

## 2016-2017 NORTH CAROLINA EMPLOYMENT LAW UPDATE

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This paper summarizes published employment law decisions from the North Carolina Supreme Court and the North Carolina Court of Appeals from June 1, 2016 to June 1, 2017

### NORTH CAROLINA SUPREME COURT

**Morris v. Scenera Research LLC, 368 N.C. 857, 788 S.E.2d 154 (N.C. 2016) (Cheri Beasley, J.)**. Affirming in part, and reversing in part the court of appeals decision in *Morris v. Scenera Research, LLC*, 747 S.E.2d 362 (N.C. Ct. App. 2013) (Linda Stephens, J.) *Under the N.C. Wage & Hour Act (WHA), the issues of whether employee was entitled to bonuses and whether bonuses were “calculable” are for the jury. Trial court did not abuse its discretion in concluding employee was not entitled to liquidated damages under WHA where employer had reason to believe that they did not owe the bonuses. A willful violation of REDA requires employer’s knowledge or reckless disregard of whether its action violated REDA, the determination of willfulness is one for the jury, and competent evidence supported trial court’s decision to not treble REDA award. Employee could not pursue rescission as a remedy for breach of employment contract.*

Robert Paul Morris was hired by Scenera and participated in Scenera’s Patent Bonus Program, whereby he was entitled to receive \$5000 for every patent application submitted to the U.S. Patent and Trademark Office (“PTO”) and another \$5000 if and when the patent issued. Effective January 1, 2008, Scenera suspended the Patent Bonus Program. At this time, Scenera owed Morris \$210,000 in patent bonuses, but Morris voluntarily agreed to suspend payments because he believed Scenera promised to reinstate the program if it did not create a new bonus plan and provide Morris with a written employment contract. After a year, the parties had not agreed on a bonus plan or employment contract, so Morris hired an attorney, and Morris threatened to sue for North Carolina Wage and Hour Act (WHA) violations. Morris’s employment then terminated, with Morris claiming he was terminated, and Scenera claiming he resigned. Scenera gave Morris a check for \$210,000, on the condition that he acknowledge Scenera’s ownership of the patent applications and patents issued from January 2008-June 2009. Morris refused and filed suit, alleging breach of contract, fraudulent inducement, unjust enrichment, and violations of the WHA and REDA, and Scenera counterclaimed for declaratory judgment regarding ownership of Morris’s inventions and Scenera’s obligation to pay bonuses after January 2008, as well as breach of fiduciary duty. The business court granted partial summary judgment in favor of Scenera, ruling that Morris was “hired to invent,” so Scenera presumptively owned the patents, and dismissing Morris’s claims for fraudulent inducement and unjust enrichment. At the close of the evidence at trial, the trial court granted Scenera’s motion for a directed verdict on the issue of patent ownership, but denied the motion on the NCWHA and REDA claims. A jury awarded Morris (1) \$210,000 in patent bonuses for patent applications filed or patents issued between January 1, 2008 and June 17, 2009 (the date Scenera advised in

writing that it was canceling the bonus program); (2) \$675,000 in patent bonuses for patent applications pending as of June 17, 2009; and (3) \$390,000 under REDA. The trial court (James L. Gale, J.) awarded Morris \$450,000 in partial attorneys' fees and \$210,000 in partial liquidated damages under the NCWHA, but declined to treble Morris's damages under REDA. Morris had prayed that he be allowed to elect between rescission of the patent assignments and damages, but the court further held that Scenera owned the patents and ordered Morris to assign all unassigned patent rights to Scenera. Scenera moved for JNOV, and the trial court denied the motion. Both parties appealed.

The court of appeals affirmed the trial court's rulings on the motions for directed verdict and JNOV, liquidated damages, WHA damages, and REDA damages. The court reversed, however, the court's ruling that Morris could not pursue rescission and remanded to allow Morris to elect between the remedies of money damages or rescinding the patent assignments to Scenera and taking back ownership of the patents. The court also reversed the partial award of attorneys' fees and remanded for consideration of whether Morris was entitled to all of his attorney's fees. Scenera appealed.

The Supreme Court affirmed in part, and reversed in part. The Court affirmed the court of appeals' holding that the trial court properly submitted the question of whether Morris was entitled to the issuance bonuses under the WHA to the jury and properly denied Scenera's motions for directed verdict and JNOV. The Court also affirmed the ruling that the issue of whether wages were "calculable" for purposes of Morris' WHA claim was a question of fact to be submitted to the jury. The Court concluded that the Morris's formula for calculating the value of the patent issuance bonuses for patent applications still pending with the PTO was reasonable, based on the evidence presented. The Court noted that absolute certainty of the bonus was not required, but both the cause and the amount of the lost bonus must be shown with "reasonable certainty." Moreover, the Court affirmed the ruling that the trial court did not abuse its discretion in denying liquidated damages under the WHA on the jury's award of issuance bonuses associated with unissued patents, where Scenera had reasonable grounds for believing that they did not violate the WHA by not paying bonuses for patents that were not issued at the time of Morris' employment termination.

The Court affirmed the court of appeals' holding that competent evidence supported the trial court's decision to not treble the REDA damages. Per N.C. Gen. Stat. § 95-243(c), REDA provides that if "the court finds that the employee was injured by a willful violation . . . , the court shall treble the amount awarded." The Court agreed with adopting the FLSA definition of "willfulness," holding a violation requires showing an employer's knowledge or reckless disregard of whether an action violated REDA. While recognizing that the determination of willfulness is a question of fact, the Court held that based on the language of REDA, the trial court must make the finding of willfulness.

The Court reversed as to the right of rescission, holding that rescission was available only "when a material breach occurs *and* all legal remedies fall short of compensating the injured party for its loss." Here, Scenera only owed Morris an obligation to pay what it owed under its contract, and monetary damages sufficiently compensated Morris. The court recognized: "To hold otherwise would seriously undermine the rationale of the hired-to-invent doctrine. As this Court explained

in *Speck v. North Carolina Dairy Foundation*, an employer takes a risk when hiring an employee to invent, because the employer has no guarantee of a return on its investment. ... If an employee is hired to invent but could later rescind that agreement and claim ownership of inventions made during his or her employment, the employee would end up in a far better position, and the employer in a far worse position, than when the parties reached their original bargain. The employer's risk would increase exponentially, thereby discouraging businesses and universities from undertaking valuable research efforts that would benefit our State and Nation."

## NORTH CAROLINA COURT OF APPEALS

### NORTH CAROLINA WAGE AND HOUR ACT

**Powell v. P2Enterprises, LLC, 786 S.E.2d 798 (N.C. Ct. App. 2016) (Ann Marie Calabria, J.).** *A restaurant manager was an "employer" within the meaning of the N.C. Wage & Hour Act (WHA), so when he independently decided to forgo wages in order to pay the restaurant's other bills, the restaurant's owner or "money man" and the LLC were not an "employer" under the WHA responsible for the manager's unpaid wages.*

Robert Powell ("Robert") and his father, Robert Henry Howell ("Powell"), formed a manager-managed limited liability company, P2Enterprises, LLC, to own and operate a restaurant in Winston-Salem, "Bob's Big Gas Subs & Pubs." According to the Articles of Incorporation, Powell was the sole member of the LLC, and Robert was the sole manager. Robert hired the restaurant's staff and managed the restaurant. Powell was rarely involved in the day to day operations, but he occasionally, when the restaurant was short-staffed, provided free labor. Powell's main role was as the "money man," i.e., he was to provide money when asked, and he was often asked, since the restaurant was not doing well on cash flow. On the occasions when Powell was unable to contribute funds, Robert independently decided to forego his own salary rather than default on other expenses. Robert and Powell's relationship grew strained. Powell distanced himself from the operations and took another job. After a dispute arose over Robert's failure to pay expenses due, Powell learned that Robert had not paid himself for certain periods, and Powell agreed to pay Robert approximately \$16,917 in back wages. Robert eventually quit. Robert then sued the LLC and Powell for his unpaid wages. The Forsyth County Superior Court (Richard Stone, J.) granted summary judgment dismissing the LLC and Powell.

