

No. 158PA23

FIFTEENTH DISTRICT

NORTH CAROLINA SUPREME COURT

MAURICE DEVALLE,

Petitioner/Appellee,

v.

N.C. SHERIFF'S EDUCATION
AND TRAINING STANDARDS
COMMISSION,

Respondent/Appellant.

From Columbus County
COA 158PA23

BRIEF OF *AMICI CURIAE* NORTH CAROLINA
ADVOCATES FOR JUSTICE and STATE EMPLOYEES
ASSOCIATION OF NORTH CAROLINA, INC. IN SUPPORT OF
MAURICE DEVALLE

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STATEMENT AND IDENTITY OF NCAJ AND SEANC AS
***AMICI CURIAE* AND THEIR INTEREST IN THE CASE**

The North Carolina Advocates for Justice (“NCAJ”) is a non-profit advocacy group dedicated to protecting people, preventing injustice, promoting fairness, and safeguarding the constitutional rights of all

¹ Pursuant to Rule 28.1(b)(3)c. of the North Carolina Rules of Appellate Procedure, no other person or entity—other than *amici curiae*, their members, and their counsel—have directly or indirectly written this brief or contributed money to its preparation.

North Carolinians. State Employees Association of North Carolina (“SEANC”) is a North Carolina non-profit corporation whose members are current and retired State employees. With approximately 42,250 active members, of whom approximately 23,500 are current employees of the State of North Carolina, the guiding purpose of SEANC is the promotion of the best interests of current, retired, and future employees of the State of North Carolina. Thousands of SEANC members currently hold certification or licensure subject to the jurisdiction of executive branch occupational licensing agencies such as respondent North Carolina Sheriff’s Education and Training Standards Commission.

The issues the Court may consider are consistent with both *amici*’s missions to protect North Carolinians’ inalienable right to enjoy the fruits of their labor and work in their chosen profession.

In this brief, *amici* seek to fulfill the “classic role of *amicus curiae* by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court’s attention to law that escaped consideration.” *Miller-Wohl Co., Inc. v. Comm’r. of Labor & Indus.*, 694 F.2d 203, 204 (8th Cir. 1982). As commentators have stressed, an

amicus curiae is often in a superior position to “focus the court’s attention on the broader implications of various possible rulings.” R. Stern *et al.*, *Supreme Court Practice*, 570–71 (1986) (quoting Bruce J. Ennis, *Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603 (1984)).

This case is of considerable importance to NCAJ and SEANC, to state and local law enforcement officers, and to everyone earning a living in a licensed profession across the state. It presents this Court with an opportunity to bring consistency to current disparate approaches to interpreting the “good moral character” standard across executive branch licensing boards and agencies. An opinion affirming the Court of Appeals holding in this case would curtail arbitrary and discriminatory application of the good moral character standard in law enforcement certifications and other professional licensing proceedings statewide.

Although the facts of the present case are of particular concern to citizens who have devoted or plan to devote their adult lives to serving the public in law enforcement careers, ultimately this Court’s decision will have far-reaching effects in dozens of fields and professions. About one-third of all jobs in North Carolina require some type of occupational license, with approximately 70 separate boards determining eligibility of

applicants to enter those jobs, and whether to deny, recertify, suspend, or revoke licenses.² A reversal of the decision below would deepen the uncertainty already inherent in North Carolina's vague concept of good moral character, while at the same time undermining the legal requirement that executive branch agencies actually investigate matters in which they exercise the power to exclude North Carolina citizens from careers of their choosing. Reversal of the Court of Appeals decision in this case would discourage or outright ignore the potential for reform and send the wrong message to law enforcement agencies, other professional boards, and the broader public, about the capacity for rehabilitation in the criminal justice system. Finally, it is a matter of vital concern to NCAJ, SEANC, and their members that evidence of rehabilitation and restoration of good moral character is not arbitrarily disregarded in the context of law enforcement certifications and other occupational licensing disputes.

² North Carolina Justice Center, New Law Opens Up Opportunities for People with Criminal Records to Obtain Occupational Licenses, <https://www.nelp.org/app/uploads/2021/09/NCJC-licensing-law-factsheet.pdf> (identifies more than 70 licensing boards); 21 N.C. Admin. Code 1-70, (identifies 57 occupational licensing boards); North Carolina Secretary of State, Occupational Licensing Boards, https://www.sosnc.gov/divisions/general_counsel/other_boards_and_commissions (identifies 55 independent occupational licensing boards); plus N.C.G.S. § 93B-1 (identifies nonexclusive list of at least 13 State Agency licensing boards, e.g., the North Carolina Department of Public Instruction).

LIST OF ISSUES

- I. WHETHER THE COURTS BELOW ERRED IN FINDING THAT MR. DEVALLE WAS REHABILITATED FROM ANY GOOD MORAL CHARACTER DEFICIENCY FROM CONDUCT BACK IN 2016 AND THAT HIS *PRESENT* MORAL CHARACTER IS GOOD?
- II. WHETHER THE COURTS BELOW ERRED IN FINDING THAT THE COMMISSION FAILED TO CONDUCT THE REQUIRED INVESTIGATION OF THE ALLEGED CHARGE AND THEREFORE VIOLATED 12 N.C. ADMIN. CODE 10B.0201?
- III. WHETHER A STATE OCCUPATIONAL LICENSING AGENCY'S FAILURE TO MEET ITS LEGAL DUTY TO INVESTIGATE PRIOR TO IMPOSING DISCIPLINE IS ARBITRARY OR CAPRICIOUS AND A VIOLATION OF PROCEDURAL OR SUBSTANTIVE DUE PROCESS?

ARGUMENT

- I. LEGISLATIVE POLICY AS REFLECTED IN N.C.G.S. § 93B-8.1 (2021) REQUIRES CONSIDERATION OF REHABILITATION IN HIRING AND OCCUPATIONAL LICENSING.

This administrative law occupational licensing case arises from the erroneous denial of Deputy Maurice Devalle's application for certification by the N.C. Sheriffs' Education and Training Standards Commission ("Commission") as a Columbus County Deputy Sheriff. The Commission denied Mr. Devalle's application for certification indefinitely based upon

its determination, without any independent investigation or even witness testimony, that Mr. Devalle lacks good moral character required to serve as a Deputy Sheriff. This case addresses an enormously important component of law enforcement occupational licensing law: the ambiguous good moral character rule.

This case has potential broad impact on all North Carolinians who depend on an occupational licensing board's determination that they possess "good moral character" before they are allowed to earn a living in their chosen fields. Such an imprimatur is necessary in a surprisingly broad array of endeavors. Teachers, electricians, barbers, lawyers, doctors, nurses, veterinarians, mental health professionals, police officers, corrections officers, engineers, pharmacists and pharmacy technicians, bail bond agents, real estate agents, insurance agents, private investigators, auctioneers, cosmetologists, contractors, plumbers, surveyors, pest control technicians, school bus drivers, and many more must pass these character tests.

There are at least 66 categories of licensed professionals in North Carolina.³ One in every five North Carolina workers is regulated by occupational licensing law.⁴

In 2019, the General Assembly enacted the North Carolina Freedom to Work Act, N.C.G.S § 93B-8.1, which took effect 1 October 2019. The new reform prohibits blanket bans on licensing individuals with criminal records. This law was part of a nationwide effort to adopt reforms aimed at reducing barriers to occupational licensing for those with criminal records. According to Deborah L. Rhode, Professor of Law and the Director of the Center on the Legal Profession of Stanford University:

Seventy million Americans have criminal records, and character-based licensing requirements are a substantial barrier to their economic livelihood and rehabilitation. Because racial and ethnic minorities are disproportionately likely to have run-ins with the criminal law, they pay a special price for these requirements.⁵

Rhode points out that character is not static, not defined by a single “bad act” and recommends incentivizing and rewarding efforts to rehabilitate.⁶

³ Institute for Justice, North Carolina Occupational Licensing, <https://ij.org/report/license-to-work-3/ltw-state-profile/north-carolina>

⁴Institute for Justice, Occupational Licensing in North Carolina, <https://ij.org/issues/economic-liberty/occupational-licensing/north-carolina/>

⁵ Deborah L. Rhode, *Virtue and the Law: The Good Moral Character Requirement in Occupational Licensing, Bar Regulation, and Immigration Proceedings*, 43 Law & Soc. Inquiry 1027 (2018)

⁶ *Id.*, 1046–47 (2018).

Given that around 4.9 million people were employed in North Carolina in 2019⁷ (now over 5 million⁸), with one-third of the jobs requiring an occupational license,⁹ reform was necessary to prevent the arbitrary and capricious denial of work licenses.¹⁰ The new law prohibits agencies from denying licenses based on “moral turpitude” and requires licensing agencies and boards to consider, among other things, the level and seriousness of the offense, when it occurred, the person’s age at the time, the surrounding circumstances, the punishment imposed, evidence of rehabilitation, whether there have been subsequent offenses, and any other affidavits or written documents, including character references. N.C.G.S. §§ 93B-8.1(b) and (b1).

Although this reform does not apply to the North Carolina Criminal Justice Education and Training Standards Commission, the North Carolina Sheriffs’ Education and Training Standards Commission, or the North Carolina Department of Revenue, administrative law still requires

⁷ North Carolina Dep’t of Commerce, North Carolina’s December 2019 Employment Figures Released, <https://www.commerce.nc.gov/news/press-releases/north-carolina%E2%80%99s-december-employment-figures-released-0>.

⁸ U.S. Bureau of Labor Statistics, North Carolina Economy at a Glance, https://www.bls.gov/eag/eag.nc.htm#eag_nc.f.1

⁹ North Carolina Justice Center, New Law Opens Up Opportunities for People with Criminal Records to Obtain Occupational Licenses, <https://www.nelp.org/app/uploads/2021/09/NCJC-licensing-law-factsheet.pdf>

¹⁰ *Id.*

these agencies to fairly consider evidence of rehabilitation. Failing to consider such evidence is arbitrary and capricious. *See, e.g., Scroggs v. N. Carolina Crim. Just. Educ. & Training Standards Comm'n*, 101 N.C. App. 699, 702, 400 S.E.2d 742, 744–45 (1991) (holding agency’s revocation of law enforcement certification based on past illegal drug use and failure to consider officer’s exemplary service since that time was arbitrary and capricious). This applies not only to law enforcement certification but across various regulated fields in North Carolina. If an applicant presents credible evidence of rehabilitation, the licensing body is required to consider that evidence before making a decision to deny or grant a license.

The decision of the Court of Appeals is consistent with the General Assembly’s efforts to reform occupational licensing policy in this State. A policy discouraging rehabilitation by allowing agencies and commissions to arbitrarily discount that evidence, as it did with Mr. Devalle, would undermine the legislature’s recent efforts.

II. THE PERILS OF THE “GOOD MORAL CHARACTER” STANDARD AND ITS HISTORY OF ABUSE

The Court of Appeals acknowledged the good moral character standard is not unconstitutional, but that “[s]uch a vague qualification,

which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial” of police certifications. *Devalle v. N. Carolina Sheriffs' Educ. & Training Standards Comm'n*, 289 N.C. App. 12, 21, 887 S.E.2d 891, 897 (2023), *review allowed*, 900 S.E.2d 664 (N.C. 2024) (*citing* *Konigsberg v. State*, 353 U.S. 252, 263, 77 S. Ct. 722, 1 L.Ed.2d 810 (1957)). This can also extend to the arbitrary and capricious denial, suspension, or revocation of licenses in other professions.

There is a history of governments abusing a “good moral character” standard during the Jim Crow era to disenfranchise the Black community on the basis of race and color. In *United States v. Mississippi*, the United States government sued the state of Mississippi, elections commissioners, and six county registrars alleging the State had amended its constitution in 1960 to add “good moral character” as a new voting qualification, “to serve as yet another device to give a registrar power to permit an applicant to vote or not, depending solely on the registrar's own whim or caprice, ungoverned by any legal standard.” 380 U.S. 128, 133, 85 S. Ct. 808, 811, 13 L. Ed. 2d 717 (1965) (internal footnote omitted).

The complaint further alleged the “good moral character”

requirement, along with other legislation, was designed to discriminate on the basis of race and color and to “deter, hinder, prevent, delay and harass” Black citizens in their efforts to register to vote. *Mississippi*, at 133. In reversing and remanding the lower court’s dismissal, Justice Black wrote,

The allegations of this complaint were too serious, the right to vote in this country is too precious, and the necessity of settling grievances peacefully in the courts is too important for this complaint to have been dismissed.

Id. at 144.

Later in 2000, Justice Breyer’s dissent in *Reno v. Bossier Par. Sch. Bd.* noted the good moral character requirement in *Mississippi* was “a standard this Court has characterized as ‘an open invitation to abuse at the hands of voting officials.’” 528 U.S. 320, 375, 120 S. Ct. 866, 896, 145 L. Ed. 2d 845 (2000) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 312–13, 86 S. Ct. 803, 810, 15 L. Ed. 2d 769 (1966) (“The good-morals requirement is so vague and subjective that it has constituted an open invitation to abuse at the hands of voting officials.”)).

