

EVA JO PATTERSON,

Grievant,

v.

DOCKET NO. 95-DPS-572

WEST VIRGINIA DEPARTMENT

OF PUBLIC SAFETY,

Respondent.

D E C I S I O N

Grievant, Eva Jo Patterson, filed this grievance directly at Level IV on December 20, 1995:

The grievable event is: my being discharged from the position of drivers license examiner, with the W.V. State Police. I am seeking reinstatement in this position, with no loss of time, benefits, or wages & no record in personnel file.

Hearings were held on February 23 and March 27, 1996, and the parties filed written proposed findings of fact and conclusions of law on or about April 18, 1996, at which time this case became mature for decision.

Grievant was employed by Respondent Department of Public Safety ("DPS") as a civilian drivers' examiner for approximately two years until her discharge on December 14, 1995. The basis for Grievant's discharge, as set forth in the December 14, 1995, dismissal letter, was the commission of three "Group I" offenses and one "Group III" offense, as described in the West Virginia State Police Rules, 81 CSR 10, entitled "Professional Standards Inspections, Employee Rights, Early Identification System, Psychological Assessment and Progressive Discipline" ("Rules"). The charges included "unsatisfactory performance", "abusive language", and "falsifying records", and involved four separate complaints filed against Grievant in July and August, 1995. The complaints were investigated and Grievant was ultimately dismissed on December 20, 1995.

The burden of proof in a disciplinary matter is on the employer to prove the charges by a preponderance of the evidence. W. Va. Code § 29-6A-6. Davis v. W. Va. Dept. of Motor Vehicles, Docket No. 89-DMV-569 (Jan. 22, 1990). In cases involving the termination of classified-exempt, at-will employees, state agencies do not have to meet this legal standard. John C. v. Dept. of Public Safety, Docket No. 95-DPS-497 (Jan. 31, 1996); Logan v. W. Va. Regional Jail and Correctional Authority, Docket No. 94-RJA-225 (Nov. 29, 1994). An at-will employee may be discharged from employment for good cause, bad cause, or no cause unless the termination contravenes some substantial public policy. John C., *supra*; Williams v. Precision Coal Co., 459 S.E.2d 329 (W. Va. 1995); Williams v. Brown, 437 S.E.2d 775 (W. Va. 1993).

This Board has previously held that West Virginia State Police civilian drivers' examiners are employees-at-will. John C., *supra*. While this Board has permitted at-will employees to utilize the grievance procedure set forth in W. Va. Code §§ 29-6A-1, et seq., to protest their dismissal, those employees' rights have been limited to asserting and proving by a preponderance of the evidence that the dismissal was in contravention of some substantial public policy. Grievant does not assert that her dismissal was in contravention of some substantial public policy, but rather, asserts that her at-will employment status has been altered by DPS' promulgation of new Legislative Rules, which create additional rights for DPS employees, including that they cannot be disciplined except "for cause".

As a result of a lawsuit styled State ex. rel. Billy Ray C. v. Skaff (Skaff I), 438 S.E.2d 847 (W. Va. 1993), the West Virginia Supreme Court ordered Respondent to develop guidelines for investigating complaints or allegations of trooper misconduct. In response, Respondent drafted 81 CSR 10, "Professional Standards Inspections, Employee Rights, Early Identification System, Psychological Assessment and Progressive Discipline" and submitted it to the Court for approval. After some modifications, the Court approved the Rules in State ex rel. Billy Ray C. v. Skaff (Skaff II), 459 S.E.2d 921 (W. Va. 1995). Following the Court's approval, Respondent submitted the Rules for approval as Emergency Rules on July 10, 1995, pursuant to W. Va. Code §§ 29A-3-1, et seq., and were approved on August 18, 1995. The Emergency Rules were amended on February 7, 1996, submitted as Final Rules on December 22, 1995, and approved on March 7, 1996, becoming effective in April 1996.

The Rules outline the procedure to be used by Respondent in responding to complaints of

employee misconduct. Although only directed by the Court to develop procedures dealing with trooper misconduct, it is undisputed that Respondent has applied these Rules to civilian employees as well. It is these Rules Grievant contends altered her at-will employment status. [\(See footnote 1\)](#)

The Rules outline various types of offenses, and categorize those offenses as Group I, Group II, and Group III offenses. The type of discipline imposed varies depending on the severity of the offense committed. The Rules state clearly that the list of types of offenses is merely illustrative and not intended to be all-inclusive. Finally, the Rules set forth a progressive practice of discipline, again depending on the severity of the employee misconduct.