The court of appeals affirmed, observing that North Carolina's Wage and Hour Act (like the FLSA) defined "employer" as "any person acting directly or indirectly in the interest of an employer in relation to the employee." N.C. Gen. Stat. § 95-25.2(5), 29 U.S.C. § 203(d). While recognizing that both individuals and commercial entities such as corporations could be "employers" under this standard, and the term was to be construed liberally, the court noted that status as an "employer" turned on the degree that the individual or entity had the right to control and direct the daily work of an individual. Applying the "economic reality" test to examine "the totality of the circumstances to determine whether the individual has sufficient operational control over the workers in question," and examining all relevant evidence, the court concluded that in this case, Robert and not Powell was the "employer." Robert actually hired and fired staff, set the rate and method of payment, maintained employment records and personnel files, was responsible for employee and management schedules, supervised the kitchen and dining areas,

and was the decisionmaker with respect to the LLC's failure to timely pay his own wages. Although Powell maintained financial control over the restaurant by virtue of his position as the sole member of the LLC, and he shared the authority to hire and fire staff, he did not have significant day-to-day operational control over the restaurant's employees. Powell was off-site more often than not, was not active in the operation, had no part in Robert's decision not to pay his own wages, and was largely confined to providing funding to cover the restaurant's shortfalls. Therefore, the Court held that neither Powell nor the LLC was an "employer" of Robert for purposes of his wage and hour claim.

### **AMERICANS WITH DISABILITIES ACT**

**Rittelmeyer v. University of North Carolina at Chapel Hill, No. COA15-1228, 2017 WL 1055663 (N.C. Ct. App. Mar. 21, 2017) (Donna Stroud, J.)** *Holding that University did not violate the Americans with Disabilities Act when it worked with employee to provide reasonable accommodations to shield her from the fluorescent lights that gave her migraines, provided her with FMLA leave and extended leave, but then fired when she stopped coming to work or communicating with University after an extended leave period expired because she was unable to return without experiencing migraines.*

Jennifer Rittelmeyer was a social clinical research assistant with UNC's Department of Medicine and Genetics. Rittelmeyer informed her supervisor that exposure to fluorescent lights caused her to have migraine headaches. The supervisor informally accommodated her light sensitivity from 2002 until 2011. In November 2011, Rittelmeyer informed her supervisor that new lighting conditions would not work for her, and she began the formal disability accommodation process. Various accommodations to the workplace were attempted, but none of the accommodations effectively resolved the issue. Rittelmeyer rejected UNC's offer to allow her to work from home, or wear room-darkening glasses. She also refused to allow UNC to speak with her health care provider about potential accommodations. Rittelmeyer's light sensitivity worsened during the accommodation process, and she began missing work frequently and suffering from a migraine almost every day she worked. UNC rejected her request to turn off all lights in her work place, provide a door and a roof for her cubicle, and require her supervisor to keep her door closed. She took FMLA leave in February 2012, and during this time, UNC made numerous other modifications. UNC denied her request of a transfer to another position, but informed her that she could apply to any position she desired. When Rittelmeyer returned to work, she acknowledged that her workplace was much darker, but her sensitivity to light had increased. Her absences increased, and she received a written warning due to her absences. She took additional FMLA leave, and then took four weeks of leave without pay. UNC terminated Rittelmeyer because she stopped communicating with UNC and failed to return to work following her leave. Rittelmeyer filed a petition for contested case hearing contending UNC failed to accommodate her disability. After her grievance with UNC was denied, she filed a second petition regarding the denial of her grievance. The two petitions were consolidated, and after a five day hearing, the ALJ affirmed the termination. Rittelmeyer filed a petition with the Superior Court to review the ALJ decision. Wake County Superior Court (Paul Gessner, J.) entered an order affirming the petition. Rittelmeyer appealed.

The court of appeals affirmed the superior court's order upholding UNC's termination of Rittelmeyer's employment. The court initially concluded that although Rittelmeyer raised challenges to the ALJ's findings of fact in her last issue on appeal, the argument was abandoned because she failed to raise arguments on appeal to particular findings of fact, failed to point to particular portions of the record, failed to address findings of fact not supported by the evidence, and failed to raise issues to material findings of fact.

The court next addressed Rittelmeyer's challenges to the ALJ's conclusions of law. The parties do not dispute that petitioner's light sensitivity, which leads to migraine headaches, is a "disability" as defined by the Americans with Disabilities Act (ADA), and the Court assumed she was qualified for the job. Thus, the court considered whether UNC unlawfully discriminated against Rittelmeyer by terminating her because of her disability. The court concluded that the crucial issue is whether UNC met its obligations to provide Rittelmeyer with reasonable accommodations under the ADA because, if UNC met this obligation, Rittelmeyer's failure to return to work would be without legal justification and that would be a proper ground for termination, not a discriminatory one.

The court rejected Rittelmeyer's argument that UNC's accommodations were not "reasonable" as a matter of law because the only accommodations that qualify as "reasonable" are those that would have been effective in eliminating her migraines at work. Under *US Airways, Inc. v. Barnett*, 535 U.S. 391 (2002), an "ineffective modification" is one which "will not accommodate a disabled individual's limitations." The most obvious modification to accommodate light sensitivity is to eliminate an employee's exposure to lights, if possible, and otherwise to reduce exposure to light as much as possible without excessive interference with the ability of other employees to do their work. UNC tried many of the measures listed in 42 U.S.C.A. § 12111(9). For example, UNC offered "job restructuring" by proposing that Rittelmeyer work from home, but she rejected this proposal more than once. UNC also "modif[ied] ... equipment or devices" by making many changes to her cubicle and to lights throughout the work area. Over the course of several months UNC made many accommodations, while also addressing complaints of other employees who were having difficulty seeing in darkened areas of the workplace. UNC was also trying to hit a moving target, since Rittelmeyer's light sensitivity increased over time. Rittelmeyer rejected the option of wearing room-darkening glasses, although she admitted that she used them elsewhere. The court concluded that UNC made numerous reasonable accommodations.

Although UNC tried the accommodation of turning off all overhead fluorescent lights, and although this accommodation was effective for Rittelmeyer, UNC was not required to continue this accommodation when it was determined that this accommodation could not continue due to other employees' complaints. The supervisor's willingness to try certain accommodations did not mean she was then bound to continue an accommodation even if it ended up being untenable. The court reasoned that it is not objectively reasonable to require all other employees to work without overhead lights in this particular situation.

The court concluded that Rittelmeyer was not terminated for her disability; instead, she was terminated because she stopped coming to work without even letting UNC know that she would not report to work as scheduled, after she also repeatedly refused to work from home.

## MUNICIPAL EMPLOYEES

### CONSTITUTIONAL CLAIMS – PROMOTIONAL PROCESS

#### **Tully v. City of Wilmington, 790 S.E.2d 854 (N.C. Ct. App. 2016) (Linda Stephens, J.).**

*Police officer alleged a valid property and liberty interest under N.C. Constitution in requiring his employer, the City of Wilmington, to comply with its own established promotional process.*

Kevin Tully was employed with the Wilmington Police Department (WPD), worked in the WPD's Violent Crimes Section, and received numerous awards, including Wilmington Police Officer of the Year for 2011 and the Public Safety Office Medal of Valor in 2014. Tully sought promotion to the rank of Sergeant, which required scoring in the top 50th percentile on a written exam, at which point he would be placed on an eligibility list for promotion. After he learned that he had failed the exam, he reviewed a copy of the answer key, and realized that many of the so-called "correct answers" were wrong because they were based upon outdated law. Therefore, his correct answers were marked incorrect. WPD's policy allowed candidates for promotion to appeal any portion of the selection process, so Tully grieved the denial of promotion the issue of the outdated examination answers. Specifically, Tully grieved the denial, relying on WPD Policy Manual Directive 4.11 on Promotions, which provides, that "[i]t is the objective of the City of Wilmington to provide equal promotional opportunities to all members of the Police Department based on a candidate's merit, skills, knowledge and abilities . . . ." The Directive further provides that "[c]andidates may appeal any portion of the selection process." But a few months later, Wilmington City Manager Sterling Cheatham told Tully that his grievance was denied, as the test answers were not a "grievable item." The City of Wilmington's Grievance Review Board made a final determination, denying Corporal Tully's appeal, on Jan. 3, 2012. Nevertheless, Tully continued to try to resolve the matter informally within the department. Almost two years later, Tully filed suit, alleging violation of his due process rights under the equal protection and "fruits of their own labor" clauses of the N.C. Constitution when it denied Tully's promotion based on his answers and then determined that such a reason was not grievable. The City filed an Answer and motion for judgment on the pleadings, arguing that Tully had no valid state constitutional rights. The New Hanover County Superior Court (Gary E. Trawick, J.) agreed with the City and granted that motion. Tully appealed.