Here, the current Administrative Code, 12 N.C. Admin. Code 10B.0301(12), and previous versions cite a series of cases defining good moral character for justice officer certifications. The previous versions from 2021¹¹ and 2022¹² read as follows:

be of good moral character as defined in: In re Willis, 288 N.C. 1, 215 S.E.2d 771 (1975), appeal dismissed 423 U.S. 976 (1975); State v. Harris, 216 N.C. 746, 6 S.E.2d 854 (1940); In re Legg, 325 N.C. 658, 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, 308 S.E.2d 647 (1983); *and later court decisions that cite these cases as authority*;

12 N.C. Admin Code 10B.0301(8)(2021); 12 N.C. Admin. Code 10B.0301(9)(2022) (emphasis added).

In 2023, the rule was amended and recodified as 12 N.C. Admin. Code 10B.0301(12), removed “and later court decisions that cite to these cases as authority,” and replaced it with even broader language, “and later court decisions”:

(12) be of good moral character as defined in: In re Legg, 325 N.C. 658, 386 S.E.2d 174 (1989); State v. Benbow, 309 N.C. 538, 308 S.E.2d 647 (1983); In re Willis, 288 N.C. 1, 215 S.E.2d 771 (1975), appeal

¹¹ 12 N.C. Admin. Code 10B.0301(8)(2021)

¹² 12 N.C. Admin. Code 10B.0301(9)(2022)

dismissed 423 U.S. 976 (1975); *State v. Harris*, 216 N.C. 746, 6 S.E.2d 854 (1940); *In re Dillingham*, 188 N.C. 162, 124 S.E. 130 (1924); *In re Applicants for License* 143 N.C. 1, 55 S.E. 635 (1906); *and later court decisions*.

12 N.C. Admin. Code 10B.0301(12)(2023) (emphasis added). Both versions are vague and confusing for law enforcement officers who do not conduct extensive legal research. As Mr. Devalle’s brief argues, this ambiguous rule with potentially limitless authority to research deprives officers of reasonable notice of the rule (Pet.’s Br. at 45).

The other justice officer certification agency—the North Carolina Criminal Justice Education and Training Standards Commission—also continues to arbitrarily apply the good moral character rule in other matters. For example, the Superior Court of Robeson County recently issued an order noting that “enforcement of this ambiguous rule is problematic.” *Locklear v. N. Carolina Crim. Just. Educ. & Training Standards Comm’n*, Case No. 24-CVS-470, (Super. Ct. NC, May 24, 2024), at p. 14, ¶ 66) (reversing the Commission’s Final Agency Decision for its arbitrary and capricious application of the good moral character rule and legal error). This order further demonstrates the need for a clear standard – careers are at stake without it.

III. AN AGENCY MUST ENGAGE IN “REASONED DECISION-MAKING”, WHICH INCLUDES FOLLOWING ITS OWN RULES AND ADOPTING FINDINGS CONSISTENT WITH DUE PROCESS PRINCIPLES.

Occupational licensing boards wield enormous power over the lives of workers subject to their jurisdiction. The licenses these agencies confer reflect, nearly without exception, a lengthy pursuit of specialized knowledge or training, often at the expense of obtaining a more broadly applicable range of skills and experience – as well as at great financial cost. Thus, an agency’s suspension, revocation, or refusal to issue a license can be catastrophic to a worker and the worker’s family. Licensing decisions are matters of utmost gravity, and should be based upon investigative and deliberative processes that reflect that gravity. Unfortunately, the record in this case shows unmistakably that Mr. Devalle received exactly the opposite: the Commission conducted no investigation, in violation of its own rules, and ultimately based its decision solely upon vague, non-specific conclusions it gleaned from the evidentiary record. As a result of these flawed investigative and deliberative processes, the resulting denial by the Commission was arbitrary and capricious. The Court of Appeals correctly decided this case.

a. The Commission Violated Its Own Rules by Failing to Conduct a Competent Investigation.

The Commission's own rules require an investigation into the subject matter to be determined in the hearing. *See* 12 N.C. Admin. Code 10B.0201.¹³ The Commission consciously ignored this requirement, failing to conduct any independent investigation of the allegations against Mr. Devalle, much less any inquiry into his present moral character. The Commission's investigation consisted of reading the State Highway Patrol's Internal Affairs file from several years prior, and in her testimony the investigator further admitted she did not interview *any* witnesses (R p 8, ¶¶ 15–17). Despite agreeing that interviewing persons with knowledge is one of the primary methods by which an investigator would find facts, the investigator admitted she never interviewed anyone – not even Mr. Devalle (*Id.* at ¶¶ 19–20). Despite knowing Mr. Devalle had been working successfully as a deputy sheriff for two and a half years as a school resource officer since his termination from the Highway Patrol, the investigator never interviewed Mr. Devalle's supervisors – the

¹³ In pertinent part, the rule provides: "(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."

school principal whom he served nor the Columbus County Sheriff (*Id.* ¶¶ 21).

Mr. Devalle was never charged for the crime of “Willfully Failing to Discharge Duties” which Respondent alleges he committed, nor was he found civilly responsible (R p 9, ¶ 24). And, shockingly, the investigator knew but failed to advise the Probable Cause Committee that Mr. Devalle was never charged (*Id.* ¶ 22). This is not an investigation.

Fellow *amicus* North Carolina Fraternal Order of Police points out in its brief filed with the Court of Appeals that the Administrative Code provisions adopted by the Commission itself mandate that any suspension or denial of justice officer certification shall be only for “*so long as the stated deficiency, infraction, or impairment continues to exist...[.]*” (FOP Br. at 4) (*quoting* 12 N.C. Admin. Code 10B.0205(3) (emphasis added)). Thus, once an officer has rehabilitated their good moral character, the suspension of the officer’s certification must be lifted (*Id.* at 4– 5).

The Commission arbitrarily and capriciously discounted Mr. Devalle’s *present* good moral character in violation of these regulations. It is a fundamental principle in our jurisprudence that *agencies must*

follow their own rules, and the failure to do so constitutes arbitrariness. *Poarch v. N.C. Dep't of Public Safety*, 223 N.C. App. 125, 132, 741 S.E.2d 315, 320 (2012); *Davis v. N.C. Dep't of Public Safety*, 2021 WL 5049198 (N.C.O.A.H.); *Tully v. City of Wilmington*, 370 N.C. 527, 810 S.E.2d 208 (2018). This is well-settled law. Indeed, this Court's recent holding in *Tully* relies on a Fourth Circuit decision from more than a half century ago:

An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down.

U.S. v. Heffner, 420 F.2d 809, 811 (4th Cir. 1969).

Even when an agency decision is supported by evidence in the record (which is certainly *not* the case here), the decision-making process may still be so flawed that the decision is arbitrary and capricious. A leading commentator¹⁴ observed:

The arbitrary and capricious test also serves a function independent of review of findings of fact. In order to avoid judicial reversal of its action as arbitrary and capricious, an agency must engage in "reasoned decisionmaking," defined to include

¹⁴ Professor Kenneth Davis, author of the *Administrative Law Treatise* quoted above, was widely known as "the father of administrative law." Jack Williams, [*"Kenneth Culp Davis, 94: pioneer in administrative law"*](#) (Obituary), *San Diego Union-Tribune*, Sep. 19, 2003.

an explanation of how the agency proceeded from its findings to the action it has taken.

Kenneth Culp Davis & Richard J. Pierce, Jr., II *Administrative Law Treatise*, 3d ed., § 11.4 at 203 (1994). The United States Supreme Court in *Bowman Transportation v. Arkansas-Best Freight System* recognized this independent function, holding that “though an agency’s finding may be supported . . . it may nonetheless reflect arbitrary and capricious action.” 419 U.S. 281, 284 (1974).

The *Bowman Transportation* holding is consistent with North Carolina’s definition of arbitrary and capricious. “Administrative agency decisions may be reversed as arbitrary or capricious if they are ‘patently in bad faith,’ or ‘whimsical’ in the sense that ‘they indicate a lack of fair and careful consideration’ or ‘fail to indicate any course of reasoning and the exercise of judgment’. . . .” *Lewis v. N.C. Dep’t of Human Resources*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989) (quoting *Commissioner of Insurance v. Rate Bureau*, 300 N.C. 381, 403-04, 269 S.E.3d 547, 573, *pet. for reh’g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980)).

In the present case, the Commission’s refusal to investigate matters crucial to the fair resolution of the issue before it – *as required by its own rules* – irretrievably tainted the proceeding, rendering the agency’s goal

and, indeed, obligation, to engage in “reasoned decision-making” unattainable.

b. The Commission’s Findings Lacked the Specificity Required to Demonstrate Substantial Evidence that Mr. Devalle Lacked Good Moral Character.

The Commission effectively found *as a matter of law* that Mr. Devalle’s evidence before the ALJ established that he had rehabilitated himself and reestablished his good moral character:

Sheriff Greene and Principal Johnson testified that Petitioner has rehabilitated and rebuilt his character since being fired by the Patrol, and as a deputy sheriff, and as school resource officer and coach at East Columbus High School. Greene and Johnson testified that for two and a half years, Petitioner’s service as a Deputy Sheriff has been nothing but exemplary both of that service and of Petitioner’s character while engaging in that service. Such testimony was credible, honest, and believable.

Commission Conclusions of Law 24 (R p 19). Having thus determined Mr. Devalle had restored his good moral character in the intervening years since his termination from the State Highway Patrol, the Commission fixated upon his hearing testimony under cross-examination as the basis for rejecting his application. That is, despite having found that Mr. Devalle “has rehabilitated and rebuilt his character,” in the relevant time

period, the Commission still deemed him unfit to serve because he did poorly under cross-examination. The Commission's Final Agency Decision offered no explanation as to what specific instances of testimony might have been lacking candor or untruthful (R pp 19–20, ¶ 25). In denying Mr. Devalle the ability to earn a living in his chosen field based upon such a flimsy pretext, the Commission undermined the integrity of the proceeding. Its ruling is an emblematic reminder that the administrative law concept of “arbitrary and capricious” is rooted in due process.

The Commission's position on appeal is that, notwithstanding contrary testimony it found “credible, honest, and believable,” Mr. Devalle's character has not been restored because his testimony at the December 3-4, 2019 hearing before the ALJ “exhibited a lack of candor and sincerity during cross-examination by Respondent's counsel” (R p 20, ¶ 25). It relies solely on a conclusory finding set out in the ALJ's proposed decision that “Petitioner was evasive and feigned a lack of memory or confusion in response to Respondent's questions about Petitioner's conduct with the Patrol in 2016,” (R p 39, ¶69), that he “remained evasive and elusive even after having his recollection refreshed with his prior

statements,” and that he was able to recollect the circumstances without having to review materials when questioned by his own counsel (*Id.*).

Neither the Commission’s findings nor the findings in the ALJ’s proposal for final decision specified or cited the testimony that was “evasive or elusive.” Despite this, Respondent attempts on appeal to identify what testimony might have been “evasive” to support the disputed finding (Res’s Br. at 11 –13, 21). Such backfilling cannot confer retroactive validity upon a hopelessly flawed deliberative process.

This Court’s decision in *Matter of Moore*, involved a bar applicant whose previous murder conviction had caused the Board of Law Examiners to question his fitness to be admitted to practice in the State. 301 N.C. 634, 272 S.E.2d 826 (1981). After extensive investigation including sworn testimony, the Board rejected the application on grounds similar to this case, finding: “3. On several occasions in his testimony before the Board, the applicant made false statements under oath on matters material to his fitness of character.” *Id.* at 639, 272 S.E.2d at 829. There, as here, the Board never specified which statements it deemed untruthful. Because the applicant had made a *prima facie* showing of present good moral character, and the Board attempted to

rebut the showing by specific acts of misconduct – i.e., false statements in the proceeding – the Board has the burden of proving the specific acts by the greater weight of the evidence. *Id.* at 639, 272 S.E.2d at 830. As the Court held, meeting the burden requires more than the conclusory finding referencing “several occasions” of false statements:

We hold that finding number three fails adequately to resolve this issue and lacks the requisite specificity to permit adequate judicial review of the Board's order. The Board, in finding that Moore made “material false statements under oath,” did not indicate which statements it considered to be untruthful. Consequently neither a reviewing court nor the applicant can be certain as to the content or materiality of the false statements referred to. The Board cannot meet its burden of proving specific acts of misconduct without setting out with specificity what they are and that they have been proved by the greater weight of the evidence. The Board in its brief attempts to specify the false statements referred to in the disputed finding. Suffice it to say that the specifications must be contained in the Board's order. Its brief should be directed to whether the specific findings are supported by the evidence and if so whether they along with other findings of misconduct are sufficient to rebut the applicant's *prima facie* case.

Id. at 640–41, 272 S.E.2d at 830. Here, the Commission never cited to any specific testimony that it deemed evasive or untruthful. Respondent argues on appeal that when shown his prior statements on cross-

examination, Mr. Devalle feigned an inability to recall them – yet nothing specific is detailed in the Commission’s findings (R p 15, ¶ 80; R p 39, ¶ 69).

In the crucible of live courtroom testimony, witnesses nearly always appear more prepared and credible on direct examination than on cross-examination. It is natural for witnesses to be flustered, surprised, and to freeze up on cross, given the adversarial and often highly intense nature of the interrogation. It can be argued that the most effective cross-examinations create an impression with the factfinder that the witness lacks credibility or is evasive. But creating such an impression surely does not mean the witness lacks good moral character. The agency has a higher burden, which is as it should be, given the stakes for individuals seeking to pursue the livelihood for which they have prepared.

