he resided at 400 Hillside Drive, Smithfield, NC 27577. (Doc. Ex. 768) Devalle admitted he never stayed, resided or parked his patrol vehicle at that address. (R p. 13)

2. Devalle falsely checked in as being on active duty when he was not.

The Patrol has a policy that a Trooper is not to clock in as being on-duty until he is in his duty station. (T1 p. 216) As previously stated, Devalle resided in Raleigh, approximately 43 miles from the Wayne County line, which was his duty station. Devalle admitted he falsely reported as being on-duty when he was at home and not at his duty station. (T1 pp. 215, 216; Doc. Ex. 494) Devalle admitted he knew this was wrong, and that he should have been in Wayne County before reporting in as being on-duty. (T1 p. 213) Devalle admitted that he never got permission to violate Patrol policy in this way from his supervisors in Wayne County. (T1 p. 217)

Devalle admitted that there were times when he signed on as being on-duty in Wayne County, but stayed home in Wake County for his entire shift. (T1 pp. 212-13, 215; Doc. Ex. 491) Devalle admitted that he knew he was not

allowed to go home for lunch because he lived out of range from his duty station. (T1 p. 162) Devalle admitted that nonetheless, on occasion, he would drive the 43 miles home for lunch and stay there for the remainder of his shift. (T1 p. 209) Devalle admitted that other times he would come home before the end of his shift and stay there. Devalle admitted that he would claim the hours he was at home as hours worked on his time sheets. (T1 p. 218)

On Friday, 11 November 2016, Devalle signed in as being on-duty at 2:53 P.M. (Doc. Ex. 943; T1 p. 97) At 7:00 P.M. Morton arrived at Devalle's home, four hours into Devalle's shift and found him in a T-shirt and shorts. (T1 pp. 96,105) When Morton asked if he was on-duty, Devalle stated he was off-duty, but he believed the CAD was showing him as on-duty. (T1 p. 106) Devalle admitted he had not left the house at all that entire day. Devalle alleged he was sick. (T1 p. 104) He was not scheduled to work until 5:00 P.M., but despite this, signed in two hours early. (Doc. Ex. 529) Devalle signed off immediately after he was discovered by Morton without difficulty. (T1 p. 104) Devalle never notified anyone at the Patrol he was not available or was sick. (Doc. Ex. 534)

Devalle admitted that preventive patrolling was part of his duties, and he could not fulfill that duty from his home. (Doc. Ex. 561) He admitted that there were times during Hurricane Matthew when he reported as being on-duty when he actually remained at his home in Wake County. (Doc. Ex. 563)

In an attempt to justify his conduct, Devalle alleged, under oath, on 9 April 2019, Patrol policy permitted a trooper to check in as on-duty anywhere in the State, as that is his jurisdiction. (Doc. Ex. 516) This statement was patently false.

3. Devalle falsified timesheets and payroll while employed with the Patrol.

Troopers are required to fill out a weekly report of daily activity as to their hours worked, mileage, and how many of their hours worked were actually spent on patrol. See Doc. Ex. 772-801. The Patrol also keeps track of vehicle mileage via fuel logs. See Doc. Ex. 804. Major James Wingo compared these documents and made a table. (Doc. Ex. 805) These records reveal that between 22 September 2016 and 6 October 2016, Devalle claimed to have worked eight days. He also claimed mileage of 767 miles during this period. The Patrol fuel logs show only 292 miles were put on Devalle's vehicle during this period. (T1 pp. 147-150; Doc. Ex. 805) Given the distance from Devalle's home to his duty station, he could not possibly have been on-duty, working for eight days as he claimed. (T1 p. 151) But, Devalle claimed all of the hours on payroll. See Doc. Ex. 802.