The court of appeals reversed, and held that Tully had alleged a valid property and liberty interest in requiring the City to comply with its own established promotional process. Judge Stephens, writing for the majority, explained that the City erred in attempting to reframe Tully's claims as assertions of a property and liberty interest in receiving a promotion. Rather, Tully's actual claim is that the City violated Tully's constitutional rights by failing to comply with its own policies and procedures regarding the promotional process. The court agreed with Tully's argument that if the government has a process for promotion of its employees, particularly law enforcement officers who are sworn to uphold and apply the law to ordinary citizens, that process cannot be completely arbitrary and irrational without running afoul of the North Carolina Constitution.

The court noted that, assuming the allegations in the complaint in the light most favorable to the Tully, the City violated Tully's constitutional interests in an equal and non-arbitrary promotional

opportunity under Article I, sections 1 and 19 of the North Carolina Constitution by failing to comply with its own promotional policies and procedures in two respects. First, Tully alleged that the City administered a written sergeant's examination that included questions based upon incorrect and outdated law such that, although Tully answered certain questions accurately based on the correct and existing law, those answers were marked wrong, causing Tully to fail the examination and score below the 50th percentile of candidates, thereby barring him from proceeding to the next stage of the promotional process. Second, the City violated Tully's rights by failing to follow its own grievance policy, allowing candidates for promotion to appeal "any portion" of the selection process. Thus, the court concluded Tully's constitutional claims were not based upon an assertion that he was entitled to receive a promotion to the rank of sergeant, but simply that he was entitled to a non-arbitrary and non-capricious promotional process.

The court acknowledged that Tully's argument—that a government employer that fails to follow its own established promotional procedures acts arbitrarily, and thus, unconstitutionally—appears to be one of first impression in this state. However, as noted by the court, that conclusion is supported by persuasive federal case law and is in keeping with North Carolina's constitutional jurisprudence. The court recognized "if a government entity can freely disregard its policies at its discretion, why have a test or grievance process or any promotional policies at all?" Since Tully sufficiently alleged claims of arbitrary and capricious action by the City and genuine issues of material fact remained to be resolved, the trial court's order was reversed.

Judge Wanda Bryant filed a dissent, concluding that "[b]ecause the City is acting as an employer rather than as a sovereign, and is vested with the power to manage its own internal operations, Tully's pleadings—although asserting what appears to be an unfair result in a standard process—do not state a viable constitutional claim." Judge Bryant found that the cases cited by Tully inapposite, as they involved the government acting as a sovereign, rather than as an employer. Noting that the "government has significantly greater leeway in its dealings with citizen employees than it does when it brings its sovereign power to bear on citizens at large[.]" Judge Bryant concluded that the cases cited by Tully related to the government acting in its capacity as a sovereign and were inapplicable here where the government acted as an employer in denying plaintiff a promotion. She concluded that Tully had no valid property or liberty interest in obtaining a promotion or in the promotional process itself, and could not assert substantive due process or equal protection rights in failing to be promoted.

## **BREACH OF CONTRACT – GOVERNMENTAL IMMUNITY**

### **Wray v. City of Greensboro, 787 S.E.2d 433 (N.C. Ct. App. 2016) (Chris Dillon, J.).**

*Reversing trial court's order dismissing police chief's breach of contract claim arising out of City's refusal to reimburse for officer's defense cost, holding that the City was not shielded by the doctrine of governmental immunity to the extent that the officer's action was based on contract. When the City entered into an employment agreement with the officer, the City had in place a policy of paying for the legal defense of its officers and employees with respect to certain claims arising from their employment, thereby waiving its governmental immunity.*

In 1980, the City of Greensboro passed a resolution ("City Policy") stating that the City would pay for the legal defense and judgments of its officers with respect to certain claims arising from

their employment. David Wray was hired by the Greensboro Police Department (GPD) in 1991, and in 2003 he became the Chief of Police. However, in 2006, following news reports of race discrimination in the GPD and initiation of federal and state investigations into those claims, he resigned his position in lieu of termination, at the City's request. Thereafter, the City, Wray, and others were named as defendants in discrimination lawsuits brought by several Greensboro police officers. Throughout this litigation, Wray asked the City to reimburse his costs of defense, but the City declined. Wray sued the City seeking \$220,593.71, the amount he paid defending the lawsuits against him. The City moved to dismiss, asserting governmental immunity (among other things). The Guilford County Superior Court (James C. Spencer, Jr., J.) granted the motion, ruling that the City had not waived governmental immunity by enacting the City Policy.

The court of appeals reversed, holding that the City was not shielded by the doctrine of governmental immunity to the extent that Wray's action was based in contract. The court recognized that a city or county waives governmental immunity when it enters into a valid contract, but a municipality waives governmental immunity only for those contracts into which it is authorized to enter. Here, N.C. Gen. Stat. § 160A-167 authorizes municipalities to provide for litigation defense of their officers and employees. One way a municipality can provide such benefit is by contract. Pursuant to § 160A-167, the City Policy was enacted "to provide for the defense of its officers and employees against civil claims and judgments and to satisfy the same...." While Wray was an at-will employee of the City, the court noted that the relationship between an employer and an at-will employee is still contractual in nature. The questions of whether the City Policy is, in fact, an element of Wray's at-will employment contract and whether Wray's litigation expenses are covered thereunder go to the merits of his contract claim.

Addressing the City's arguments, the Court distinguished the North Carolina Supreme Court's holding in *Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 420 S.E.2d 432 (1992), which said, "Action by the City under N.C.G.S. § 160A-167 does not waive immunity." The court concluded that the Supreme Court was referring to immunity from tort actions. Finally, the court held that Wray sufficiently alleged the City's waiver of governmental immunity. Wray alleged that he was employed as the City's police chief, that he was acting within the "course and scope of his employment" at all times material to his claim, that pursuant to the City Policy he is entitled to reimbursement for his legal expenses and fees, and that the City failed to honor the City Policy. The court concluded that Wray's allegations were sufficient to establish waiver through a breach of Wray's contractual relationship as an employee of the City.

Judge Wanda Bryant dissented, observing that the City Policy established only a policy, did not provide substantive rights or procedural steps, and was not a contractual provision upon which Wray could compel performance. Judge Bryant further stated that the record was sufficient for the trial court to determine that Wray could not establish a valid contractual agreement with the City regarding the provision of legal defense as a condition of employment. Accordingly, she would affirm the trial court's dismissal.

## **SUPERIOR COURT REVIEW – RIGHT TO JURY TRIAL**

**City of Asheville v. Frost, No. COA16-577, 2017 WL 1632610 (N.C. Ct. App. May 2, 2017) (Wanda Bryant, J.).** *N.C. Session Law 2009-401, which governs appeals from the Asheville Civil Service Board, provides only petitioner with a right to demand a jury trial.*

Officer Frost was terminated from his employment with the City of Asheville based on an allegation of excessive force. Officer Frost appealed the termination to the Civil Service Board of the City of Asheville. The Civil Service Board found that his termination was not justified, should be rescinded, and that Officer Frost should be reinstated with back pay and benefits. The City of Asheville filed a civil summons and a petition for a trial *de novo* in Buncombe County Superior Court. Forty-five minutes later, Officer Frost filed his own petition for a trial *de novo*. In his petition, Officer Frost requested a trial by jury, but the City of Asheville did not request a trial by jury. The superior court dismissed Officer Frost’s petition with prejudice for lack of standing per the doctrine of prior pending action. The trial court (William Coward, J.) denied the City of Asheville’s motion to strike Officer Frost’s demand for a jury trial. The City of Asheville appealed.