The ALJ who conducted the evidentiary hearing was in the best position to assess the weight of Mr. Devalle’s cross-examination testimony in light of all the evidence, and she determined that any testimonial shortcomings were not of sufficient moment to undermine her findings regarding his rehabilitation and present good moral character. R p 39, ¶ 70; 43, ¶ 24; 44 ¶¶ 26-27. This first-hand perspective is of great

significance in an administrative law setting, and is entitled to deference from reviewing tribunals. In a contested case under the Administrative Procedure Act,¹⁵ as in a legal proceeding initiated in District or Superior Court:

“there is but one fact-finding hearing of record when witness demeanor may be directly observed.” Julian Mann III, *Administrative Justice: No Longer Just a Recommendation*, 79 N.C. L.Rev. 1639, 1653 (2001) [hereinafter, Mann, 79 N.C. L.Rev. 1639]. Thus, the ALJ who conducts a contested case hearing possesses those “institutional advantages,” *Salve Regina Coll.*, 499 U.S. at 233, 111 S.Ct. at 1222, 113 L.Ed.2d at 199, that make it appropriate for a reviewing court to defer to his or her findings of fact.

N. Carolina Dep't of Env't & Nat. Res. v. Carroll, 358 N.C. 649, 662, 599 S.E.2d 888, 896–97 (2004).

At the evidentiary hearing, the evidence of Mr. Devalle’s rehabilitation and present good moral character was undisputed. Indeed, *the Commission itself* adopted a finding establishing that he had met his burden:

81. During his case in chief, Petitioner presented significant evidence demonstrating that Petitioner has rehabilitated and rebuilt his career since 2016 and 2017 while working as a school resource officer

¹⁵ N.C.G.S. § 150B-1 (2024)

at East Columbus High School. Such evidence showed that Petitioner has exhibited highly favorable traits, including but not limited to helping, teaching, and serving as positive role models for students at East Columbus High School not only as a school resource officer, but as a coach in two sports. Sheriff Greene and Principal Johnson opined that Petitioner's absence from their respective entities would have a negative impact on their workplaces. The scope and magnitude of Petitioner's character traits, as witnessed by Sheriff Greene and Principal Johnson, qualify as extenuating circumstances which the Respondent should consider in determining whether Petitioner possesses the good moral character required of a justice officer.

(R p 15, ¶ 81). The Commission's arbitrary decision to discard the testimony of Mr. Devalle's supervisors – one of whom holds the same certification sought by Mr. Devalle – and instead to base its decision on second-hand, vague, and unspecified observations of cross-examination testimony illustrates exactly the “lack of fair and careful consideration” our courts consistently have found to be so corrosive to the administrative process.

The decision of the Commission to deny Mr. Devalle's application for certification, while failing to provide specific instances of the misconduct it claims drove the decision, is a violation of basic due process

principles and Article I, Section 19 of the North Carolina Constitution's

Law of the Land Clause:

A party is entitled, of course, to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation.

Bowman Transportation, 419 U.S. at 288 n.4; *Eason v. Spence*, 232 N.C. 579, 583, 61 S.E.2d 717, 721 (1950) ("The law of the land and due process of law are interchangeable terms.")

CONCLUSION

For the foregoing reasons, and for the reasons stated in Mr. Devalle's brief, this Court should affirm the Court of Appeals.

Respectfully submitted this 6th day of December, 2024.

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document has been served on the following counsel of record by e-mail on this the 6th day of December, 2024.

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No. 158PA23

FIFTEENTH DISTRICT

NORTH CAROLINA SUPREME COURT

MAURICE DEVALLE,

)

)

Petitioner/Appellee,

)

)

v.

)

N.C. SHERIFF'S EDUCATION
AND TRAINING STANDARDS
COMMISSION,

)

)

)

Respondent/Appellant.

)

)

)

)

From Columbus County
COA 158PA23

APPENDIX TO BRIEF OF *AMICI CURIAE* NORTH CAROLINA
ADVOCATES FOR JUSTICE and STATE EMPLOYEES
ASSOCIATION OF NORTH CAROLINA, INC. IN SUPPORT OF
MAURICE DEVALLE

Locklear v. N. Carolina Crim. Just. Educ. And Training Standards
Comm'n,

Case No. 24-CVS-470, (Super. Ct. NC, May 24, 2024).....13

STATE OF NORTH CAROLINA
COUNTY OF ROBESON

FILED

2024 MAY 28 P 4: 26

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 24 CVS 470

Joe Travis Locklear

ROBESON CO., C.S.C.

Petitioner

v.

BY _____

North Carolina Criminal Justice Education And
Training Standards Commission

Respondent

ORDER ON JUDICIAL REVIEW

This matter is before this Court on Petitioner's Petition for Judicial Review challenging a Final Agency Decision of the Respondent Commission. This Court has conducted its judicial review pursuant to N.C.G.S. 150B-43, 50, 51 and the Administrative Procedure Act and issues this order effective immediately. Upon consideration of the Petition for Judicial Review and Respondent's response thereto, the Final Agency Decision of the N.C. Criminal Justice Education and Training Standards Commission (hereafter Commission), and the record and arguments of the parties, this Court hereby enters this order overruling and reversing the Commission Decision and makes the following findings and conclusions.

This Court heard this matter on May 13, 2024, in the Robeson County Superior Court. Respondent Commission was represented by Assistant Attorney General Kristen Mallett. The Petitioner was represented by Attorneys J. Michael McGuinness, William C. Gore Jr., and Danny Britt.

Parties

1. The Petitioner is Trooper Joe Travis Locklear, who began serving as a North Carolina State Trooper in Robeson County on May 31, 2006. See e.g. Stipulated Finding of Fact 11. Trooper Locklear earned a very good record of service and conduct with the Highway Patrol including high ratings, very good evaluations, and no prior discipline. See Stipulated Finding of Fact 15; Petitioner's Exhibit A-5, pages 34-51. Trooper Locklear was terminated from employment based on the underlying allegations that gave rise to this dispute. After a full evidentiary hearing, Trooper Locklear was reinstated to his position as a State Trooper by the Honorable

1 The administrative record of the Commission contains 751 pages. Petitioner objected in the failure to include one other document that was presented to the Commission before the Commission hearing on November 16, 2023. This administrative record will be cited herein as "R.p."

Michael C. Byrne, Administrative Law Judge. *Joe T. Locklear v. N.C. Department of Public Safety*, 21 OSP 01175; 2023 WL 2389874. See R.p. 166-197. The N.C. Court of Appeals unanimously affirmed, and reinstated Trooper Locklear. 289 N.C. App. 268, 887 S.E.2d 501 (2023).

2. The Respondent is the North Carolina Criminal Justice Education and Training Standards Commission (hereafter the “Commission”). The Commission is a state occupational licensing agency that certifies North Carolina law enforcement officers for service. See Chapter 17C of the General Statutes and Title 12 of the North Carolina Administrative Code. The Commission has limited authority to impose occupational licensing discipline on law enforcement officers under appropriate circumstances with valid proof of a rule violation.

Background, the Petition and Jurisdiction

3. The two charges against Trooper Locklear are contained in the charging document, the Notice of Probable Cause, Respondent’s Exhibit 2; R.p. 376-380; see Final Agency decision, Finding of Fact 58; R.p. 07. This occupational licensing case arose from the indefinite suspension of Trooper Locklear’s law enforcement certification by the Commission for an alleged lack of good moral character and a five-year suspension of Trooper Locklear’s certification for an alleged violation of N.C.G.S. 14-230. This matter was tried by the Honorable Stacey Bice Bawtinheimer, North Carolina Administrative Law Judge.
4. After a full evidentiary hearing, Judge Bawtinheimer ruled for Trooper Locklear and found that Trooper Locklear does not lack good moral character and that he did not commit a violation of N.C.G.S. 14-230. Judge Bawtinheimer found that: “There is no factual or legal basis to conclude that Petitioner lacks good moral character. The evidence demonstrates that Petitioner is a person of good moral character and a dedicated professional law enforcement officer in North Carolina for many years. Petitioner is morally fit to continue to serve as a law enforcement officer in North Carolina and has good moral character as required by law and rule.” Conclusion of Law 35, at page 5. See *Locklear v. N.C. Criminal Justice Education and Training Standards Commission*, 23 DOJ 02965, 23 WL 2023 WL 2711303 (February 20, 2023), which appears in the record at R.p. 18-36. The Commission, however, rejected Judge Bawtinheimer’s conclusions and instead imposed an indefinite suspension and a five-year suspension of Petitioner’s law enforcement certification. R.p. 16.
5. Trooper Locklear filed his Petition for Judicial Review in this Court on February 15, 2024, pursuant to N.C.G.S. 150B-23, 43, 45, 46 51 and decisional law. The Petition challenged the final decision of the Commission, issued on January 17, 2024. The parties are properly before the Court and the Court has subject matter jurisdiction. The Petitioner resides in Robeson County. Therefore, Robeson County venue is proper as per N.C.G.S. 150B-45.
6. A Superior Court has jurisdiction on a Petition for Judicial Review to consider and reverse a law enforcement officer certification decision by the Commission pursuant to N.C.G.S. 150B-51 and decisional law. See, e.g. *Maurice Devalle v. N.C. Sheriff’s Education and Training*

Standards Commission, 289 N.C. App. 12, 887 S.E.2d 891 (2023); *Scroggs v. N.C. Criminal Justice Education and Training Standards Commission*, 101 N.C. App. 699, 400 S.E.2d 742 (1991).

7. In addition to the constitutional law involved, there are three primary administrative regulations in issue in this case, including:
 - A. the Commission's good moral character rule (12 NCAC 9 .0101(3)(h));
 - B. an administrative charge under N.C.G.S. 14-230, and
 - C. the rule requiring that the Commission shall conduct an investigation of the charges (12 NCAC 9A.0201(b)).
8. This Court has applied the standard of review from N.C.G.S. 150B-51 and decisional law including *Russell v. N.C. Department of Public Safety*, 282 N.C. App. 542, 872 S.E.2d 821, 826 (2021); *N.C.D.E.N.R. v. Carroll*, 358 N.C. 649, 599 S.E.2d 888 (2004) and *Maurice Devalle v. N.C. Sheriff's Education and Training Standards Commission*, 289 N.C. App. 12, 887 S.E.2d 891 (2023). This Court has applied the *de novo* review standard for the issues of law. This Court has applied the whole record test in reviewing the Commission's fact finding and has examined whether the agency's decision and fact finding is supported by substantial evidence of record. This Court has applied the preponderance of evidence standard as per N.C.G.S. 150b-29.

Procedural Background

9. The Respondent Commission issued a charging document (Respondent's Exhibit 2) in the form of a letter to Trooper Locklear on June 22, 2022, entitled "Notification of Probable Cause to Revoke Justice Officer Certification." R.p. 376-380. The document alleged that "probable cause" had been found for the two alleged charges, alleged lack of good moral character and an alleged violation of G.S. 14-230. There were no other charges alleged against Trooper Locklear. The Commission ultimately suspended Trooper Locklear's certification indefinitely based upon its determination that Petitioner lacks good moral character to serve as a law enforcement officer. R.p. 15-16. The Commission further imposed a five-year suspension on the Petitioner for an alleged violation of G.S. 14-230. Petitioner challenges the Final Agency Decision of the Commission on numerous grounds, as specified in the Petition, arguing, *inter alia*, that the Commission erred as a matter of law in its interpretation and application of its good moral character rule and for G.S. 14-230, and for other reasons set forth in the Petition.
10. Respondent filed a Response to the Petition, including argument addressing some of the issues before the Court. This Court has reviewed and considered Respondent's Response, the Record, authorities and arguments submitted in this case.
11. An abbreviated procedural history of this case is as follows. The underlying conduct was initially heard as a state personnel case. The transcript of the personnel case was admitted without objection in this case. R.p. 242-373. Both Administrative Law Judge Michael Byrne

and the North Carolina Court of Appeals unanimously found that there was no just cause for Trooper Locklear's termination of employment and reinstated him. See *Joe Travis Locklear v. N.C. Department of Public Safety*, 21 OSP 01175, 2022 WL 2389874 (May 9, 2022), *aff'd* 289 N.C. App. 268, 887 S.E.2d 501 (June 6, 2023). Next, the Probable Cause Committee of the Commission considered this matter and found probable cause for the two alleged rule violations. Later after a full evidentiary hearing, Judge Bawtinheimer ruled for Petitioner Locklear and found that Petitioner does not lack good moral character and that Petitioner did not commit a violation of G.S. 14-230. R.p. 18-36. Next, the Commission considered this matter. Despite Judge Bawtinheimer's Findings and Conclusions, on January 17, 2024, the Respondent Commission found two alleged rule violations and imposed severe discipline. Petitioner sought judicial review of the Commission decision on numerous grounds.

Issues for Superior Court Determination

- A. Whether the Petition for Judicial Review is sufficient to comply with the pleading requirements of N.C.G.S. 150B-46?
- B. Was the Final Agency Decision below affected by an error of law or unlawful procedure? Did the Commission below err as a matter of law in its interpretation and application of its good moral character rule and G.S. 14-230?
- C. Whether Petitioner is *presently* a person of good moral character?
- D. *Alternatively*, whether Petitioner is rehabilitated from his actions on August 20 and 21, 2020?
- E. Whether the Commission failed to properly investigate the charge of an alleged lack of good moral character and the charge under G.S. 14-230 as required by 12 NCAC 10B.0201?
- F. Whether there was insufficient and substantial evidence to establish a violation of N.C.G.S. 14-230? Was there any substantial evidence to support each element of the alleged offense including substantial evidence of actual injury to the public by the Petitioner?
- G. Whether there was insufficient substantial evidence to establish a violation of the good moral character rule?
- H. Whether there was sufficient and substantial competent evidence to support the Commission's findings and conclusions?
- I. Whether there was sufficient and substantial evidence to support Judge Bawtinheimer's findings and conclusions?