The Patrol keeps tabs of when a trooper signs on ("10-41") and signs off on a CAD report. See Doc. Ex. 769. Troopers also do timekeeping in Beacon Payroll system to record hours worked, pay and leave, which is reflected on

their pay stubs. (T1 p. 139) See Doc. Ex. 802. Jones reviewed these documents and records of the Patrol, including Devalle's own admissions. (T1 pp. 49-53; Doc. Ex. 132-147) Pursuant to her investigation, Jones determined that between 26 September 2016, and 14 October 2016, Devalle claimed more hours on Beacon than he actually reported as being on-duty and working on five occasions. (Doc. Ex. 132-147)

As delineated above, substantial evidence supports the Commission's FAD that Petitioner was dishonest and untruthful while employed with the Patrol, that Devalle nor his witnesses established his propensity to defraud his employer and the citizens of the State had been rehabilitated and that Devalle continues to lack the good moral character required for certification as a justice officer due to his lack of candor at his OAH hearing. It is abundantly clear, upon application of the "whole record test" the Commission's decision is supported by substantial evidence.

iv. The FAD was not arbitrary, capricious or an abuse of discretion under N.C.G.S. § 150B-51(b)(6).

Devalle did not allege a violation of N.C. Gen. Stat. § 150B-51(b)(6) in his PJR, however, during his oral arguments, Devalle stated, "[t]he Commission saw the evidence virtually identical to Judge Lassiter, but disagreed with the ultimate conclusion. It might be a good point there… it could be contended that the Commission's decision is arbitrary." (T3 p. 23)

Taken in context with the statements made around this quote, it is evident the argument was an afterthought. See generally, T3 pp. 22-23. Nonetheless, the Commission addresses the contention below. Asserted errors under subdivision (5) of N.C. Gen. Stat. § 150B-51(b) are analyzed using the "whole record test" standard of review. N.C.G.S. § 150B-51(c).

Agency decisions are arbitrary and capricious "when such decisions are "whimsical" because they indicate a lack of fair and careful consideration; when they fail to indicate any course of reasoning and the exercise of judgment, or when they impose or omit procedural requirements that result in manifest unfairness in the circumstances." State ex rel. Comm'r of Insurance v. N.C. Rate Bureau, 300 N.C. 381, 420, 269 S.E.2d 547, 573 (1980) (internal citations omitted). While the court reviewing an agency decision may reverse or modify a decision if it is "arbitrary or capricious," the court, has no authority to overturn "decisions within agency discretion when that discretion is exercised in good faith and in accordance with law." [citation omitted]. Lewis v. N.C. Dep't of Hum. Res., 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989). All procedural requirements, established pursuant to the North Carolina Administrative Code, as applicable to the Commission, were followed, as were all procedural requirements of the Administrative Procedures Act under N.C. Gen. Stat. Chapter 150B. Devalle was afforded every opportunity to present his explanation to the Commission. ALJ Lassiter's Proposed Decision

acknowledged the Commission had the authority to deny certification to Devalle based on the evidence and the Commission's rules, in recommending that the Commission exercise its discretion and issue a lesser sanction than denial. (R p. 44) The fact the Commission chose not to adopt ALJ Lassiter's proposal does not make the FAD arbitrary. Review of the "whole record" in this case indicates the Commission carefully considered the facts established at the contested case hearing in rendering its FAD. The Commission's decision was not "whimsical," rather, it was well supported by the evidence. Given the severity of the actions at issue, the decision to deny certification to Devalle was not arbitrary or capricious, and did not constitute an abuse of discretion. Accordingly, the Superior Court should not have reversed the Commission's decision.

CONCLUSION

WHEREFORE, based on the authorities and argument presented herein, it is respectfully requested that this Court find the Superior Court erred by granting Devalle's Petition for Judicial Review.

Electronically submitted this the 31st day of May, 2022.

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CERTIFICATE OF COMPLIANCE WITH RULE 28 (j)(2)

Undersigned counsel certifies that the State's Brief is in compliance with Rule 28(j)(2) of the North Carolina Rules of Appellate Procedure in that it is printed in thirteen-point Century Schoolbook font and the body of the brief, including footnotes and citations, contains no more than 8,750 words as indicated by Word, the program used to prepare the brief.

Electronically submitted this the 31st day of May, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing RESPONDENT-APPELLANT BRIEF upon Petitioner-Appellee via e-mail to his below-listed attorney pursuant to N.C. R. App. P. 26(c), which allows service of a document by e-mail if it has been electronically filed with a North Carolina appellate court:

J. Michael McGuinness
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Electronically submitted this the 31st day of May, 2022.

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