The court of appeals reversed the superior court’s order refusing to strike Officer Frost’s demand for a jury trial. The court concluded that where N.C. Session Law 2009-401, which governs appeals from the Asheville Civil Service Board, specifically says, “If the *petitioner* desires a trial by jury, the petition shall so state,” only the petitioner City of Asheville had the right to request a jury trial. While recognizing that the session law goes on to say that “the matter shall proceed to trial as any other action,” the court rejected the argument that this provision should be interpreted to mean that N.C. R. Civ. P. 38 (“Any party may demand a trial by jury of any issue triable of right by a jury....”) applied to allow respondent Officer Frost to demand a jury trial. Pursuant to the statutory construction favoring the rule tailored to a specific circumstance as controlling over a more generally applicable rule, the court concluded that the language of the session law naming only the petitioner as the party who may request a jury trial is controlling over the more generally applicable right of any party to demand a jury trial, as provided in Rule 38. Moreover, the court concluded that the superior court’s reading of the session law would render the language designating only the petitioner as the party who may request a jury trial meaningless.

Judge Richard Dietz concurred. Judge Dietz first noted that Rule 38 does not create a substantive right to a jury trial – it merely creates the procedure to request a jury trial where there is a right to one. The right to a jury trial is conferred either by statute or by our state constitution, and here, the statute only converts the right to a jury trial on the petitioner, not the respondent. Second, Judge Dietz rejected the dissent’s assertion that the majority opinion reads the term “only” into the statute. Furthermore, Judge Dietz asserts that the majority’s interpretation does not lead to absurd results; thus, it is improper to invoke the absurdity canon to ignore the plain language of the statute. Permitting only the losing side to request a jury trial in an administrative proceeding is unusual, but it is something the General Assembly certainly could have intended.

Robert Hunter Jr. dissented. Judge Hunter concluded that either party has a right to the jury trial following the Board’s determination. He recognized an ambiguity created by the Civil Service Act and would construe it in light of the intent of the legislature. The session law expressly

provided “either party” has the right to request a trial de novo, and that this trial de novo would proceed as “any other civil action.” Therefore, the invocation of Rule 38 indicates all the consequences of designating this mechanism for judicial review a “civil action” are in effect, especially the fundamental right to a trial by jury. Judge Hunter concluded that the majority’s literal interpretation of one sentence of the statute yielded an absurd result, stating he could not contemplate another civil action in this state which allows only one party to designate whether a trial includes a jury. He also recognized that the majority’s interpretation would lead to a race to the courthouse at best, and an incentive to lose before the board at worst.

## **PUBLIC EMPLOYEES**

### **JUST CAUSE DETERMINATIONS**

**Harris v. N.C. Department of Public Safety, 798 S.E. 2d 127 (N.C. Ct. App. 2017) (John Tyson, J.)** *Affirming ALJ’s determination that correctional officer’s conduct in punching inmate wearing restraints in the stomach did not amount to just cause for termination. Under a new statutory scheme, an ALJ may find just cause to discipline a state employee, but the ALJ may also substitute a different discipline than that imposed by the employer-agency. Here, the ALJ could reinstate correctional officer but deduct a week’s wages from his back pay.*

Officer Steven Harris began working as a correctional officer at Maury Correctional Institution in February 2013. His personnel record contained no disciplinary action prior to the incident at issue. The night of February 5, 2015, an inmate placed his feces into a plastic bag, placed the bag in the toilet, caused water to leak on the floor, and then poured the feces on the floor. Harris and other officers removed the inmate from his cell for it to be cleaned. The inmate was restrained with handcuffs behind his back, a waist chain, and leg cuffs. Officers testified that Harris approached the inmate, stated: “you think this is funny,” and then punched him in the stomach. Shortly after the incident, the inmate stated “Y’all hit like bitches.” Less than thirty minutes after the incident, the inmate was screened by medical personnel, who observed no bruising or redness on his abdomen. Despite the inmate’s history of frequent complaints, at no point did Walls complain that Officer Harris had struck him or abused him in any way. The North Carolina Department of Public Safety (DPS) terminated Harris for unacceptable personal conduct. Harris filed an internal appeal with the Employee Advisory Committee, which recommended the termination be upheld. After receiving notice of the final agency decision upholding the termination, Harris filed a petition for a contested case hearing with the Office of Administrative Hearings. ALJ Donald Overby heard the case, reviewed the evidence, and found that Harris struck a restrained and compliant inmate, but with very little force. The ALJ concluded that the agency had just cause to discipline petitioner, but not to terminate his employment. The ALJ reinstated Harris with back pay, less a deduction equal to a one week suspension. DPS appealed.

The court of appeals affirmed the ALJ’s decision. The court first addressed the 2013 statutory changes to N.C. Gen. Stat. Chapter 126, which enacted the State Human Resources Act and streamlined the procedure governing state employee grievances and contested case hearings. Chapter 126 governs the proceeding before the ALJ and provides the aggrieved party the right to appeal to the court of appeals (rather than to the superior court), but is silent as to the scope and

standard of review. Perceiving no intent to alter the standard of review on appeal, the court concluded that Chapter 150B sets forth the standard. The court held that its review of the ALJ's final decision remains whole record as to findings of fact and *de novo* as to conclusions of law. The court also held that an ALJ, reviewing an agency's decision to discipline a career state employee, owes no deference to an agency's legal conclusion of whether just cause existed, or (i.e., just cause) or to the particular consequences or sanction imposed. The ALJ may order any remedy within the range provided in § 126-34.02 without regard to the initial agency determination.

The court followed the framework of *Warren v. N.C. Dep't of Crime Control*, 221 N.C. App. 376, 726 S.E.2d 920 (2012), for determining whether just cause existed for Officer Harris's dismissal for unacceptable personal conduct. First, the employee engaged in the conduct, as the unchallenged findings of fact showed Harris punched an inmate in the stomach, without provocation, at a time when the inmate was restrained and under the control of multiple officers. Second, Harris's conduct amounts to the "willful violation of known or written work rules" (i.e., the use of force policy), which is one of the instances of unacceptable conduct listed in 25 NCAC 1J .0614(8)(d). Therefore, the court concluded that the record evidence and ALJ's conclusions supported the determination that Harris's conduct constituted "unacceptable personal conduct" that warranted discipline.

When evaluating the third factor, i.e., whether just cause existed for termination, the court reiterated that just cause is determined upon examination of all the facts, circumstances, and equities of a case, and consideration of additional factors shedding light on employee's conduct. Here, the ALJ considered several mitigating factors, including Harris's good work history, his prior positive working relationship with the particular inmate, it was not logical for Harris to punch an inmate without provocation while working with strangers on another shift, lack of medical evidence or injury, no complaints made by the inmate, video taken near the incident showed nothing unusual, and that the only rational conclusion was that Harris struck the inmate with very little force. The court deferred to the ALJ's findings of fact, even with evidence to support contrary findings. In consideration of the the ALJ's findings of fact, and after "balancing the equities," the court held that the ALJ did not err in determining that DPS did not meet its burden to show just cause for Harris's termination.

The court affirmed the ALJ's determination that just cause did not exist to impose the most severe form of discipline: dismissal from employment. 25 NCAC 1J.0504(a) sets forth four disciplinary alternatives, which may be imposed against an employee upon a finding of just cause: "(1) written warning; (2) Disciplinary suspension without pay; (3) Demotion; and (4) Dismissal." N.C. Gen. Stat. § 126-34.02(a)(3) gives the ALJ express statutory authority to "[d]irect other suitable action" upon a finding that just cause does not exist for the particular action taken by the agency. Under the ALJ's *de novo* review, the authority to "[d]irect other suitable action" includes the authority to impose a less severe sanction as "relief." The court concluded that the ALJ imposed a sanction within the range of authorized disciplinary alternatives.

Chief Judge Linda McGee concurred in part, and dissented in part. She concurred in the majority's conclusion that an "administrative law judge, reviewing an agency's decision to

discipline a career state employee ... owes no deference to the agency's conclusion of law that ... just cause existed" for the action taken by the agency. She also agree that, "[a]fter receiving and considering the evidence, and entering findings of fact, an administrative law judge is free to substitute their judgment for that of the agency as to the legal conclusion of whether just cause ... existed for the agency's action."

However, Chief Judge McGee dissented from the majority's holding that the standards of review provided in N.C. Gen. Stat. § 150B-51 apply to this case. She also dissented from the majority's conclusion, in its application of the *Warren* analysis, that Harris's actions did not give rise to just cause for the discipline imposed - termination. She reasoned that § 126-34.02(b)(3) does not indicate that a career state employee may initiate a contested case to argue that he should have received a lesser disciplinary action when just cause existed for the disciplinary action he received. Chief Judge McGee would hold that a single incident of intentionally and maliciously punching a restrained and compliant inmate for no legitimate purpose in violation of DPS's Use of Force policy amounts to unacceptable personal conduct that provides just cause for termination, regardless of the amount of force used.