- J. Whether the Commission erred by not finding all facts that were necessary in order to properly adjudicate both the good moral character and G.S. 14-230 charges?
- K. Whether Petitioner is entitled to be credited with undisputed evidence of his good moral character that the Commission erroneously failed to apply?

**Respondent's Argument That the Petition Has Not Been
Pled With "Any Particularity or Specificity."**

- 12. Respondent summarily argues that Petitioner's Petition for Judicial Review is not sufficiently specific and detailed. See Respondent's Response to the Petition at 10. Respondent devotes four sentences to its argument that the twenty-five-page single spaced Petition has not been pled with "any particularity or specificity." *Id.* The Petition was pled with exacting particularity and specificity.
- 13. The Petition pled many and various enumerated arguments, points, legal authorities, evidence and multiple clearly stated exceptions and objections. The Petition set forth extensive specific exceptions and objections to the Commission decision. Further the Petition incorporated by reference Petitioner's 64-page *Legal Brief Directed by the Commission*, which was filed below thereby affording the Commission extensive notice not only of the legal positions of Petitioner, but extensive legal argument citing and arguing multiple authorities and detailing the evidence adduced at the hearing.
- 14. The Petition asserted 117 separate paragraphs, which included far more information than is required by N.C.G.S. 150B-46. Petitioner's Exceptions and Objections pinpointed each finding of fact that was challenged and each conclusion of law. For example, see paragraphs 24, 36, 39, 41, 47, 48, 50, 58, 61, 62, 63, 64, 65, 68, 70, 72, 74, 75, 81, 82, 83, 85, 86, 99, and others identified therein.
- 15. The Petition stated numerous specific exceptions and objections to the Final Agency Decision and then argued regarding the good moral character and G.S. 14-230 issues before the Commission. The Petition cited further regulatory authority, statutory authority and Supreme Court precedent addressing good moral character in occupational licensing cases. The Petition further pled summaries of the evidence supporting Petitioner's position as pled in the Petition. The Petition further specifically pleaded for the relief sought.
- 16. This Court finds and concludes that the Petition is more than adequate and sufficient to constitute a valid Petition for Judicial Review. The Petition afforded clear notice of the purpose and nature of the Petition and key underlying facts and made sufficient and appropriate reference to authority, the record, and other documents to afford Respondent detailed notice of the Petition. The Petition is a full and clear expression of Petitioner's position seeking judicial review under Chapter 150B.

17. Respondent was in no way blindsided by a lack of notice or detail. Both in its Response to the Petition and as reflected in Respondent's argument before the Court, Respondent was aware of Petitioner's objections and exceptions, claims and even the legal theory underlying Petitioner's Petition. The Petition is legally sufficient and complies with G.S. 150B-46. The Commission's argument that the Petition is inadequate and insufficient is overruled.

The Administrative Record and the Certification Hearing

18. The administrative law hearing below was held on December 15, 2022, before the Honorable Stacey Bawtinheimer, North Carolina Administrative Law Judge. The transcript shows the testimony of various witnesses and the admission of exhibits. R.p. 680-751. The transcript from the previous administrative law hearing before Judge Michael Byrne was admitted as an exhibit without objection, which provided additional relevant evidence. R.p 242-373.
19. On February 20, 2023, Judge Bawtinheimer issued a lengthy *Proposal for Decision*, including a detailed review and analysis of the evidence and issues of law. Judge Bawtinheimer made 68 Findings of Fact and 36 Conclusions of Law. R.p. 18-36.
20. In her Proposal for Decision, Judge Bawtinheimer included all of the Stipulated Findings of Fact agreed to by the parties. Those stipulated findings appear as Findings of Fact 5-52. Judge Bawtinheimer then made findings of "Additional Material Facts" which appear as Findings 53-68. Judge Bawtinheimer's findings of fact are supported by substantial admissible evidence of record.
21. Applying the law of good moral character, Judge Bawtinheimer found that "there is no factual or legal basis to conclude that Petitioner lacks character." Conclusion of Law 35. R.p. 35. Judge Bawtinheimer also found there was no violation of G.S. 14-230 by the Petitioner. Conclusion of Law 23. R.p. 31.

The Commission Decision Under Judicial Review

22. The Commission Decision of January 17, 2023, contained 61 Findings of Fact and 37 Conclusions of Law. R.p. 1-16. The Commission found a violation of 14-230 for a failure to discharge duties of office and imposed an active five-year suspension of Petitioner's certification. As to the charge of an alleged lack of good moral character, the Commission found a violation of the rule and ordered that Petitioner's certification be suspended indefinitely. R.p. 15-16.

The State Personnel Case Adjudication Background

23. The personnel case addressing the underlying facts of this case was heard by Judge Byrne, in Case No. 21 OSP 01175; 2023 WL 2389874. On May 6, 2022, Judge Byrne issued an extensive Final Decision, where he made 77 Findings of Fact and 100 Conclusions of Law. Judge Byrne found that there was no just cause for Trooper Locklear's termination of

employment, but that commensurate discipline was appropriate. Judge Byrne imposed substantial discipline in the form of both a suspension of ten days and a demotion. R.p. 124-146. Judge Byrne ordered that Trooper Locklear be reinstated to the Patrol. The N.C. Court of Appeals unanimously affirmed, and reinstated Trooper Locklear. 289 N.C. App. 268, 887 S.E.2d 501 (2023).

The Commission Good Moral Character Rule

24. The Commission's good moral character rule in 12 NCAC 9B .0101(12) provides that "[e]very law enforcement officers who is employed...shall: be of good moral character as defined in: *In Re Willis*, 288 N.C. 1, 215 S.E.2d 771 (1975), appeal dismissed 423 U.S. 976 [96 S. Ct. 389, 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. 658, 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, 308 S.E.2d 647 (1983); and later court decisions that cite these cases as authority."
25. The Commission's good moral character rule simply provides that an officer "be of good moral character" and refers officers to appellate cases. The rule does not provide a definition, criteria, standards, or defined elements, other than citing to some appellate cases. This approach to defining a regulatory standard essentially requires an officer to apprehend case authorities in order to understand what conduct that the rule prohibits. The Rule cites moral character cases but none of those cases involve a good moral character analysis or determination in a law enforcement officer case. Those cited cases are discussed by Judge Bawtinhimer at length in Conclusion of Law 33(A) – (G). Each of those cases is distinguishable from this case.

FINDINGS OF FACT

26. This Court adopts the Findings and Stipulations of Fact in the Commission's Final Agency Decision 1 – 61. R.p. 2-8. These findings are all of the proper findings of fact made by the Commission. The Commission erroneously failed to find or address the additional Findings of Fact made by Judge Bawtinhimer, which begins with Finding 62 through 68 in her Proposal for Decision. This Court finds that Judge Bawtinhimer's additional Findings of Fact 62 – 68 in the Proposal for Decision (R.p. 26-27) are correct, based upon substantial evidence and necessary for consideration as a part of the totality of all of the evidence for both charges.
27. The Commission Final Agency Decision was incomplete by failing to include Findings of Facts that were necessary for consideration of the totality of Petitioner's moral character history, Petitioner's actions in the underlying event and is necessary to address the two charges against Trooper Locklear and his defenses.
28. The following are supplemental necessary findings, which are supported by the substantial competent evidence of record and by a preponderance of the admissible evidence.

The Underlying Event of August 20, 2020

29. The Commission specifically found that Trooper Locklear “was a credible witness.” Finding of Fact 1; R.p. 2. Judge Bawtinhimer also found that Trooper Locklear “was a credible witness.” R.p. 20; Findings of Fact 1. Judge Byrne also found that Trooper Locklear was a credible witness. R.p. 125.
30. Trooper Locklear was on duty on August 20, 2020. T82. Trooper Locklear observed an apparent violator when he was traveling on Highway N.C. 72, near Lumberton. T83. Trooper Locklear observed a vehicle with a driver without a seat belt and a passenger who appeared to be drinking alcohol. T83. Locklear stopped the vehicle operated by Cornelius Callahan. Locklear then observed that the operator had put his seat belt on, and that the passenger was drinking a “red bull” and not an alcoholic beverage. T8.5 A verbal warning was given. R.p. 21-22.
31. After this vehicle stop, Trooper Locklear observed a small bag in a ditch near the location where Locklear had stopped Callahan. T87. Locklear did not then conduct any type of thorough search of the bag. T87. Locklear observed some marijuana in the bag. T87. Locklear believed that the bag was associated with the vehicle he had stopped. *Id.* It was Locklear’s intent to go find Callahan’s vehicle and inquire about the bag. T88. R.p. 22.
32. Trooper Locklear then “set up” on the vehicle hoping that he would come back by as Locklear was observing the area. T88-89. Callihan’s vehicle did not come back by the area. T89 When Callihan did not come back by, Locklear put the bag back into the general area where he had found the bag near the thicket. T90.
33. Trooper Locklear later that evening received a group text communication from Sgt. Collins. T91 Sgt. Collins inquired about the traffic stop with Callahan. T91. Locklear responded and learned that there had been a complaint. *Id.* Callahan had reported that Locklear had stolen the bag out of his car. T92. This was a false allegation. Locklear’s reaction was that he panicked and got scared. T92. Locklear wishes that he was immediately forthcoming, but he misrepresented to Sgt. Collins that he hadn’t picked up the bag. T92. The parties stipulated that Trooper Locklear panicked and got scared from the complaint. Finding of Fact 32; R.p. 23.
34. On the next morning, Sgt. Collins directed Locklear to go to the scene. T93 The bag was still there. T94 Sgt. Collins determined that everything was in the bag. *Id.* Sgt. Collins directed Locklear to go prepare a *Member’s Statement*. T94. Petitioner’s statement was truthful, and accurate. T101 Locklear was not fully forthcoming with Sergeant Collins initially the following morning, Trooper Locklear was next directed to accompany Sgt. Collins to Internal Affairs in Raleigh. *Id.* Trooper Locklear knew that Internal Affairs was the official proceeding. T95. See R.p. 24.

35. Trooper Locklear told the entire truth to Internal Affairs. T97, 103. Trooper Locklear's meeting with Internal Affairs was on 21 August 2020, before lunchtime. T97 It was Trooper Locklear's intent to tell the whole truth to Internal Affairs and he did so. T98 Trooper Locklear was not charged with any alleged untruthfulness for his Internal Affairs interview. *Id.* R.p.5. Trooper Locklear's mistakes of temporary misrepresentations to Sgt. Collins were a result of his panic and fear. R.p. 5 Trooper Locklear quickly corrected and rectified his misrepresentations to Sgt. Collins.

Locklear's Background & History

36. Trooper Locklear was born in 1974 and was 47 years old at the time of hearing. T77. Locklear grew up in Robeson County, North Carolina. *Id.*; R.p.2. Locklear has been married to Angela Locklear for over twenty-five years and is the father of a son and a daughter. T78. See T2-32-34. Locklear has maintained support for his children. T2-33. Locklear worked with Barnhill Paving after being terminated. T2-43. Petitioner Locklear has since been reinstated to the Highway Patrol as a Trooper. R.p. 145.
37. Trooper Locklear attends church at Union Chapel Methodist Holiness Church, near Lumberton. T2-33. Locklear regularly attends church. T2-33. Trooper Locklear has been active in his community, helping his community. T2-34. Trooper Locklear has helped coach various sports in his community including softball, volleyball, baseball, and basketball. T2-34.
38. Trooper Locklear became employed as a State Trooper in 2006. T78. Trooper Locklear successfully and continuously served as a Trooper for over thirteen years, until his termination on 13 October 2020. *Id.* Locklear earned the rank of Master Trooper. T78.
39. Trooper Locklear's Supervisor, Sgt. Phillip Collins, further confirmed that Locklear had earned a good personnel record. T30. Trooper Locklear was never previously disciplined by the Highway Patrol. T81; T2-35-36; R.p. 3. Trooper Locklear's evaluations were meeting or above expectations. T2-35. He was not rated below expectations. *Id.* See Exhibit A-5, on pages 52-66.
40. Trooper Locklear was rated as "exceeding expectations" on ethics and integrity. T2-36. Trooper Locklear was observed to be an asset to the Patrol. T2-36. See Exhibit A-5, on pages 52-66. Trooper Locklear was commended for his work ethic. Trooper Locklear was found to have exceeded expectations for leadership. T2-36. Locklear also rated exceeded expectations in diversity. See Exhibit A-5, on pages 52-66; R.p. 214-231.
41. Trooper Locklear also earned good evaluations for his work performance and conduct going all the way back to 2006 when he was first evaluated. T81. Locklear also earned commendations or awards because of his Patrol service. T82. Locklear earned an award from a group known as Mothers Against Drunk Driving (MADD). T82; T2-376. This award from MADD is a very honorable and prestigious award. T82 Trooper Locklear earned other awards

for his performance and conduct. T82. Trooper Locklear was a valuable asset to his employer and to the State for his entire career. See Exhibit A-5, on pages 52-66; R.p. 217-231.