Respondent cites W. Va. Code § 15-2-21, as authority for the promulgation of the Rules. G Ex. 5. That Code Section provides, in pertinent part:

The superintendent may suspend, demote in rank or discharge from the service any member of the department of public safety for any of the following causes: Refusing to obey the lawful orders of his superior officer, neglect of duty, drunkenness, immorality, inefficiency, abuse of his authority, interference with the lawful right of any person, participation in political activities, primaries, conventions or elections, conviction for a crime or any action proscribed under this article . . . The member may appeal the superintendent's order to the board of appeals created for such purpose or to the circuit court of Kanawha county in accordance with the provisions of section six [§ 15-2-6] of this article. . . .

W. Va. Code § 15-2-6 creates a grievance procedure recommendation board to hear "[a]ppeals of transfers, suspensions, demotions in rank and discharges. . ." of members of DPS. It is clear from reading the above Code Sections, in pari materia, that those Sections were designed to deal with discipline and resulting appeals of members of the uniformed service, the troopers, within DPS, not civilian employees. However, the enactment of the Rules, Respondent's reliance on W. Va. Code § 15-2-21 for their authority, and the subsequent application of those Rules to civilian employees, clearly evidences an intent on the part of DPS to apply W. Va. Code § 15-2-21 to those employees, resulting in authority to only discharge those employees for "cause".

Grievant has proven that the promulgation and approval of the Rules serves to alter her at-will status and extends additional rights to civilian employees of DPS with regard to discipline for misconduct. Thus, the burden of proof now shifts back to the employer to prove the charges brought against Grievant by a preponderance of the evidence. [\(See footnote 2\)](#)

Grievant was dismissed on December 14, 1995, by letter from Superintendent Colonel Thomas Lee Kirk, as follows:

1. Under the provisions of Chapter 15, Article 2, Section 21, Code of West Virginia, 1931, as amended, the following named employee of the West Virginia State Police is hereby DISCHARGED from employment for:

"UNSATISFACTORY PERFORMANCE" in violation of West Virginia Administrative Rule, West Virginia State Police, 81CSR10(§11.5.1.1), Group I Offense, IA#95-209, in that on July 12, 1995, you improperly failed driver's license applicant Stephanie D. Lacy, by stating that the applicant's vehicle had non-functioning emergency flashers, when witnesses verified that the flashers were functional, for

"ABUSIVE LANGUAGE" in violation of West Virginia Administrative Rule, West Virginia State Police, 81CSR10(§11.5.1.3), Group I Offense, IA#95-223, in that on August 1, 1995, you screamed and otherwise acted in an abusive and unprofessional manner to Michelle Kuhn, her daughter Kristy, and her ten year old son while they were attempting to conduct business at the Winfield Regional Office of the Department of Motor Vehicles, for

"ABUSIVE LANGUAGE" in violation of West Virginia Administrative Rule, West Virginia State Police, 81CSR10(§11.5.1.3), Group I Offense, IA#95-226, in that on August 2, 1995, you were rude and otherwise acted in an unprofessional manner to Rosalene Black, while Ms. Black was attempting to conduct business at the Huntington Regional Office of the Department of Motor Vehicles, for

"FALSIFYING RECORDS" in violation of West Virginia Administrative Rule, West Virginia State Police, 81CSR10(§11.5.3.5), Group III Offense, IA#95-228, in that on August 9, 1995, you indicated on the official Record of Examination (DPS Form #6), that Joshua Riffe had left the designated test area at the Huntington Regional Office of the Department of Motor Vehicles with the written test form, and was failed for that reason when, in fact, Mr. Riffe did not leave the test area and even if he did, there is no policy, law, or rule stating that such an infraction warrants failure, effective at 0001 hours, December 15, 1995.

EVA JO PATTERSON

2. Ms. Patterson may submit to an exit interview pursuant to State Police Operating Policy and Procedure #2.

3. Ms. Patterson, pursuant to W. Va. Code §29-6A-4(a), has the right to file a Level One grievance with her immediate supervisor pertaining to this special order if

done within ten (10) days of receiving the order. Ms. Patterson may, pursuant to W. Va. Code §29-6A-4(e), file an expedited grievance directly to the hearing examiner at Level Four within ten (10) days since this order involves a discharge from employment.

It is well-established that a governmental agency must comply with all properly enacted rules and regulations. Powell v. Brown, 238 S.E.2d 220 (W. Va. 1977). Thus, Respondent has the burden of proving by a preponderance of the evidence the charges listed above, as well as proving that the procedures set forth in the Rules were followed with regard to the action taken against Grievant.