**Cole v. N.C. Department of Public Safety, No. COA16-340, 2017 WL 1650085 (N.C. Ct. App. May 2, 2017) (Linda McGee, C.J.).** *Reversing ALJ's determination that there was not just cause to dismiss laundry plant manager for unsatisfactory job performance, where his two prior warnings were "inactive"; Holding that in order to dismiss a career state employee for unsatisfactory job performance, the employee must have received "at least two prior disciplinary actions" before being subject to dismissal for a third disciplinary action, and there is no requirement that the prior written warnings be "active."*

Randall Cole began working for N.C. Dept. of Public Safety (DPS) in 2003, and he was promoted to plant manager of the Craggy Laundry Facility in 2010. After his promotion, a change of command audit was performed, which revealed areas that needed improvement. Cole was advised that there would be a follow-up audit to verify that the problems identified were corrected. The second audit found that some issues identified in the first audit had not been corrected, and an employee action plan was issued to Cole, directing him to correct all violations. On December 15, 2011, Cole was issued a first written warning for unsatisfactory job performance, for not correcting the items in the action plan. On March 20, 2013, Cole was issued a second written warning for grossly inefficient job performance due to his failure to obtain a required certification as a Laundry Manager under the Association of Linen Management Program, and advised that he must achieve his certification by April 20, 2013. In July 2013, Cole's supervisor, Ronald Young, advised him that he was failing to properly reconcile receipts and send invoices to Raleigh for payment. On September 24, 2013, Cole was issued a third written warning for unsatisfactory job performance related to his failure to properly forward receipts and invoices, as well as his failure to correct issues found in an audit conducted on August 15, 2013. Shortly after the third written warning, a semi-annual safety inspection of the facility found several violations, including failure to maintain safety reports and properly train staff. A pre-disciplinary conference was held, and Cole was terminated for unsatisfactory job performance. Cole filed an internal appeal, and a final agency decision affirmed his dismissal. On April 3, 2014, Cole filed a petition for a contested case hearing with the Office of Administrative Hearings (OAH), alleging dismissal without just cause. Cole voluntarily

dismissed his petition on August 25, 2014. On August 12, 2015, Cole filed a second petition for contested case hearing. Donald W. Overby, ALJ, denied DPS's motion to dismiss the second petition, concluding that Rule 41(a)(1) applies to proceedings before OAH, allowing petitions to be refiled within one year after a voluntary dismissal. After a hearing, ALJ Overby concluded as a matter of law that because Cole did not have two active warnings at the time he was disciplined and terminated, DPS lacked just cause to dismiss Cole from his position, and ordered that he be retroactively reinstated but demoted. DPS appealed.

The court of appeals reversed, concluding that DPS had just cause to dismiss Cole. In its preliminary analysis, the court held that N.C. Gen. Stat. § 1A-1, Rule 41(a)(1), which permits a voluntarily dismissed claim to be refiled within one year of such dismissal, applies to contested cases before OAH; therefore, the ALJ properly denied DPS's motion to dismiss Cole's second petition. The court reasoned that pursuant to its authority, OAH promulgated 26 NCAC 03 .0101(a), which provides that the North Carolina Rules of Civil Procedure "shall apply" in contested cases before OAH unless a "specific" statute or regulation provides otherwise, and there was no specific statute or rule that provides Rule 41(a)(1) did not apply to contested cases before OAH.

In holding that just cause existed for Cole's termination, the court interpreted the meaning of the administrative regulation setting out the requirements for a career state employee to be dismissed for unsatisfactory job performance. Under 25 NCAC 01J .0605(b), "In order to be dismissed for a current incident of unsatisfactory job performance an employee must first receive at least two prior disciplinary actions: First, one or more written warnings followed by a warning or other disciplinary action which notifies the employee that failure to make the required performance improvements may result in dismissal." In this case, Cole received his first written warning on December 15, 2011, and a second written warning on March 20, 2013, and both warnings advised him that failure to improve might result in further disciplinary action, including dismissal. Cole was ultimately terminated for failure to correct deficiencies in his third written warning on September 24, 2013, which served as the "current incident of unsatisfactory job performance." The court rejected Cole's argument, and the ALJ's conclusion, that 25 NCAC 01J .0614(6), which defines "inactive disciplinary action," requires that a disciplinary action be "active" – or not "inactive" – before it can be used to justify dismissal for unsatisfactory job performance. The court reasoned that this interpretation did not render 25 NCAC 01J .0614(6)'s definition of "inactive disciplinary action" meaningless because there may be future amendments to that section of the Administrative Code to give use to that term.

**Watlington v. Department of Social Services Rockingham County, No. COA16-1038, 2017 WL 1251022 (N.C. Ct. App. Apr. 4, 2017) (John Tyson, J.).** *As a local government employee of a consolidated human services agency, community social services technician's termination case was governed by 25 N.C.A.C. Subchapter I rather than Subchapter J, so Subchapter I governs both the substantive just cause determination, the analysis of whether any procedural violations occurred, and the remedies available.*

Rockingham County Department of Social Services (DSS) hired Gloria Watlington as a community Service Technician, whose duties included providing transportation to families and children, supervising case visits between parents and children in DSS custody, and providing

case visit reports to DSS social workers. DSS Personnel Policy described appropriate employee behavior, including DSS policies on unacceptable personal conduct and the acceptance of gifts and favors. In December 2015, during a supervised custody visit, a parent purchased an inexpensive jewelry set for Watlington, which she accepted. Watlington's supervisor learned about the gift, she informed Watlington that the gift violated DSS policy, and Watlington immediately surrendered the jewelry set to DSS. Watlington was placed on administrative leave, pending investigation and review of the allegations. During the investigation, additional allegations were made that she accepted food and beverage from DSS clientele, used SSI money belonging to a child in custody to purchase food for herself, accepted a cash loan of \$60 from a foster parent, and removed a bassinet stored at DSS without permission and gave it to a foster family. DSS provided Watlington with written notice of a pre-dismissal conference, which listed the specific reasons for the recommendation of dismissal. Watlington later received written notice of dismissal, which listed the specific reasons for dismissal and informed her of her right to appeal to the county manager. The county manager upheld the termination and notified her by letter, but the letter did not provide the specific reasons why the county manager was upholding her termination or that the letter was public record. Watlington appealed her termination and filed a petition for contested case hearing with the Office of Administrative Hearings (OAH). J. Randall May, ALJ, affirmed Watlington's termination, but ordered DSS to pay Watlington back pay due to a procedural violation. The parties appealed.

The court of appeals affirmed in part, reversed in part, and remanded. The court affirmed the ALJ's conclusion that Watlington was a career state employee subject to the State Human Resources Act (SHRA). The court noted that DSS never contested the application of the SHRA to Watlington nor her status as a career state employee prior to its argument on appeal, reiterating that a contention not raised and argued before the ALJ may not be raised and argued for the first time on appeal.

The court held that as a local government employee of a consolidated human services agency, Watlington's termination case was governed by 25 N.C.A.C. Subchapter I that applies to local government employees, reversing the ALJ's conclusion of law that Subchapter J governs the case.

The court held that the ALJ failed to make appropriate findings of fact or conclusions of law to allow the court to review the just cause determination. With regard to the just cause analysis, the ALJ's conclusions of law recognize the proper three-prong test set forth in *Warren v. N.C. Dep't of Crime Control and Pub. Safety*, 221 N.C. App. 376, 726 S.E.2d 920 (2012). The ALJ made findings of fact addressing the first prong of the *Warren* test, finding that Watlington engaged in the conduct DSS alleged - accepted small gifts from clients, which she turned over to DSS, with the exception of some small amounts of food. However, the ALJ failed to make any findings of fact or conclusions of law related to the second and third prongs of the *Warren* test - The ALJ did not indicate that Watlington's conduct amounted to unacceptable personal conduct, and the ALJ did not conclude that DSS had substantive just cause for any disciplinary action against Watlington. The court remanded to the ALJ to make findings of fact and conclusions of law, applying the definitions of just cause and unacceptable personal conduct found in Subchapter I, rather than Subchapter J.