42. Numerous persons have observed that Trooper Locklear has very good moral character and also is presently a person of good moral character. Petitioner's Exhibit A-4; R.p. 204-16. The following persons submitted statements observing that Petitioner Locklear is of good moral character: Attorney David Branch; Attorney Jeff Wynn; Trooper Mike Chavis; Rudolph Freeman; Dr. Rudy Locklear; Deputy Stan McNeil; Amy Paul-Scott; Ted Woodell; Reverend Greg Lowery; James Bronnie Scott; Reverend James Kelvin Locklear and Captain Mike Seago of the St. Pauls Police Department. Excerpts from the record show: Mike Chavis observed that "Robeson County is a better place because of Joe." Stan Mitchell observed that "Joe has great character ... Joe is a wonderful person ... He has a great reputation in his community and with his peers." Amy Paul Scott observed that Joe Locklear is "very family oriented ...[and is] very productive ... professional ... fair ... is an asset filled with dignity and integrity ... his work ethic proves that he is an asset." Ted Woodell observed that Joe Locklear "has not only been a member of our community but a leader as well." Reverend Greg Lowery observed that Joe Locklear "has been greatly involved in his community and individual lives Joe is an honorable man," James Kelvin Lockler observed that Joe Travis "was always willing to assist if needed." Exhibit A-4; R.p. 204-216. No witness testified that Trooper Locklear lacks good moral character.
43. Captain Seago of the St Pauls Police Department testified that others have indicated that he is a good Christian, and really good to be around. T2-20. Petitioner Locklear is "very helpful for other people." *Id.* Petitioner has been helpful to the St. Pauls Police Department and the community there also. *Id.* Captain Seago has always known Petitioner "to be professional all the time." T2-20. Petitioner is "a hardworking person." *Id.* If you needed help, "he would help you out." T2-20.
44. Interim Chief Adrian Hunt of the Pembroke Police Department observed that Trooper Locklear is "very professional" and who appears to "work hard." R.p. 199. Chief Hunt observed that Trooper Locklear "is well known and highly respected" and "has a very good reputation as an officer and personally." *Id.* Chief Hunt explained that Trooper Locklear "is known as a person of high integrity and very high character." R.p. 199-200. Chief Hunt observed that Trooper Locklear is "a family man" and believes his moral character is "excellent." R.p. 200. Chief Hunt described Trooper Locklear as very "remorseful." *Id.* Chief Hunt believes that Trooper Locklear is "well fit to continue to serve" and that his mistakes here should not ruin his successful police career." *Id.*
45. As to Locklear's employment background and experience with the Highway Patrol, including his officially evaluated performance, his conduct, his history, his record of service, his awards and commendations, Trooper Locklear demonstrated thirteen years of very good to excellent overall service and conduct. Petitioner's Exhibit A-4 (Ten witness statements); R.p. 204-216; Petitioner's Exhibit A-5 (Performance evaluations).

46. Trooper Locklear acknowledged his mistakes and regretted his action. T98-99, 102. Trooper Locklear made a sincere apology for his mistakes. T102 Trooper Locklear recognized that truthfulness is very important. T102. Trooper Locklear had never before in his entire thirteen-year career been accused of any untruthfulness. T99.
47. The totality of all substantial, competent and admissible evidence demonstrates that Trooper Locklear does not lack good moral character and in fact has very good moral character. Trooper Locklear's actions of August 20, 2021, and the early morning of August 21, 2020, were an aberration and an isolated incident, and were clearly not enough to ruin his otherwise longstanding very good character as a law enforcement officer and as a very respected citizen in the Robeson County community. Petitioner's Exhibit A-4.
48. The totality of all competent and admissible evidence demonstrates that Trooper Locklear did not violate N.C.G.S. 14-230. Petitioner did not willfully fail to carry out a duty of his office. The elements of this alleged offense were not established. There was no evidence of any actual injury to the public. R.p. 30.
49. The totality of all substantial, competent, and admissible evidence does not warrant any occupational licensing discipline upon Trooper Locklear.

CONCLUSIONS OF LAW

50. This Court adopts the Commission's Conclusions of Law 1-7, 9-13, 15, and 24. The Commission's other conclusions of law erroneously failed to correctly apply the principles of good moral character law set forth by the Court of Appeals in *Devalle* and other cases, and the law interpreting G.S. 14-230.
51. This Court declines to decide the issue of whether or not Respondent has the burden of proof to affirmatively prove that Petitioner violated the rules cited by the Commission. See Proposal for Decision at page 2, section denominated as "Burden of Proof." There are differences of opinion between Administrative Law Judges and the Commission regarding who should have the proof in an occupational licensing case of this nature. Although this Court believes that the analysis and conclusions of Judge Bawtinheimer are correct in this regard; for purposes of this case, the determination of who has the burden of proof is not dispositive and is not necessary for this decision. Without assigning a burden of proof, the substantial evidence of record clearly demonstrates that Trooper Locklear did not violate either of the two rules that he was charged with violating. The substantial evidence of record demonstrated that Trooper Locklear is presently a person of good moral character and did not commit the offense of violating G.S. 14-230. A preponderance of the admitted evidence demonstrates that Trooper Locklear is a person of good moral character and did not violate G.S. 14-230. *Alternatively*, if the burden of proof is assigned to Petitioner, this Court finds and concludes that Petitioner has carried the burden of proof by a preponderance of admissible evidence and has proven that he does not lack good moral character; that he has very good moral character, and that he did not violate G.S. 14-230.

52. This Court finds that Conclusion of Law 8 is erroneous as a matter of law because it does not accurately provide a complete and correct statement of the law of good moral character.
53. This Court finds that Conclusion of Law 14 is erroneous as a matter of law because it does not accurately provide a complete and correct statement of the law of G.S. 14-230.
54. This Court finds that Conclusions of Law 16, 17, 18, 19 and 20, are not valid Conclusions of Law because they actually purport to be Findings of Fact, and those findings are not supported by substantial and admissible evidence of record. Conclusion of Law 16 contains inadmissible opinions and speculation; it erroneously finds facts from contentions that were not made at the hearing. Conclusion of Law 16 is erroneous, incomplete, misleading and not supported by the substantial evidence of record. Conclusion of Law 16 is not a statement of law at all. The alleged facts set forth in Conclusions of Law 16-20 are not supported by any citation to the transcript, any exhibits or other authority; these conclusions of law are not supported by substantial and admissible evidence of record.
55. This Court finds that Conclusions of Law 21, 22 are not correct statements of law because they do not accurately provide an accurate and complete statement of the law of good moral character.
56. This Court finds that Conclusion of Law 23 is not a valid or accurate conclusion of law. This conclusion purports to contain findings of fact, and those findings are not supported by substantial and admissible evidence of record. Conclusion of Law 23 contains inadmissible opinions and speculation; and it finds facts based on contentions that were not made at the hearing. Conclusion of Law 23 is erroneous, incomplete, misleading and not supported by the substantial evidence of record. Conclusion of Law 23 is not a statement of law at all. The alleged facts set forth in this Conclusion of Law are not supported by any citation to the transcript, any exhibits or other authority.
57. This Court finds that Conclusions of Law 25 and 26 are not valid or accurate conclusions of law; they do not accurately provide a complete statement of the law of good moral character. The conclusion reached is a misinterpretation of the law of good moral character.
58. This Court finds that Conclusions of Law 26-37 are not valid or proper conclusions of law. Conclusion of Law 27 is erroneous as a matter of law as it misapplied the law of good moral character, and it erroneously finds a preponderance of evidence that is not based on the substantial and admissible evidence of record. Conclusions 27 – 37 purports to be or contain findings of fact, and those findings are not supported by substantial and admissible evidence of record; these Conclusions of Law contain inadmissible opinions and speculation; those conclusions contentions that were not made at the hearing. These Conclusions of Law are erroneous, incomplete, misleading and not supported by the substantial evidence of record. These conclusions of law are not statements of law at all; they are more akin to fact finding. The alleged facts set forth in these Conclusions of Law are not supported by any citation to the transcript, any exhibits or other authority.

59. This Court finds that Conclusions of Law 27-37 are not valid or proper conclusions of law. Those conclusions are incomplete as stated and do not accurately state the body of complete true facts and circumstances that are relevant and necessary for consideration. There is no legal or factual basis to conclude that Trooper Locklear lacks good moral character.
60. The Commission Final Agency Decision and order was affected by errors of law, contained a misunderstanding and a misapplication of the law of good moral character and the law of G.S. 14-230.
61. The challenged Conclusions of Law by the Commission do not represent accurate statements of the law of good moral character or the law of G.S. 14-230. R.p. 27-37. The Commission Final Agency Decision failed to cite, address, or apply the good moral conduct standards from *Devalle v. N.C. Sheriffs' Education and Training Standards Commission*, 289 N.C. App.13, 887 S.E.2d 501 (2023) and other cases.

The Alleged Lack of Good Moral Character Charge

62. This Court adopts the Conclusions of Law by Administrative Law Judge Bawtinheimer as to both the law of good moral character and the law of G.S. 14-230. The Commission decision was affected by errors of law in interpreting and applying both the law of good moral character and the law of G.S. 14-230.
63. Judge Bawtinheimer accurately identified and explained the law of good moral character. See Conclusions of Law 24 – 36 in Judge Bawtinheimer's Proposal for Decision. Particularly, Judge Bawtinheimer explained that "'Later court decisions" as referenced in the [good moral character]' rule, hold consistently that isolated acts of conduct generally do not establish bad moral character, particularly with persons of demonstrated historical character. Conclusion of Law 34, citing five cases.
64. Trooper Locklear's conduct was from a single event that was prompted by his fear and panic. Conditions of fear and panic have become more common in current law enforcement employment environments. In *Dietrich v. N.C. Department of Crime Control*, 00 OSP 10-39, 2001 WL 34055881, Judge Beecher Gray explained: "Troopers serving the North Carolina Highway Patrol have challenging, difficult, stressful and dangerous jobs." This was a one-time incident in Trooper Locklear's otherwise unblemished career and long history of very good moral character. This event and his conduct do not outweigh his life and career of very good moral character. In *Dietrich*, Judge Gray further explained in *Dietrich*: "Ideally, it is desired that law enforcement officers be near perfect; however, that is not a realistic standard."
65. In *Devalle*, the Court of Appeals explained: that "Character thus encompasses both a person's past behavior and the opinion of members of his community arising from it." Further, "whether a person is of good moral character is seldom subject to proof by reference to one or two incidents." 289 N.C. App. at 21, 887 S.E.2d at 89.

66. The U.S. Supreme Court and many lower Courts – and the Commission itself – also have recognized how the good moral character rule is “unusually ambiguous.” E.g. *Konigsberg v. State*, 353 U.S. 252, 262-63 (1957); *Marcum v. N.C. Criminal Justice Education and Training Standards Commission*, 15 DOJ 07702 (Final Agency Decision, June 5, 2017)(Conclusion of Law 54, citing *Konigsberg* and observing that the good moral character rule is “unusually ambiguous,” “vague” and can be a dangerous instruments for arbitrary and discriminatory denial...) Consequently, enforcement of this ambiguous rule is problematic. Many courts, administrative law judges, law enforcement commissions, other tribunals and commentators have expressed very serious concerns about various aspects of the good moral character rule in occupational licensing cases such as this case. E.g., *In Re Willis*, 288 N.C. 1, 10, 215 S.E.2d 771, 776-777 (1975) (the term good moral character is “unusually ambiguous”).
67. In *Hands v. N.C. Sheriffs Education and Training Standards Commission*, 21 DOJ 03746, 2022 WL 1201808; see also the Final Agency decision by the Sheriff’s Commission (July 13, 2022), where the Commission took no action against Hands’ certification and the conduct involved misrepresentations to a supervisor. The Commission in *Hands* found that the term “good moral character” is “unusually ambiguous.” *Id.* at 6. Many other authorities express grave concerns about the problematic enforcement of the good moral character rule. E.g., *Giroux v. N.C. Criminal Justice Education and Training Standards Commission*, 23 DOJ 02864, 2023 WL 9229513 (Byrne, ALJ) (explaining the law of good moral character in detail and identifying disparate treatment in occupational licensing discipline by the Commission).
68. The North Carolina law of good moral character as it relates to occupational licensing discipline for law enforcement officers is an ill-defined body of law that does not contain clear and easily identifiable standards or criteria. The Rule’s reference to appellate cases in other contexts does not provide any clear statement of standards or elements for police officers. In *David v. N.C. Criminal Justice Education and Training Standards Commission*, 17 DOJ 06743, 2018 WL 2387452, it was explained that the cases cited by the good moral character rule did not deal with law enforcement certification cases and that it is not reasonable to expect law enforcement officers to have to shepardize appellate cases to ascertain the meaning of good moral character for law enforcement officers. *David* explained that “arbitrary moral standards” should not be grounds for revocation of an officer’s certification. This Court also concludes that the portion of the Commission good moral character rule that requires officers to be able to analyze appellate judicial authority and shepardize those cases is unreasonable and unduly burdensome to law enforcement officers. Law enforcement officers have been unduly burdened with increasing responsibilities in recent years, and it is not appropriate to require police officers to be able to conduct legal research techniques.
69. In the Commission Final Agency Decision, there is a glaring omission of mandatory legal authority including *Devalle v. N.C. Sheriffs’ Education and Training Standards Commission*, 289 N.C. App.13, 887 S.E.2d 501 (2023). In *Devalle*, the Court of Appeals issued a unanimous decision addressing the law and principles of good moral character in a North Carolina law enforcement officer context. *Devalle* was issued by the Court of Appeals on May 16, 2023, and *Devalle* was argued at length before the Commission within Petitioner’s 64-page *Legal*

Brief Directed by the Commission. Despite the Commission having been put on direct notice of mandatory precedent in *Devalle*, the Commission did not cite, address or attempt to distinguish *Devalle*.

