

STATE OF NORTH CAROLINA  
COUNTY OF WAKE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
10 OSP 1105

ANTHONY E. SCOTT, )  
 )  
 Petitioner, )  
 )  
 v. )  
 )  
 NORTH CAROLINA DEPARTMENT OF )  
 CRIME CONTROL AND PUBLIC SAFETY; )  
 NORTH CAROLINA HIGHWAY PATROL, )  
 )  
 Respondent. )

DECISION GRANTING  
SUMMARY JUDGMENT

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THIS CASE CAME ON TO BE HEARD on October 19, 2010, before Fred G. Morrison Jr., Senior Administrative Law Judge, on all pending motions, including: Respondent's Motion to Dismiss and Petitioner's Motion for Summary Judgment. The Administrative Law Judge, having considered Respondent's Motion to Dismiss, Petitioner's Memorandum in Opposition to the Motion to Dismiss, Petitioner's Summary Judgment Motion, Respondent's Response in Opposition to the Motion, Petitioner's Reply Memorandum and Addendum to Reply Memorandum, along with accompanying exhibits filed by the parties, the file in the case, and the parties' arguments, hereby renders the following:

DECISION

1. As Petitioner timely filed his Petition for Contested Case Hearing and as Respondent did not give Petitioner notice of the filing fee requirement, and as Petitioner timely mailed the filing fee to the Office of Administrative Hearings, though it was not received, and then mailed the filing fee to the Office of Administrative Hearings and it

was received, and as the filing fee requirement, being waivable, is not jurisdictional, Respondent's Motion to Dismiss is Denied.

2. As there is no genuine issue as to any material fact, Petitioner is entitled to judgment as a matter of law. N.C. Gen. Stat. § 126-34 compels a State employee after being disciplined to "follow the grievance procedure established by the employee's department or agency" before filing a Petition in the Office of Administrative Hearings in a just cause case. The North Carolina Highway Patrol Policy Manual limits the authority of the Secretary of Crime Control and Public Safety on an appeal from discipline imposed by the Commander of the Highway Patrol to upholding or reducing the discipline or referring any new allegations to the Highway Patrol Commander for investigation, and as any action by the Secretary on appeal increasing the discipline would not only violate that policy but would also have a chilling effect on the right of members of the Highway Patrol to appeal to the Secretary, the action by the Secretary dismissing Petitioner was beyond the Secretary's authority. Accordingly, Petitioner's Motion for Summary Judgment is granted. As Petitioner does not contest the disciplinary measures initially imposed, i.e., his demotion in rank and a 15% reduction in pay, nor does Petitioner object to assignment by the Highway Patrol, Respondent is ordered to reinstate Petitioner at the demoted rank and pay, with assignment in the discretion of the Highway Patrol, with back pay and attorney fees.

#### ORDER AND NOTICE

The Members of the North Carolina State Personnel Commission will make the Final Decision in this contested case. N.C. Gen. Stat. § 150B-36(b), (b1), (b2), (b3) and (d) enumerate the standard of review and procedures the agency must follow in making

its Final Decision, and adopting and/or not adopting the Decision of the Administrative Law Judge.

Pursuant to N.C. Gen. Stat. § 150B-36(a), before the agency makes a Final Decision in this case, it is required to give each party an opportunity to file exceptions to this decision, and to present written arguments to those in the agency who will make the Final Decision. N.C. Gen. Stat. § 150B-36(b)(3) requires the agency to serve a copy of its Final Decision to each party's attorney of record and to the Office of Administrative Hearings, 6714 Mail Service Center, Raleigh, N.C. 27699-6714.

IT IS SO ORDERED.

This the \_\_\_\_\_ day of October, 2010

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Fred G. Morrison Jr.  
Senior Administrative Law Judge

A copy of the foregoing was mailed to:

Barry Nakell  
Attorney at Law  
149 Dixie Drive  
Chapel Hill, N. C. 27514  
ATTORNEY FOR PETITIONER

Tamara S. Zmuda  
Hal F. Askins  
N.C. Department of Justice  
9001 Mail Service Center  
Raleigh, N.C. 27699-9001  
ATTORNEYS FOR RESPONDENT

This the \_\_\_\_\_ day of October, 2010

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