The court also reversed the ALJ's award of back pay, as back pay was not available as a remedy for any procedural violations under Subchapter I, and the ALJ is bound by those remedies provided under Subchapter I.

## **EXEMPT DESIGNATION**

***Vincoli v. State, 792 S.E.2d 813 (N.C. Ct. App. 2016) (Ann Marie Calabria, J.)*** *Even though the General Assembly repealed N.C. Gen. Stat. § 126-34.1(c) – which allowed a career state employee to challenge the designation of his position as exempt from the North Carolina Human Resources Act – § 126-5(h) still provides a statutory right to bring a contested case petition before the Office of Administrative Hearings as to whether a career state employee is subject to the Act, which would implicate addressing whether an exempt status designation is proper.*

Joseph Vincoli was hired in 2010 by the North Carolina Department of Public Safety (DPS) in a position subject to the North Carolina Human Resources Act (HRA). He eventually became a “career state employee,” which afforded him certain protections under the HRA, including the right not to be disciplined without just cause. The HRA, however, also gives governors the authority to designate certain positions exempt from those protections, and it was revised in August 2013 to eliminate a provision allowing employees to appeal when their job status was changed. Specifically, the General Assembly repealed N.C. Gen. Stat. § 126-34.1(c) – which allowed a career state employee to file a contested case hearing before the Office of Administrative Hearings (OAH) to challenge the designation of a position as exempt from the HRA – and replaced it with § 126-34.02 - which eliminated an action to challenge an exempt designation. In October 2013, Vincoli's position was reclassified as exempt, and he was fired about two months later, on the stated grounds that “a change in agency staff is appropriate at this time.” After his termination, Vincoli filed an internal grievance with DPS, and a grievance in the Office of State Human Resources (OSHR), but DPS and OSHR both refused to hear the grievances. Vincoli then attempted to contest his case before OAH, which dismissed it almost immediately because the revised HRA repealed his right to appeal his exempt designation.

Vincoli filed a complaint and petition for a declaratory judgment action in Wake County Superior Court, challenging the constitutionality of the HRA and the enactment of § 126-34.02 as it applied to him. Vincoli asserted that the enactment of § 126-34.02 deprived him of his previously vested property interest in continued employment without any due process or compensation. Vincoli and the State filed cross-motions for summary judgement. Donald Stephens, J. granted Vincoli's motion and declared that the enactment of § 126-34.02 was unconstitutional as it applied to Vincoli because it did not provide him with the right to a contested case hearing before OAH to challenge the designation of his position as exempt. The trial court permanently enjoined the State from enforcing the statute against Vincoli and ordered he be provided with a contested case hearing before OAH regarding whether his exempt designation was proper.

The court of appeals reversed the trial court's order, holding that the plain language of N.C. Gen. Stat. § 126-5(h) still provides Vincoli with a statutory right to a hearing before OAH as to whether he is subject to the HRA, which would implicate addressing whether his exempt designation was proper. Based on this avenue of appeal, the court concluded that the trial court

erred by declaring the newly enacted G.S. § 126-34.02, which eliminated a career state employee's opportunity to file a contested case hearing before OAH as to an exempt designation, unconstitutional as applied to Vincoli.

Judge Richard Dietz wrote a separate concurring opinion, agreeing that § 126-5 clearly permits Vincoli to contest whether his position properly could be designated exempt under the HRI. Judge Dietz recognized the “rub, of course, is that the General Assembly repealed § 126-34.1(c), a more specific statute authorizing employees to challenge their exempt designation in OAH.” While recognizing that the court's interpretation of § 126-5 rendered the repeal of the specific language in § 126-34.1(c) meaningless, Judge Dietz reasoned that courts should avoid an interpretation of a statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question. The court's “reasonable alternative interpretation” of the statute avoided Vincoli's constitutional challenge.

## **NORTH CAROLINA WHISTLEBLOWER ACT – TORTIOUS INTERFERENCE**

**Hubbard v. North Carolina State University, 789 S.E.2d 915 (N.C. Ct. App. 2016)**  
**(Rick Elmore, J.).** *Affirming summary judgment dismissing University employee's Whistleblower and tortious interference with contract claims based on her failure to establish that the University's proffered reason for her termination was pretextual, and dismissing state constitutional claims because Whistleblower claims were an adequate state law remedy for her alleged free speech violations.*

Hubbard was the at-will Director of Development at the College of Sciences at NCSU, and Anita Stallings was her supervisor. In the summer of 2012, Stallings began expressing dissatisfaction with Hubbard's performance to her superiors and peers, and documenting and discussing Hubbard's performance issues with Hubbard. In the summer and in November 2013, Stallings met with Human Resources to discuss terminating Hubbard's employment. In December 2013, Hubbard reported alleged misconduct by Stallings, including mishandling and misuse of donor funds, nepotism, age and gender discrimination, but acknowledged that her own relationship with Stallings had deteriorated and that she feared for her job as a result. In response to these reports, NCSU investigated and ultimately concluded it could not substantiate Hubbard's reports. NCSU interviewed Stallings in March 2014, but according to Stallings, she was not aware of Hubbard's complaints, and believed the department was participating in a routine audit. In April 2014, Hubbard was notified that her at-will employment would be terminated effective July 24, 2014. In November 2014, Hubbard filed a complaint against NCSU and Stallings in Wake County Superior Court alleging violation of N.C.'s Whistleblower Act, wrongful discharge in violation of public policy, tortious interference, and a direct constitutional claim. In April 2015, the superior court dismissed the wrongful discharge claim. In October 2015, the superior court granted summary judgment on Hubbard's remaining claims. Hubbard appealed.

The court of appeals affirmed summary judgment in favor of defendants. The court held that Hubbard failed to produce evidence to support the third element of her Whistleblower claim, i.e., a causal connection between her protected activity and her termination. The court concluded that Defendants met their burden of articulating a lawful reason for terminating Hubbard, and Hubbard failed to show that the proffered reason was pretext. The court found it persuasive that

before Hubbard made complaints that led to an investigation of Stallings' conduct, Stallings had expressed concern about Hubbard's productivity and conduct for around eighteen months, suggested to her own superiors the need to terminate Hubbard's employment, and allotting a specific time period for improvement, to no avail.

Affirming the dismissal of the tortious interference claim, the court ruled that Hubbard failed to present evidence that Stallings acted without justification; rather, the evidence of record showed that Stallings had legitimate reasons to recommend termination of plaintiff's employment. The court also ruling that Hubbard failed to rebut NCSU's evidence of performance deficiencies, or that Stallings' decision to terminate pre-dated Hubbard's report, or that Stallings was even aware of Hubbard's report when the termination decision was delivered to Hubbard.

Addressing the direct claim under the state constitution, the court held that Hubbard could not sue Stallings individually for violating Hubbard's freedom of speech, and her claim against NCSU was only available in the absence of an adequate state remedy. The court held that the Whistleblower Act provided an adequate state remedy for the alleged violation of her free speech rights, even if Hubbard ultimately was unsuccessful on that claim.

## **NORTH CAROLINA WHISTELBLOWER ACT**

**Gerity v. N.C. Department of Health and Human Services, 788 S.E.2d 589 (N.C. Ct. App. 2016) (Rick Elmore, J.)**. *Where an autopsy technician failed to follow protocol after discovering what he believed to be evidence that contradicted the medical examiner's findings, his complaints about the medical examiner's decision to let his autopsy report stand were not protected activity under the Whistleblower Act.*

Kevin Gerity was an autopsy technician and facility manager at the Office of the Chief Medical Examiner (OCME), and was supervised by Deputy Chief Medical Examiner Dr. Clay Nichols. In May 2011, Gerity assisted Nichols with an autopsy of Terrell Boykin, who had a gunshot wound in the head and was one of the apparent victims of a double homicide. Nicholas failed to find a bullet in the autopsy. After the autopsy, Gerity discovered a bullet while washing off the autopsy bench, put it in an evidence bag, obtained a photograph, and took the unmarked bag to Nichols's office, where he gave it to Nichols. Nichols did not amend his autopsy report to reflect the discovery of the bullet. Gerity informed Nichols's boss, Chief Medical Examiner Dr. Deborah Radisch, that the autopsy report "inaccurately stated the bullet exists and is not recovered." Two months later, Nichols instructed Gerity not to use his cell phone to conduct outside business on OCME time; chastised Gerity for his open contempt for Radisch, his long history of belligerence, snide remarks, and open confrontation; and instructed Gerity to attend three training classes. Gerity then e-mailed Radisch and her supervisor, Dr. Lou Turner, requesting a meeting to discuss his concern that the autopsy states no bullet was recovered when he recovered the bullet. Around the same time, senior management learned that the SBI was investigating Boykin's autopsy, as did the N.C. Department of Health and Human Services. Thereafter, Nichols was fired, and Gerity was notified to attend a pre-disciplinary conference related to the autopsy. At that conference, and before discussing the case, Gerity delivered a letter resigning effective immediately, stating his intent to retire within the month. Five months later, Gerity filed a petition for contested case with the Office of Administrative Hearings (OAH), contending he was

threatened with discharge and constructively discharged because he made reports that constituted protected activity under the N.C. Whistleblower Act. After hearing and arguments, OAH (Fred Gilbert Morrison Jr., ALJ) concluded that Gerity was not entitled to relief under the Whistleblower Act because he failed to prove any of the three elements of his claim.