70. In *Devalle* the Court of Appeals explained: “Character thus encompasses both a person's past behavior and the opinion of members of his community arising from it.” Further, “whether a person is of good moral character is seldom subject to proof by reference to one or two incidents.” 887 S.E.2d at 897. *Devalle* further explained that: “[s]uch a vague qualification [good moral character rule], which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial” *Konigsberg v. State*, 353 U.S. 252, 263, 77 S. Ct. 722, 1 L.Ed.2d 810 (1957).” The Supreme Court’s concerns stated in *Konigsberg* are present here. The very substantial body of very good moral character evidence supporting Trooper Locklear, which is virtually undisputed, is hardly mentioned by the Commission, much less applied in the totality of the evidence assessment.
71. In *King v. N.C. Sheriffs Education and Training Standards Commission*, 23 DOJ 02317, 2023 WL 8826550, Administrative Law Judge Byrne explained that North Carolina has long recognized the settled doctrines that prohibit the enactment of policies which are unduly vague or overbroad. See *Treants Enterprises v. Onslow County*, 83 N.C. App. 345, 350 S.E.2d 365 (1986), *aff’d*, 320 N.C. 776, 360 S.E.2d 783 (1987) (Treants I); *Treants Enterprises v. Onslow County*, 94 N.C. App. 453, 380 S.E.2d 602 (1989) (Treants II).” “It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” *Treants II* at 458, quoting *City of Mesquite v. Aladdin’s*, 455 U.S. 283 (1982) and *Grayned v. City of Rockford*, 408 U.S. 104 (1972).
72. *Devalle* interpreted the good moral character rule as having a “severe and clear” standard. The Court in *Devalle* concluded: “The evidence and findings fail to show severe misconduct amounting to a lack of good moral character as a matter of law.” *Devalle*’s conduct involved multiple instances of duty and duty-related conduct. *Devalle*’s duty related conduct was more prevalent than Trooper Locklear’s more isolated conduct. Here, Trooper Locklear’s conduct was similarly not severe; it arose from one event; it was prompted by panic and did not result in any actual harm.
73. As explained in *Devalle* and its antecedents, generally, *isolated instances* of misconduct are insufficient to properly conclude that someone lacks good moral character. See *In Re Rogers*, 297 N.C. 48, 58 (1979) (“whether a person is of good moral character is seldom subject to proof by reference to one or two incidents.”); *Daniel Brannon Gray v. N.C. Sheriffs Education and Training Standards Commission*, 09 DOJ 4364 (March 15, 2010; May, ALJ), and many other cases cited herein.
74. In *Jeffrey Royall v. N.C. Sheriffs’ Education and Training Standards Commission*, 09 DOJ 5859, the Sheriffs’ Commission adjudicated a good moral character case and issued its Final Agency Decision. There, the Sheriffs’ Commission explained its interpretation of its good moral character rule. This Court finds that the good moral character principles within the

Conclusions of Law in *Royall* represent an accurate summary of the law and this Court adopts those principles. The Court of Appeals in *Devalle* also cited and relied upon *Royall*.

75. In *Devalle*, the Court of Appeals addressed and explained several bases for its decision reversing the Commission, including that the Commission acted arbitrarily by failing to apply the same standards as previously applied and that “the Commission erred and applied an arbitrary and capricious decision to Mr. Devalle.” 887 S.E.2d 891, 901. The Court of Appeals further explained:

“We agree with the trial court these findings and conclusions do not conform with the standard the agency applied in *Royall*. By failing to apply the same standard to similarly situated individuals, the record in this case is one “which indicates arbitrary, discriminatory or capricious application of the good moral character standard” by the Commission. *In re Willis*, 288 N.C. at 19, 215 S.E.2d 771.” 887 S.E.2d at 900.

76. In *Devalle*, the Court of Appeals further explained the Commission’s errors and concluded:

“the Commission applied a heightened good moral character standard to Mr. Devalle than that which it has previously enumerated when it denied his justice officer certification indefinitely such that its decision was arbitrary and capricious. The Commission’s denial was further unsupported by substantial evidence.” 887 S.E.2d at 891.

We agree with the trial court and conclude the Commission did not abide by its own good moral character standard when it denied Mr. Devalle’s justice officer certification indefinitely. The Commission’s decision was arbitrary and capricious, and its denial was unsupported by substantial evidence. We affirm the trial court’s order reversing the Commission’s Final Agency Decision.” 887 S.E.2d at 897.

77. The Commission’s decision in this case similarly erred by not following and applying the law of good moral character as explained by the Court of Appeals in *Devalle*. The Commission failed to apply the same good moral conduct standard that it previously applied in other Commission cases. The Commission here applied a heightened standard to Trooper Locklear. The Commission even erroneously suggested that “Whether this specific conduct was or was not of good moral character requires no analysis” Conclusion of Law 22. All of the evidence of good moral character surely requires analysis, weighing and balancing to determine whether the standards of *Devalle* and its antecedents are met or not. Some of the Commission’s errors of law here were its failures in not properly considering and determining the totality of all of the evidence, including the substantial evidence of record supporting Trooper Locklear’s very good moral character. Trooper Locklear was entitled to have his decades of many good deeds fairly and properly considered and applied in the good moral character analysis. The failure to consider and apply that substantial evidence in Trooper Locklear’s favor was arbitrary.

78. The character evidence that was adverse to Trooper Locklear is very narrow and limited in scope and time; it was one event and incident whereby Trooper Locklear misrepresented to his Sergeant beginning on the late evening of August 20, 2020, and in the early morning of August 21, 2020. This evidence plainly fits within settled North Carolina law from *Devalle* and cases cited therein that ordinarily one or two adverse incidents is not sufficient to cause someone to have bad moral character or otherwise ruin what had been good moral character. On the other hand, the evidence of Trooper Locklear's good moral character is extensive and compelling. The Commission misapplied the law of good moral character to this evidence. The evidence cited by the Commission for its conclusion that Trooper Locklear lacks good moral character is insufficient as a matter of law to reach the high standard of clear and severe misconduct; and even if it did, it was limited to the one event and legally insufficient in that regard as well.
79. There is no known North Carolina or other similar case on point finding a lack of good moral character on these or similar facts. In fact, to the contrary, as demonstrated in *Evington v. N.C. Criminal Justice Education Standards Commission*, 09 DOJ 3070, 2009 WL 4912691 (Gray, ALJ), there are several examples of cases where egregious misconduct did not prompt good moral character charges or any occupational licensing punishment by the Commission. Some of the examples listed by Judge Gray are especially egregious such as the Trooper who committed a truthfulness violation and also threatened to kill his wife twenty-two times. He received only nominal personnel discipline and no certification discipline. In *Giroux v. N.C. Criminal Justice Education and Training Standards Commission*, 23 DOJ 02864, 2023 WL 9229513, Judge Byrne issued a comprehensive proposal for decision addressing good moral character issues including the inconsistency in enforcing or not enforcing the good moral character rule and the disparities in the imposition of discipline. There, at Conclusions of Law 10-16, Judge Byrne identified additional cases demonstrating wide disparities in enforcement of the good moral character rule. These cases present equal protection concerns.
80. In *Knox v. N.C. Sheriff's Education and Training Standards Commission*, 11 DOJ 04831, 2014 WL 10794970 (November 19, 2014), Administrative Law Judge May provided a straightforward explanation of the law of good moral character, which this Court adopts. Judge May explained in pertinent part:

4. Moral character is a vague and broad concept. E.g. *Jeffrey Royall v. N.C. Sheriffs' Education and Training Standards Commission*, 09 DOJ 5859; *Jonathan Mims v. North Carolina Sheriff's Education and Training Standards Commission*, 02 DOJ 1263, 2003 WL 22146102 at page 11-12 (Gray, ALJ) and cases cited therein. See *Mims* at page 11.

5. The United States Supreme Court has described the term "good moral character" as being "unusually ambiguous." In *Konigsberg v. State*, 353 U.S. 252, 262-63 (1957), the Court explained: The term good moral character ... is by itself ... *unusually ambiguous*. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer. Such a vague qualification, which is easily adapted to fit personal views and predilections,

can be a dangerous instrument for arbitrary and discriminatory denial ... (emphasis added).

6. Police administrators, officers and others have considerable differences of opinion as to what constitutes good moral character. *Royall* at page 13; *Mims, supra.* at page 12...

7. While having good moral character is an ideal objective for everyone to enjoy, the lack of consistent and clear meaning of that term within the Respondent's rule, and the lack of clear enforcement standards or criteria for application of the rule, renders enforcement actions problematic and difficult. *Royall, supra* at page 14; *Mims, supra.* at page 12, Conclusion of Law 4.

8. Because of these concerns about the flexibility and vagueness of the good moral character rule, any suspension or revocation 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. *Royall, supra* at 14, *Mims, supra.* at page 12 and 13.

81. The term in question "good moral character" raises definitional questions of morality, immorality, and good and bad character. Starting with character, traditional definitions of character reveal that the term has to do with an "aggregate of the moral qualities which belong to and distinguish an individual person." *Black's Law Dictionary* 211 (5th ed. 1979). The term means the "predisposition or habit, or aggregate..." of qualities. *Id.* Character is 'a persons' fixed disposition or tendency, as evidenced to others by his habits of life ..." *Id.*
82. The term "bad character" means "the predominance of evil habits of a person." *Black's Law Dictionary* 127 (5th ed. 1979). Immorality is evil, sinful or otherwise wrong behavior; it is a state. See www.vocabulary.com/dictionary/immorality. Character is an aggregate of acquired behavior, over time. Character is typically not defined by a single or few instances but rather examines the long course of human behaviors, habits, and customs of a person over time. In *In Re Legg*, 325 N.C. 658, 386 S.E.2d 174 (1989), a moral character case, the Supreme Court emphasized the "pattern." of misconduct that gave rise to the conclusion. In *In Re Rogers*, 297 N.C. 48, 253 S.E.2d 912 (1979), the Supreme Court's analysis of moral character included examining the "aggregate" and the "systemic pattern" of behaviors.
83. This Court's assessment of Trooper Locklear's moral character pursuant to *Devalle* and other cases focuses on the totality of all of the character evidence of record and Trooper Locklear's history in *the aggregate*. The cases and authorities interpreting good moral character law warrant consideration of a wide variety of factors for this Court to consider in its analysis. Trooper Locklear has demonstrated the following which can be factors providing an indicia of good moral character: being a good citizen, supporting one's community, being helpful to others, being a caring person, supporting one's family, being a good father, educating children, being a public servant, promoting law and order, attending church, being active in one's church,

having a good reputation in one's residential community, having a good reputation in one's occupational community, earning awards from community organizations, having a good work ethic, being a good employee, being fair to others, respecting the rights of others, being fiscally responsible, accepting responsibility for mistakes, and having a good record of being law abiding and the absence of criminal convictions. These are examples of Trooper Locklear's good moral character traits and behaviors. See Exhibit A-4 and A-5; R.p. 204-231.

84. Trooper Locklear introduced exhibits including statements from other law enforcement officers, the Director of the BLET for Robeson Community College; and from attorneys who had worked directly with Petitioner; and private individuals expressing confidence in Petitioner's honesty, integrity, professionalism and many other admirable traits. Petitioner's Exhibit A-5, pp 34-51
85. The totality of all of the evidence demonstrates that Trooper Locklear has very good moral character based on the aggregate of his long-term actions, conduct and traits. The evidence in this case does not establish a violation of the Commission's good moral character rule. Under a correct interpretation of the good moral character rule, Trooper Locklear presently has good moral character sufficient for certification as a law enforcement officer.
86. This case involves extenuating circumstances. Trooper Locklear panicked and in some moments of fear engaged in poor judgment in misrepresenting to his Sergeant. However, his better judgment returned quickly, and he corrected his mistakes. He apologized and made a full accurate account of the event. Trooper Locklear did not misrepresent anything to the Patrol Internal Affairs personnel in his interview. Trooper Locklear's misrepresentations were limited in time and scope, and they involved one event. The singular event does not outweigh Trooper Locklear's many years of very good moral character.
87. The five judges who have examined the underlying evidence have all concluded that Trooper Locklear is fit for continued law enforcement service. In the personnel case, Judge Byrne and the Court of Appeals concluded that Trooper Locklear's conduct was insufficient to warrant termination of employment; and that is now a final judgment by the Court of Appeals. Consequently, since the conduct has been judicially determined to be insufficient to even terminate Locklear's employment, it stands to reason that the conduct is plainly insufficient to terminate Locklear's certification and ability to be employed in law enforcement at all. It would constitute arbitrariness to find conduct to be so severe that it justifies an indefinite suspension from an occupational field, when the same conduct has been held by the Court of Appeals to not even be sufficient to terminate employment of one job.
88. This Court has interpreted Respondent's good moral character rule and concludes as a matter of law that Respondent's interpretation is erroneous as a matter of law and that Trooper Locklear has very good moral character sufficient to currently be certified and serve as a law enforcement officer, and that Petitioner has not violated the Commission's good moral character rule.