The undersigned will address each charge separately, referring to their more common names, i.e., the Lacy, Kuhn, Black, and Riffe incidents, respectively.

The Lacy Incident (Group I Offense)

After reviewing the evidence and the testimony of the parties with regard to this allegation, the undersigned finds that Respondent has not proven this charge by a preponderance of the evidence. The charge states that Grievant failed Ms. Lacy because her vehicle had non-functioning emergency flashers. The evidence presented, by credible witnesses, proves that the vehicle's equipment was functioning, but Ms. Lacy simply did not know how to operate that equipment.

The witnesses relied upon by the investigating officer, Sgt. Steven M. Cook, testified they saw the flashers blinking, and based upon this information, Sgt. Cook found Grievant had incorrectly cited the reasons for failing Ms. Lacy. However, witnesses presented by Grievant, who appeared to the undersigned to be credible and without any bias or motivation, testified that Ms. Lacy was operating the turn signal arm instead of the emergency flashers in response to Grievant's instruction to turn on the flashers. Thus, the witnesses who saw the lights come on would not be incorrect, but Grievant still correctly failed Ms. Lacy for not knowing her vehicle's equipment.

The undersigned believes Grievant's version of this incident, and finds Respondent has failed to prove by a preponderance of the evidence the charge as stated.

The Kuhn Incident (Group I Offense)

Ms. Kuhn and her daughter, Kristy, filed complaints against Grievant alleging she acted towards them and Ms. Kuhn's young son in an abusive and otherwise unprofessional manner. When questioned by Sgt. Cook regarding this complaint, Grievant responded that she did not remember the incident. Sgt. Cook testified that when a complaint is made, and the employee does not recall the incident, the practice is to find the complaint "sustained", or proven, because there is no evidence to

refute the allegation. Thus, Sgt. Cook found Ms. Kuhn and her daughter's complaints to be sustained. Sgt. Carl Blankenship, Coordinator of Professional Standards, confirmed Sgt. Cook's testimony regarding this practice. Sgt. Blankenship reviews all recommendations from the investigating officer, either accepts their recommendation, or makes his own, and forwards the file up the chain of command, to the Superintendent, who has the ultimate authority to make a final determination. Sgt. Blankenship confirmed that, in cases where the employee does not recall an incident, the complaint is found to be "sustained" due to lack of any evidence in rebuttal. Thus, because Grievant did not recall the Kuhn incident, the charge was sustained.

At the Level IV hearing, Grievant remembered that, on the day in question, a young boy was being very disruptive in the testing area, running down the hallways, hanging on the ropes and pylons in the testing area, and being noisy. She recalled asking the mother, Ms. Kuhn, to take the boy out of the testing area several times, and also reprimanding the boy directly. Grievant testified she did not yell or scream at the boy or his mother, but rather used a "stern" voice to relay her instruction.

Jerry Mitchell was present in the DMV office when this incident took place. He recalled the boy swinging on the ropes and Grievant asking him to stop. The boy did not stop and he remembered Grievant asking the boy's mother to take him to the waiting room. Mr. Mitchell testified Grievant may have raised her voice a little, but did not scream and was not rude. He averred that raising her voice was probably warranted. Again, based upon this evidence, the undersigned cannot find Respondent has proven the charges against Grievant in this instance by a preponderance of the evidence.

The Black Incident (Group I Offense)

In this incident, Grievant testified that it was a particularly busy day, there was a line to her counter, and Ms. Black came into the testing area, passed the line and proceeded directly to Grievant's counter, demanding attention. Grievant testified she instructed Ms. Black to go back to the end of the line, using a "stern" voice. Ms. Black filed a complaint alleging Grievant had been rude to her. Grievant does not dispute she used a stern voice with the woman, who had "barged" to the front of the line. Grievant's witness, Patricia Quate, testified she was in the line that day and that Ms. Black made more of Grievant's instruction to go to the back of the line than was warranted. Ms. Quate testified Ms. Black became very verbal about how she had been treated by Grievant. Ms. Quate testified she, herself, did not witness anything inappropriate. Based upon this evidence, the

undersigned cannot find that Respondent has met its burden of proving by a preponderance of the evidence that Grievant committed the act accused of in this instance.