The court of appeals affirmed, concluding that the greater weight of the evidence did not support a conclusion that Gerity engaged in protected activity when he reported his concerns about the autopsy to his superiors. Gerity failed to show that numerous findings of performance problems were not supported by substantial evidence. Gerity knew under protocol and work rules that he should have called Nichols to return to the autopsy room so that Nichols could properly collect and bag any newly discovered evidence. Instead, Gerity put the object in an unmarked evidence bag and took it to Nichols's office. Nichols's decision not to mention the object – presented to him in his office after the autopsy ended in an unmarked evidence bag with no documented record of where it came from – in his autopsy report does not make the autopsy report fraudulent. The court also concluded that he failed to show that his complaints regarding his superior's "fraud" in failing to amend the autopsy report constituted one of protected activities under N.C. Gen. Stat. § 126-84.69.

Although Gerity suggested that he was targeted for termination because Dr. Turner and others believed that he may have "leaked" information to the media, he denied that he did so, and the court declined to determine whether a "perceived whistleblower" was entitled to protection since a perceived report of the same "fraud" to a different party would likewise not constitute protected activity.

## **CONSTITUTIONAL CLAIMS – MAGISTRATE PAY SCALE**

**Adams v. State, 790 S.E.2d 339 (N.C. Ct. App. 2016) (Chris Dillon, J.).** *When the plaintiff-magistrates accepted their positions, N.C. Gen. Stat. § 7A-171.1 provided a salary schedule of raises based on their time in office. The statutory scheduled raises did not constitute a contract with the State; rather, the General Assembly could – as it did – make changes so long as it did not deprive the magistrates of benefits they had earned through past work.*

The North Carolina Constitution provides that the General Assembly shall prescribe and regulate the salaries of magistrates. The General Assembly enacted a salary schedule for magistrates in 1977, which has been amended several times, and is currently codified in N.C. Gen. Stat. § 7A-171.1. On July 1, 2009, the General Assembly enacted legislation suspending the step increases for fiscal years 2009-2010, 2010-2011, 2011-2013, and 2013-2015. Thirty-nine magistrates sued the State of North Carolina in Wake County Superior Court, arguing that when they accepted employment as magistrates, the pay schedule set forth by statute became a vested contractual right, so that they could recover for breach of contract and constitutional violations when the General Assembly suspended statutory step increases in 2009, 2011 and 2013. The State filed a motion to dismiss under Rules 12(b)(1), (2), and (6). The trial court (Michael O'Foghludha, J.) granted the State's Rule 12(b)(6) motion. The magistrates appealed.

The court of appeals affirmed the Rule 12(b)(6) dismissal, holding that the magistrates did not have a vested contractual right to future salary increases for work not already performed.

The court explained that an appointment or election to public office does not establish contract relations between the State and the persons appointed or elected. As a general rule, unless specifically prohibited by the constitution, the Legislature may change the salaries of such officers during their term of office, but it cannot deprive them of the whole.

The court recognized that the relationship between magistrates and the state is contractual in nature in one respect: magistrates are employees who provide labor in exchange for wages and benefits. It also acknowledged that a statute enacted by our General Assembly can create a vested contractual right where the statute provides a benefit for work already performed. The court explained that if an employee fulfills certain conditions under a statute and thereby becomes entitled to a benefit, the benefit is considered “vested” and may not be taken from the employee by legislative action. However, the court reiterated that a statute does not create a private contractual or vested right unless the legislature manifests a clear intention to be contractually bound.

Since the magistrates failed to meet their burden of showing that intent, no binding contract rights to receive a certain salary in the future arose, and the General Assembly was free to amend the statute’s terms prospectively, for work to be performed in the future. The court found this position consistent with its recent decision in *NCAE v. State*, 786 S.E.2d 1 (2015) (teachers who had already achieved career status could not be divested of that right through statutory amendment, but teachers who had not achieved career status had no vested rights upon which they could sue), and with the rule that a statute prescribing duties and compensation of a public officer is subject to the general law and “therefore contain[ed] within itself a provision that such duties and compensation may be changed by any general law whenever the Legislature shall think a change required by the public good.” *State ex rel. Buntin v. Gales*, 77 N.C. 283, 286-89 (1877). Because the magistrates did not have a vested right to their future salaries as set forth in § 7A-171.1, they had no constitutional claims under the Contract Clause of the United States Constitution or the Law of the Lands Clause of the North Carolina Constitution.

## **SPECIAL SEPARATION ALLOWANCE**

### **Lovin v. Cherokee County, 789 S.E.2d 869 (N.C. Ct. App. 2016) (Rick Elmore, J.).**

*Reversing summary judgment in favor of sheriff whose special separation allowance under N.C. Gen. Stat. § 143-166.42 should have been based only on 12 years of creditable service with the Local Government Employment Retirement System (LGERS). Sheriff had already started receiving pension benefits from his prior service as a state trooper when he retired from his subsequent service as a sheriff; consequently, at the time of his retirement, he was no longer a “member” of the Teachers’ and State Employees’ Retirement System (TSERS) and was not entitled to receive a separation allowance for his 24 years of service under TSERS.*

Ronald Keith Lovin was a Hickory police officer for 14 months, and a North Carolina state trooper for 22 years and 10 months, participating in the Teachers’ and State Employees’ Retirement System (TSERS). From 2002 through 2014, he served as sheriff of Cherokee County and participated in the Local Government Employment Retirement System (LGERS). Meanwhile, in 2009, he began drawing TSERS retirement benefits. When Lovin retired as sheriff in January 2015, Cherokee County determined that he was eligible for a special separation

allowance under N.C. Gen. Stat. § 143-166.42, paying him based on his 12 years of LGERS service, but excluding his 24 years of TSERS service because he was not a member of TSERS when he retired. Lovin sued for declaratory relief in Cherokee County Superior Court, arguing that his special separation allowance should be based on his combined creditable service of 36 years, representing the 12 years of LGERS service and the 24 years of TSERS service. The superior court (Jeff Hunt, J.) granted Lovin's motion for partial summary judgment and entered an order awarding him a special separation allowance for 36 year of creditable service through both TSERS and LGERS. Cherokee County appealed.

The court of appeals reversed. Under N.C. Gen. Stat. § 143-166.42, the special separation allowance for qualifying law enforcement officers is provided based on "each year of credible service," which is defined as "the service for which credit is allowed under the *retirement system of which the officer is a member.*" The court concluded that under State law a TSERS participant is no longer a "member" if he "withdraws his accumulated contributions or becomes a beneficiary," that is, receives "a pension, an annuity, a retirement allowance or other benefit as provided by this Chapter." N.C. Gen. Stat. § 135-1(6). Once Lovin began receiving retirement benefits, he became a beneficiary and ceased to be a member of TSERS, and his 24 years of service under TSERS could not be included in calculating his special separation allowance. By contrast, pursuant to N.C. Gen. Stat. § 128-26(e), LGERS' creditable service could include prior service certified in a prior service certificate, service in a N.C. Retirement system that was transferred to LGERS, and prior service credit allowed by a participating employer for earlier service to the employer or the State. Lovins did not dispute the fact that the county never issued him a prior service certificate, he never transferred membership of his TSERS service to LGERS, and the county never gave him credit for prior service. The court concluded that Lovin's creditable service under LGERS was limited to his 12 years of membership service as a local sheriff, and so was his special separation allowance.