Rehabilitation Since The Event

89. This Court has found and concluded that Trooper Locklear has historically had and presently has good moral character. However, *alternatively*, if this single event from 2020 constituted a loss of good moral character, the evidence further demonstrates that Petitioner's continued good conduct and behaviors shows that he is rehabilitated from the incident that occurred back in 2020.
90. Following the isolated incident that gave rise to this case in 2020, Trooper Locklear acted responsibly and professionally in the immediate aftermath of the incident and thereafter. He was forthcoming in acknowledging his mistakes and very apologetic. Trooper Locklear demonstrated remorse. Judge Bawtinheimer found that Petitioner was candid with the Highway Patrol internal investigation. Conclusion 26.
91. The evidence demonstrates that Trooper Locklear's isolated conduct has been rehabilitated and his good character restored through his actions. Trooper Locklear successfully resumed his law enforcement service following his reinstatement to the Highway Patrol. Trooper Locklear's actions and candor after the incident speaks well of Petitioner's moral character. The decisions of five judges suggest confidence in Trooper Locklear and his ability to resume his law enforcement career.
92. This Court finds that the totality of the evidence demonstrates that Trooper Locklear's history both before and after the event suggests that he will not engage in similar behavior again in the future.
93. The principle of *restoration* or rehabilitation of good moral character is widely recognized. See, e.g., *Devalle, supra*; *Marcum v. N.C. Criminal Justice Commission*, 2016 WL 6830998 (Lassiter, ALJ); *Rodney Bland v. Criminal Justice Education and Training Standards Commission*, 2013 WL 8116063, 12 DOJ 03839 (Overby, ALJ); *Kevin King v. N.C. Sheriffs' Education and Training Standards Commission*, 2012 WL 928115, 11 DOJ 11631 (Overby, ALJ). Therefore, as *an alternative basis* for this Court's decision and order, the Petitioner has been rehabilitated and he presently has good moral character and is in compliance with the Commission's good moral character rule.

The G.S. 14-230 Charge

94. N.C.G.S. 14-230 is a criminal statute that the Commission has applied administratively. 14-230 provides:
 - a) If any clerk of any court of record, sheriff, magistrate, school board member, county commissioner, county surveyor, coroner, treasurer, or official of any of the State institutions, or of any county, city or town, shall willfully omit, neglect or refuse to discharge any of the duties of his office, for default whereof it is not elsewhere provided that he shall be indicted, he shall be guilty of a Class 1

misdemeanor. If it shall be proved that such officer, after his qualification, willfully and corruptly omitted, neglected or refused to discharge any of the duties of his office, or willfully and corruptly violated his oath of office according to the true intent and meaning thereof, such officer shall be guilty of misbehavior in office, and shall be punished by removal therefrom under the sentence of the court as a part of the punishment for the offense.

95. N.C.G.S. 14-230 contains several elements and there must be substantial evidence by proof of each element in order for there to be a violation. The elements are:

- A. The defendant must be a government official as defined in the statute; and
- B. Who shall willfully;
- C. Omit, neglect or refuse to discharge a duty of his office; and
- D. That there must have been some actual harm to the public caused by the willful failure.

See, e.g., *State v. Hockaday*, 265 N.C. 688, 144 S.E.2d 867 (1965) (“if such officer, after his qualification, willfully and corruptly omits, neglects or refuses to discharge any of the duties of his office or willfully violates and corruptly violates his oath of office . . .”) See *State v. Birdsong*, 325 N.C. 418, 384 S.E.2d 5 (1989); *State v. Rhome*, 120 N.C. App. 278, 462 S.E.2d 656 (1995).

96. There was no competent, substantial and admissible evidence of any injury or harm to the public from the Petitioner’s actions, therefore this charge fails for that reason. There was no sufficient and substantial evidence that the Petitioner willfully omitted, neglected or refused to discharge a duty of his office. While Petitioner’s isolated actions constituted an exercise of poor judgment and was not good law enforcement service, it does not rise to the high required level of a willful failure to discharge duties of office. G.S. 14-230 is not meant to criminalize poor judgment or poor performance.

97. In *Lucas v. N.C. Sheriffs Education and Training Standards Commission*, 2015 WL 6125382 (2015), Administrative Law Judge Lassiter addressed a case involving a charge of an alleged violation G.S. 14-230. The case involved some neglect in the retention of counterfeit money evidence. However, Judge Lassiter found that “The incident was not proved to have been harmful to the public.” Judge Lassiter also explained the nature of recurring mistakes by officers.

Many law enforcement officers make mistakes in the completion of their duties of office, some of which are in the form of omissions and failure to act. Authorities have recognized how law enforcement officers should not be held to unrealistic standards of perfection..... E.g., *Dietrich v. N.C. Department of Crime Control and Public Safety*, 2001 WL 34055881, 00 OSP 1039 (Gray, ALJ; August 13, 2001)

98. This Court has reviewed Judge Bawtinhimer's analysis and conclusions of the allegations of an offense under G.S. 14-230. This Court finds that Judge Bawtinhimer's Conclusions of Law are correct and adopts those Conclusions of Law 10-23; R.p. 29-35.
99. Additional authorities support Judge Bawtinhimer's Conclusions. In *State v. Powers*, 75 N.C. 281, 1876 WL 2791 (1876), our Supreme Court observed that public officials are not criminally liable for errors or mistakes. *Powers* was cited in *State v. Shipman*, 202 N.C. 518, 163 S.E.657 (1932), where the Supreme Court observed how one is not criminally chargeable for an error of judgment or a mistake. 163 S.E. at 669. *Powers* and *Shipman* remain as valid precedent, and followed by scores of cases reaffirming that officer mistakes and mistaken beliefs are not criminal offense. See *State v. Norris*, 111 N.C. 652, 16 S.E 2 (1892).
100. The Supreme Court has observed the "difficulty of establishing injury to the public." *Morgan v. Public Utility District*, 554 U.S. 527, 562 (2008). The "public" means "of, relating to, or affecting all the people or the whole area of a nation or state." www.meriam-webster.com/dictionary/public. Black's Law Dictionary defines the public as: "Pertaining to a state, nation, or whole community ... affecting the whole body of people or an entire community." *Black's Law Dictionary* 1104 (5th ed. 1979).
101. Black's Law Dictionary defines "Public Injuries" as "breaches and violations of rights and duties which affect the whole community as a community." *Black's Law Dictionary* 707 (5th ed. 1979). An injury is defined as a "wrong or damage done to another." *Black's Law Dictionary* 706 (5th ed. 1979). An injury is "the invasion of any legally protected interest of another." *Id.*
102. In *State v. Rhome*, 120 N.C. App. 278, 462 S.E.2d 656 (1995), the Court interpreted G.S. 14-230 and explained that "injury to the public must occur as a consequence of the omission, neglect or refusal." 120 N.C. App. at 294; 462 S.E.2d at 667. Here, there has been no such injury to the public. There was no such evidence as Judge Bawtinhimer found in Conclusion of Law 22: "There was no evidence offered in this case showing any injury to the public by Petitioner." *Id.*; R.p. 31.
103. The cases interpreting G.S. 14-230 require *actual injury to the public* – as opposed to potential or speculative injury. Our Supreme Court made this clear in 1929 in *State v. Anderson*, 196 N.C. 771, 147 S.E. 305 (1929), where the Court stressed that "injury to the public" is required. The injury must be concrete. Just like in a civil case for damages, the injury must be real and established. Here, in the Commission's Conclusions of law 16-20, the Commission attempts to articulate theoretical and speculative injuries. Imagined or speculative injuries are insufficient to satisfy the elements of G.S. 14-230.
104. There is no competent substantial evidence that any conduct by Petitioner, that Respondent claims violated N.C. Gen. Stat. § 14-230, caused injury to the public. Significantly for due process purposes, Respondent's Notice of Probable Cause also fails to make that allegation. See Judge Bawtinhimer's Conclusion of Law 18. R.p. 30.

105. In addition to an essential element of the alleged offense being wholly unproven, Respondent failed to give Trooper Locklear proper notice of the elements of the offense he allegedly committed. “Petitioner has the due process and statutory right to notice of the acts for which his certification is being challenged.” *Enrico Miguel Orevillo Sabangan v. NC Criminal Justice Education and Training Standards Commission*, 2022 WL 888027, 21 DOJ 03253. See *Matter of Chastain*, 2022-NCCOA-54, ¶ 32, 281 N.C. App. 520, 529, 869 S.E.2d 738, 745). “It is fundamental that both unfairness and the appearance of unfairness should be avoided.” *American Cyanamid Company v. F.T.C.*, 363 F.2d 757, 767 (6th Cir. 1966); *Crumph v. Bd. of Educ. of Hickory Admin. Sch. Unit*, 326 N.C. 603, 624, 392 S.E.2d 579, 590 (1990); N.C. Const. Art. I, Sec. 19.
106. Judge Bawtinhimer found that Trooper Locklear was not given adequate and proper notice of the alleged elements of this offense. See Conclusion of Law 19; R.p. 30. This Court agrees. This defect creates a constitutional due process problem. The Commission’s charging document appears in Respondent’s Exhibit 2; R.p. 107-111. There, the Commission failed to properly allege all elements of a G.S. 14-230 offense. This charge was constitutionally defective through the failure of proper notice and should therefore be dismissed. However, *alternatively*, this Court shall nevertheless reach the merits of this issue and consider other legal issues and the sufficiency of the evidence for the G.S. 14-230 charge.
107. The legal term “injury to the public” is a long-recognized mandatory element of the criminal offense of “Willful Failure to Discharge Duties” in violation of N.C. Gen. Stat. § 14-230. There was no evidence offered in this case showing any injury to the public by the Petitioner. Thus, the evidence failed to “satisfy the elements of a specified criminal offense.” 12 N.C.A.C. 09A .0103 (5).
108. There was also no injury to Cornelius Callahan, who relinquished all interests in his bag and its contents containing contraband and items of personal property. When Callihan threw his bag and contents into the road ditch and left that area, he relinquished his interest in his personal property. His actions constituted an abandonment of that personal property and all interests therein. See *Kitchen v. Wachovia Bank*, 44 N.C. App. 332, 260 S.E.2d 772 (1979). There was no harm to Callihan from the Trooper Locklear’s actions.
109. There was no competent and substantial evidence of any actual harm to any person or entity, or the public, from Trooper Locklear’s actions.
110. The potential criminal case against Mr. Callahan could have been initiated by Highway Patrol officials and/or the District Attorney’s office.
111. Petitioner did not “commit” the offense of “Willful Failure to Discharge Duties” in violation of N.C. Gen. Stat. § 14-230. R.p. 31.
112. This Court finds that the Commission’s Conclusions of Law 16, 17, 18, 19 and 20, are not valid or proper Conclusions of Law. Those conclusions purport to be or contain findings of fact, and

those findings are erroneous and are not supported by substantial and admissible evidence of record; they contain inadmissible opinion evidence that did not come in through any witness. Conclusion of Law 16-20 contain inadmissible opinions and speculation.

113. Conclusions of Law 16-20 are erroneous, incomplete, misleading and not supported by the substantial evidence of record. Conclusions of Law 16-19 are not conclusions of law at all. The alleged facts set forth in these alleged Conclusions of Law are not supported by any citation to the transcript, any exhibits or other authority. These purported findings or conclusions are not supported by any testimony or exhibits; they are essentially opinions and those opinions do not have a rational basis in the substantial evidence of record. Conclusions of law 16-20 contain errors of law and are inconsistent with the decisional law interpreting G.S. 14-230.
114. As notably found by Judge Bawtinheimer, the Notification charging document did not assert the G.S. 14-230 element of actual injury to the public. "Petitioner has the due process and statutory right to notice of the acts for which his certification is being challenged." *Enrico Miguel Orevillo Sabangan v. NC Criminal Justice Education and Training Standards Commission*, 2022 WL 888027, 21 DOJ 03253. See *Matter of Chastain*, 2022-NCCOA-54, ¶ 32, 281 N.C. App. 520, 529, 869 S.E.2d 738, 745).

The New Legal Charge and Theory Advanced on Appeal

115. The two charges against Trooper Locklear are contained in the charging document, the Notice of Probable Cause, Respondent's Exhibit 2; R.p. 376-380; see Commission Final Agency Decision, Finding of Fact 58; R.p. 07. This document is entitled "Proposed Suspension of Law Enforcement Officer Certification." R.p. 376. This is the charging document where Trooper Locklear was afforded notice of only two alleged charges. The document alleged that "probable cause" had been found for the two alleged charges, alleged lack of good moral character and G.S. 14-230. Therefore, Respondent's charges against Trooper Locklear were noticed by this Notification. Petitioners are entitled to reasonable notice of alleged occupational licensing offenses. The Respondent Commission litigated this case based on the charges and theories set forth in Respondent's Exhibit 2, and as amplified in its Prehearing Statement. R.p.376-80; R.p.104-05.
116. This case is now on appeal before this Superior Court. When before this Court in oral argument on May13, 2024, the Respondent Commission articulated and attempted to advance a new theory and theoretical charge, that Trooper Locklear committed a Chapter 90 drug violation, a "felony." This new allegation was not made in the Notification charging document that initiated this case. R.p. 376-380. Therefore, Trooper Locklear was not afforded any notice or opportunity to defend a charge under Chapter 90. Trooper Locklear has never been charged with that violation or theory. The Commission Investigator, Ms Judy Kelly, did not identify this as a possible charge or possible theory for the Commission to consider. The Probable Cause Committee Memorandum of January 28, 2022 (Respondent's Exhibit 3; R.p. 381-386). did not identify a Chapter 90 allegation as a possible theory against Trooper Locklear. The Commission failed to bring that charge or raise or argue that point in its prehearing statement.