## **NEGLIGENT MISREPRESENTATION**

### **Rountree v. Chowan County, 796 S.E.2d 827 (N.C. Ct. App. 2017) (Rick Elmore, J.).**

*Affirming summary judgment on tax administrator's negligent misrepresentation claim against County after discovering that his new position with the County following retirement rendered him ineligible to receive retirement benefits; the County did not have any legal duty to provide accurate information to a prospective employee to make sure hiring him did not make him ineligible for benefits; the tax administrator's reliance on the County's representation was not justifiable, as he failed to show that he made a reasonable inquiry into the County's representations, that he was denied the opportunity to investigate, or that he could not have learned the true facts through reasonable diligence.*

Wilton Gene Rountree, a former tax administrator in Edgecombe County and then Nash County, retired from his employment February 2009. As a retiree, Rountree was receiving benefits through the Local Government Employees' Retirement System (LGERS). In 2009, Chowan County was experiencing financial difficulties, and the longtime tax administrator resigned. The Chowan County Manager, Peter Rascoe, was referred to Rountree as a potential replacement. During his initial meeting with Rascoe, Rountree expressed interest in the tax administrator position, but made clear that he wanted to protect his retirement benefits. After their meeting,

Rascoe sent Rountree an offer letter describing the terms of the proposed employment agreement. The letter offered an “at will” contract relationship, with a term of 24 month, and stated that the County would not withhold retirement contributions, as he was already receiving those benefits. Rountree accepted the position, and he worked as the tax administrator for nearly two years, until he received a written notice from the North Carolina Retirement Systems Division that informed him that based on his employment agreement, he had returned to “regular employment,” his compensation was subject to retirement contributions which had not been made, and he had received retirement benefits he was not entitled to under LGRS. Rountree retired the next day. Rountree filed a complaint against Chowan County alleging breach of contract and negligent misrepresentation. The County answered and moved for summary judgment, which the Chowan County Superior Court (J. Carlton Cole, J.) granted. Rountree appealed the grant of summary judgment on his negligent misrepresentation claim.

The court of appeals affirmed summary judgment for the County. The court first addressed whether the economic loss rule barred Rountree’s negligent misrepresentation claim. Although the economic loss rule generally bars recovery in tort for damages arising out of a breach of contract, the court concluded that if the evidence had shown that the County had no contractual obligation to protect Rountree’s retirement benefits, then his tort claim, construed liberally, would not have been barred by the economic loss rule.

The court held that Rountree failed to show that the County owed him a duty of care, as is necessary to support a negligent misrepresentation claim. According to the court, the dispute arose out of a potentially adversarial arm’s-length negotiation between an employer and prospective employee. The County did not have exclusive access or control over the benefits eligibility information, which was publicly available and readily accessible, and Rountree had an equal opportunity to perform his own investigation to determine whether the proposed terms of employment were suitable. Therefore, the court concluded that in the course of their discussions, the County had no legal duty to provide accurate information regarding Rountree’s continued retirement benefits eligibility.

Moreover, the court held that Rountree failed to show that his reliance on Roscoe’s representation that the new position would not jeopardize his eligibility for retirement benefits was justified. The court reasoned that Rountree failed to produce any evidence – or allege in his complaint – that he made a reasonable inquiry into Rascoe’s representations, that he was denied the opportunity to investigate, or that he could not have learned the true facts through reasonable diligence. On the contrary, Rountree’s deposition testimony stated that he was familiar with LGERS and was aware that the rules governing his benefits were available in the State Employee Retirement Handbook. Rountree also confirmed that his understanding of his benefits eligibility was based purely on his review of the Handbook and that he even consulted the Handbook for other benefits information as he prepared to retire from his previous position with Nash County. While Rountree acknowledged his own responsibility for maintaining his personal retirement benefits, he did not consult with anyone else regarding his eligibility requirements before accepting the position with Chowan County.

## EDUCATION

**Ragland v. Nash-Rocky Mount Board of Education, 787 S.E.2d 422 (N.C. Ct. App. 2016) (Wanda Bryant, J.).** *Affirming termination of a teacher who acted inappropriately in an encounter with an out-of-control male student and in stroking the hair of a female student.*

Kimarlo Ragland was a math teacher at Tar River Academy, an alternative school. Less than two weeks after starting his new job at Tar River Academy, Ragland became involved in an altercation in the hallway with Student X, and retreated to his classroom and locked the door (leaving the student in the hallway). Instead of calling for assistance, he took off his shirt as though preparing for a fight, and paced shirtless near the door. A female student told him to put on his shirt or he would be fired, and he put his shirt back on. Student X kicked the door and eventually broke its glass panels, cutting himself and bleeding profusely. One of the students in the classroom video-recorded his actions on her cell phone. Another teacher had to intervene with Student X in the hallway, who was escorted away by the school resource officer. Ragland was given a written letter reprimanding him for bad judgment, failure to follow procedures, failure to call for assistance, and a lack of concern for student safety and school guidelines. The very next school day, Ragland approached the female student, stroked her hair, told her he was “thinking about her the whole weekend,” asked her why she asked him to put his shirt back on, and said, “didn’t you want to see my muscles?” The female student reported his conduct to another teacher, the teacher informed the principal, the principal spoke to Ragland. Ragland admitted that he stroked the female student’s hair and made the comments, but he did not see that he had done anything wrong. The superintendent recommended Ragland’s dismissal, expressing concern about his lack of judgment. Ragland appealed his dismissal to the Nash-Rocky Mount Board of Education, and after a 3-hour hearing, the Board voted to terminate based on inadequate performance, neglect of duty, failure to comply with such reasonable requirements as the Board may prescribe, and failure to fulfill legal duties and responsibilities of teachers. Ragland sought judicial review, and the Nash County Superior Court (Alma Hinton, J.) affirmed.

The court of appeals affirmed the superior court’s decision to uphold Ragland’s termination. The Court denied Ragland’s motion to strike the cell phone recording, holding that Ragland’s termination had to be reviewed based upon the administrative record, which did not permit subsequent exclusion of evidence that was reviewed by the Board (the cell phone recording), even if it was not reviewed by superior court.

The court ruled that *de novo* review applied to Ragland’s claims that the Board violated N.C. Gen. Stat. § 115C-325.8(1) (in violation of constitutional provisions), (2) (in excess of statutory authority or jurisdiction of the board), (3) (was made upon unlawful procedure), (4) (is affected by other error of law, and the whole record test applied to Ragland’s claims that the Board violated N.C. Gen. Stat. § 115C-325.8(5) (unsupported by substantial evidence) and (6) (arbitrary and capricious).

The court held that the trial court did not err by not “adjudicating” his subpoena. At Ragland’s dismissal hearing before the Board, he was permitted to subpoena witnesses, and he did so. Once the administrative record was closed, Ragland had no right to request additional discovery or to subpoena additional witnesses before the superior court.

The court concluded that the superior court properly denied Ragland's motions (1) for entry of default, (2) for judgment by default, and (3) for summary judgment. Since Ragland was seeking administrative review of the board's decision, the Board was not required to respond in accordance with the Rules of Civil Procedure. Instead, the Board responded in a timely manner to the petition for judicial review.

The court also rejected Ragland's assertion that the trial court neglected its duty and failed to perform a proper review of the Board's decision, as well as his claim that he was prejudiced by the Board's representation by a different attorney at the hearing.

Where Ragland did not dispute the essential facts of the case, the Court concluded there was substantial evidence to support the Board's decision to terminate Ragland for neglect of duty, inadequate performance, failure to fulfill the duties and responsibilities imposed upon teachers by state law, and failure to comply with reasonable requirements prescribed by the board, any of which, standing alone, would be sufficient to support the board's decision.

Further, there is nothing in the record to suggest that the Board failed to consider and weigh all of the evidence or that the board's decision was patently in bad faith, or whimsical. Accordingly, the Board's decision to terminate Ragland was not arbitrary or capricious.

The court concluded that the Board was entitled to consider the evidence before it, and the Board was not required to make findings of fact. The Board's written notice to Ragland of the basis for his dismissal clearly conveys the Board's determination that his conduct warranted dismissal and the precise facts upon which that determination was based.

Finally, addressing Ragland's argument that his constitutional rights were violated, the court held that the detailed dismissal letter and hearing before the Board constituted due process.