R.p. 108-111. Moreover, the Commission, in its Final Agency Decision, never mentioned or addressed that possible charge or theory. R.p. 1-16. Finding of Fact 58 specifically identified the two charges, and there was no reference to a chapter 90 theory. R.p.07. After the hearing below before Judge Bawtinheimer, the Commission is attempting to assert a new charge on appeal. The Commission is effectively attempting to “swap horses” and try a new theory not previously brought. The Commission prepared its own Final Agency Decision and did not advance this theory then. It is therefore now waived and precluded on due process grounds.

117. Under these circumstances, the Commission’s attempted use of this new theory, after the Commission has issued its Final Agency decision of its choosing, violates fundamental constitutional principles including Trooper Locklear’s procedural and substantive due process rights. The Commission brought its case with two alleged charges with no reference whatsoever to Chapter 90 in its charging document, its Prehearing Statement or Final agency Decision. It would be manifestly unjust and arbitrary to permit the Commission to tack on a new charge or new theory after the fact.

118. The Respondent’s argument that Trooper Locklear has committed a Chapter 90 violation is an effort to “swap horses” to advance another argument on appeal that was not charged below. The Respondent is not entitled to “swap horses” and assert new charges and new theories on appeal now that were not preserved and brought below before the Administrative Law Judge. In *State v. Sharpe*, 344 N.C.190, 473 S.E.2d 3 (1996), the Supreme Court explained the rule prohibiting swapped horses:

This Court has long held that where a theory argued on appeal was not raised before the trial court, “the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court.” *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934); *see also State v. Benson*, 323 N.C. 318, 321-22, 372 S.E.2d 517, 518-19 (1988) (where defendant relied on one theory at trial as basis for written motion to suppress and then asserted another theory on appeal, “no swapping horses” rule applied); *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) (“The theory upon which a case is tried in the lower court must control in construing the record and determining the validity of the exceptions.”); *State v. Woodard*, 102 N.C. App. 687, 696, 404 S.E.2d 6, 11 (where defendant objected on one theory at trial to denial of his request for an instruction and then asserted different theory on appeal, “no swapping horses” rule applied), *disc. rev. denied and appeal dismissed*, 195 329 N.C. 504, 407 S.E.2d 550 (1991).

119. Many cases have followed this principle. E.g. *State v. Chapman*, 244 N.C. App. 649, 714, 781 S.E.2d 320 (2016). Even though these authorities preclude use of this new theory, alternatively, this Court also rejects this theory on substantive grounds because there is no sufficient and substantial evidence to establish any Chapter 90 offense.

120. North Carolina administrative law provides that agencies are not permitted to shift and add new charges or theories after a case is tried. In *Amanini v. N.C. Department of Human*

Ressources, 114 N.C. App. 668, 443 S.E.2d 114 (1994), the Court of Appeals addressed this very issue. There, the agency terminated an employee on the stated grounds of personal misconduct. On appeal, the agency attempted to advance an alternative position, that the employee had committed “unsatisfactory work performance. The Court of Appeals explained that there was no indication that the alternative position was ever put before the administrative law judge. 114 N.C. App at 681. *See, e.g., Grissom v. Dept. of Revenue*, 34 N.C. App. 381, 383, 238 S.E.2d 311, 312–13 (1977) (“An appeal has to follow the theory of the trial, and where a cause is heard on one theory at trial, [respondent] cannot switch to a different theory on appeal.”) (citations omitted), *disc. review denied, appeal dismissed*, 294 N.C. 183, 241 S.E.2d 517 (1978). *See also Cone Mills Corp. v. N.L.R.B.*, 413 F.2d 445, 452 (4th Cir.1969) (“[C]ourts may not accept appellate counsel’s *post hoc* rationalizations for agency action....”).

121. In *Hardy v. N.C. Central University*, 260 N.C. App. 704, 817 S.E.2d 495 (2018)(unpublished), the Court of Appeals addressed another administrative law case where an agency similarly attempted shift its position. The Final Agency Decision alleged that the Petitioner had committed “unacceptable personal misconduct.” But the agency did not make that argument at trial. 260 N.C. App. at 704, note 1. Citing *Ananini*, the Court of Appeals held that “NCCU is bound by the theory that it argued at trial.” Similarly, here, the Commission is bound by the theory that it used at trial, which did not at all involve any Chapter 90 charge or theory. Here, there is no appropriate basis for the Commission to attempt to arbitrarily punish Trooper Locklear under a new charge and or new theory that he had no opportunity to defend at trial before Judge Bawtinheimer, This kind of *post hoc* argument is not proper for consideration against Trooper Locklear. The Commission’s new theory is arbitrary and is overruled because of a lack of constitutionally adequate notice and because there is no sufficient or substantial evidence of a Chapter 90 violation. *Alternatively*, even if this new theory is considered, this Court finds and concludes that there is no sufficient or substantial evidence to support it.

The Commission’s’ Failure to Investigate the Good Moral Character and G.S. 14-230 Charges

122. Trooper Locklear argued below that the Commission failed to comply with its own legal duty to conduct a sufficient and complete investigation. Petitioner’s Legal Brief before the Commission at 62. However, the Commission failed to address the argument or the regulation that requires that the Commission “shall investigate the alleged violation ...”.
123. The Commission was required to investigate the alleged charges against the Petitioner. 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. (Emphasis added)

124. The underlying investigation by the Commission merely consisted of obtaining the Highway Patrol's investigation. T2-53, 59. Judy Kelly was the Commission Investigator assigned to investigate Petitioner Locklear. T2-53. Ms. Kelly's investigation consisted of: "I obtained the IA [Highway Patrol Internal Affairs investigation report] – they actually put it on a thumb drive – IA, - meaning the internal investigation." T2-53; 59 When asked about whether there were any other interviews done, other than what was provided by the Highway Patrol, Ms. Kelly testified that "I did not conduct interviews." T260 Ms. Kelly further testified that there were not any further interviews conducted regarding Trooper Lockler's life. The Committee Memorandum to the Probable Cause Committee (Respondent's Exhibit 3; R.p. 381-386) described the allegations and then began referencing the documents from the Highway Patrol Internal Affairs investigation. There was no reference to any other investigation. Trooper Locklear was therefore subjected to an incomplete investigation by the Commission.
125. Considering the seriousness of an allegation of the lack good moral character of a law enforcement officer, a fair, complete and proper investigation of the charge is essential. Our Supreme Court has reaffirmed that "it is fundamental that both unfairness and the appearance of unfairness should be avoided." *Crumpp v. Board of Education*, 326 N.C. 603, 624, 392 S.E. 2d 579, 590 (1990). When an occupational licensing agency takes action that effectively takes away someone's means of livelihood, fundamental constitutional principles are triggered.
126. Law enforcement officers have settled procedural due process, substantive due process and liberty interests at stake when the Commission undertakes an investigation that may result in severe discipline that may destroy an officer's ability to continue in his or her profession. "A professional license is a protected property interest." *In re Magee*, 87 N.C. App. 650, 654, 362 S.E.2d 564, 567 (1987); *Barry v. Barchi*, 443 U.S. 55 (1979) (holding that occupational license is a protected interest); *Bell v. Burson*, 402 U.S. 535, 539 (1971) (due process is required in licensing disciplinary proceedings). As Judge Bryne explained in *Giroux*, at Conclusion 31: "Police officers are possessed of and entitled to enjoy the same Constitutional rights and privileges that all other persons in the United States possess and enjoy." *Smith v. Price*, 446 F. Supp. 828 (M.D.Ga.1977), rev'd on other grounds, 616 F.2d 1371 (5th Cir.). Our Supreme court has mandated that law enforcement officers are "not relegated to a watered down version of constitutional rights" *Garrity v. New Jersey*, 385 U.S. 493, 500 (1967).
127. Trooper Lockler also enjoyed constitutional rights to have his evidence fairly and properly considered prior to a decision imposing discipline. See e.g. *Quintero v. Garland*, 998 F.3d 612 (4th Cir. 2021) (describing due process considerations in immigration proceeding; a fully developed evidentiary record is required).
128. This extremely limited investigative approach by the Commission here created fundamental problems because the Highway Patrol did not conduct its investigation seeking to determine if Petitioner had or did not have good moral character or if there was a violation of G.S. 14-230.

Retrieving some other investigation may have been an appropriate start, but that was clearly insufficient in this instance. The Highway Patrol investigation is dated back in 2020, and the law requires that Petitioner's *present* good moral character should be assessed. *Devalle* emphasized that the test of good moral character is for the *present* character of Petitioner. The Commission's investigation of Petitioner was inadequate and insufficient, and violated Petitioner's rights under 12 NCAC 10B .0201.

129. The failure to conduct a proper and complete investigation is a factor militating against discipline. E.g. *Bulloch v. N.C. Department of Public Safety*, 732 S.E.2d 373 (N.C. App. 2012); *Colaprete, Internal Investigations: A Practitioner's Approach* (2007) at 83-108; Hein, *Inside Internal Affairs* (Looseleaf 2013). Administrative Law Judge Donald Overby held in *Bulloch v. N.C. Dep't of Crime Control*, 2010 WL 690232, that: "An inadequate, incomplete, or improper underlying personnel investigation may result in an arbitrary and capricious personnel decision. Scores of cases have condemned arbitrary and capricious public personnel decisions."
130. Respondent was required to follow the procedures outlined in the administrative regulations where its authority to act is described. *Simonel v. N.C. Sch. of the Arts*, 119 N.C. App. 772, 776, 460 S.E.2d 194, 197 (1994) (affirming trial court decision that agency's decision was based upon unlawful procedure where procedure did not comport with procedures expressly set forth in the administrative rules created and adopted by the agency. *See Nanny's Korner Care Ctr. By Bernice M. Cromartie, CEO v. N. Carolina Dep't of Health & Human Servs.-Div. of Child Dev.*, 234 N.C. App. 51, 758 S.E.2d 423, 424 (2014).
131. Petitioner enjoyed constitutional rights to have his submitted evidence fairly and properly considered prior to a decision imposing discipline. See e.g. *Quintero v. Garland*, 998 F.3d 612 (4th Cir. 2021) (describing due process considerations including a fully developed evidentiary record is required). A decision maker must "weigh all relevant evidence under the totality of the circumstances." *Zuh v. Mckasey*, 547 F.3d 504, 507 (4th Cir. 2008).
132. This Court finds and concludes that the Commission failed to comply with the regulation requiring the investigation, which was prejudicial to the Petitioner. A reasonable investigation, as required by this regulation, would have likely discovered substantial evidence of Petitioner's present good moral character. Thus, the violation of this regulation was prejudicial to Petitioner and violated his rights to a fair, proper and complete investigation.
133. This Court finds that the discipline imposed upon Petitioner by the Commission was predicated upon an unlawful procedure (the failure to properly investigate) prohibited by N.C.G.S. 150B-51(c) and also constituted an error of law as per by N.C.G.S. 150B-51(d). Therefore, the discipline must be overruled and reversed because of this violation of law.

CONCLUSION

134. The Commission decision erroneously failed to follow the Court of Appeals precedent in *Devalle* and other good moral character precedent and otherwise misinterpreted and misapplied the Commission's good moral character rule, therefore the Final Agency Decision was affected by errors of law.
135. Petitioner Locklear presently has good moral character, and the isolated incident alone was insufficient to ruin Trooper Locklear's otherwise good moral character considering his long successful and unblemished career and very good life.
136. This Court finds and concludes that Trooper Locklear did not violate G.S. 14-230. The Commission committed errors of law in its interpretation and application of the law of G.S. 14-230. The alleged G.S. 14-230 charge was also defective.
137. This Court finds and concludes that the Commission's investigation was inadequate and incomplete and therefore violated the Petitioner's rights under 12 NCAC 10B.020 and due process principles.
138. This Court overrules and reverses Commission's Conclusions of Law 8, 14, 16-20-23, 26-37, as they are not valid, accurate and complete conclusions of law. Further, Conclusions of Law 16-20, and 27-37 include purported factual findings which are erroneous and not supported by the substantial evidence of record.
139. This Court overrules and reverses the "order" and Decision of the Commission as it is predicated on errors of law, unlawful procedure, findings not based on substantial competent evidence, and constitutional violations, which have deprived Trooper Locklear of his rights under the Administrative Procedure Act in Chapter 150 B of the General Statutes and under G.S. 150B-51(1)(3)(4)(5) and (6).

ORDER

The Petitioner is entitled to relief under the Administrative Procedures Act. The Petition is GRANTED, and the relief requested is ALLOWED. Petitioner Locklear did not violate either the Commission's good moral character rule or G.S. 14-230. Petitioner Locklear *presently* has good moral character sufficient to serve as a law enforcement officer. The Commission Final Agency Decision, with findings and conclusions to the contrary, is OVERRULED and REVERSED on multiple and alternative grounds as stated in this Order on Judicial Review.

NOW THEREFORE it is ORDERED ADJUDGED AND DECREED that the N.C. Criminal Justice Education and Training Standards Commission shall reverse and rescind the discipline imposed upon Petitioner and his law enforcement certification, which is retroactively effective to the time of the suspension of his certification. The indefinite suspension and the five year suspension imposed on the Petitioner by the Commission shall be rescinded and removed from

Petitioner's certification file maintained by the Commission. The Commission shall take all action necessary for Petitioner's law enforcement certification to be fully and immediately restored and validated authorizing his return to immediate law enforcement service as a State Trooper. The Commission shall immediately notify the N.C. Highway Patrol that Petitioner's certification is no longer in any suspended status and that Petitioner may return to full law enforcement service. This order is not stayed pending any appeal. This order is effective immediately.

This 28 day of May, 2024.


James Gregory Bell
Senior Resident Superior Court Judge Presiding