The Riffe Incident (Group III Offense)

This is the most serious charge brought against Grievant as it is a Group III offense. An employee can be discharged immediately for misconduct falling within the Group III category of offenses. In this incident, a boy who had been taking his written driver's examination test, came out of the testing room, passed by Grievant's counter, and called out to his girlfriend across the room. Grievant testified she called to the boy to come back to her counter, but he ignored her and proceeded toward his girlfriend. Grievant then approached the boy, took his test away, and failed him. Grievant testified she was told by her supervisor, Sgt. Zirkle, that if she felt an applicant was attempting to walk away from the testing area with a test, she had permission to automatically fail him or her.

The investigation by Sgt. Cook revealed that the boy came out of the testing room and past Grievant's counter, but not all the way out into the testing area. He called out to his girlfriend because he said he did not know what to do with the test. In a photograph provided by Grievant of the testing area, there is a sign which directs the applicants where to go after finishing their test. The boy told Sgt. Cook the sign was either not there or turned around. Sgt. Cook concluded that Grievant had wrongfully failed the boy, because there is no policy which states that an applicant will be failed for taking their test out of the testing area, and there was no evidence the boy was attempting to walk away with the test. Grievant did not call Sgt. Zirkle as a witness to confirm the statement she attributed to him.

The undersigned, after hearing the evidence of the witnesses in this matter, must find that Respondent has proven this charge by a preponderance of the evidence. There is no policy which directs that applicants automatically fail if they leave the area with their tests. Grievant did not wait to see what the boy was going to do with the test, but assumed he was going to ask his girlfriend the answers to the questions. The boy told Sgt. Cook he simply did not know what to do with the test after he was finished. Given that these are sixteen or seventeen-year old adolescents, the undersigned does not find this explanation unreasonable under the circumstances.

Conclusion

The Rules provide that an employee may be suspended without pay, not to exceed five days, upon accumulation of three active Group I offenses. An employee may be discharged upon the

accumulation of more than one Group II offense, or a combination of three Group I offenses and one Group II offense. Finally, an employee may be discharged for a single occurrence of a Group III offense. G. Ex. 5.

In this instance, Respondent has proven one Group III offense. Thus, the discipline imposed on Grievant, dismissal, is warranted by the Rules, and will be upheld by the undersigned.

Findings of Fact

1. Grievant was employed by DPS as a drivers' examiner for approximately two years prior to her dismissal on December 14, 1995.
2. DPS promulgated Rules, pursuant to an order from the West Virginia Supreme Court of Appeals, 81 CSR 10, outlining the procedures for receiving, processing, and investigating complaints against DPS employees, as well as the modes of discipline to be imposed in relation to those complaints.
3. Grievant was the subject of four complaints in July and August, 1995, involving rudeness and improperly failing drivers' license applicants.
4. Sgt. Steven Cook, Motor Vehicle Drivers' License Supervisor, was assigned to conduct investigations into the four complaints. Following his investigations, Sgt. Cook found the complaints were proven and were "sustained".
5. Sgt. Carl Blankenship, Coordinator of Professional Standards, reviewed Sgt. Cook's investigations of the complaints and concurred in his findings. The complaint files were forwarded up the chain of command, ultimately to the Superintendent who has the final authority to make a determination as to discipline.
6. Superintendent Kirk issued a letter to Grievant dated December 14, 1995, dismissing her on the basis of the four complaints, which involved Unsatisfactory Performance, Abusive Language, and Falsifying Records.

Conclusions of Law

1. Grievant was an at-will employee who could be discharged for good cause, bad cause, or no cause unless the termination contravened some substantial public policy. John C. v. Department of Public Safety, Docket No. 95-DPS-497 (Jan. 31, 1996).
2. The Emergency Rules promulgated by DPS and approved by the Secretary of State

pursuant to W. Va. Code §§ 29A-3-1, et seq., create additional rights for employees of DPS, which serve to alter the at-will status of the civilian employees.

3. The promulgation of Rules providing that employees can only be discharged for "cause", serves to shift the burden of proof in disciplinary matters to Respondent to prove the charges against an employee by a preponderance of the evidence.

4. Respondent failed to prove the Lacy charge by a preponderance of the evidence, but successfully proved the remaining charges, including a Group III offense, for which Grievant could be dismissed immediately.

Accordingly, this Grievance is **DENIED**. Any party or the West Virginia Division of Personnel may appeal this decision to the "circuit court of the county in which the grievance occurred," and such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7. Neither the West Virginia Education and State Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal, and should not be so named. Any appealing party must advise this office of the intent to appeal and provide the civil action number so that the record can be prepared and transmitted to the appropriate court.

MARY JO SWARTZ

Administrative Law Judge

Dated: May 28, 1996

[Footnote: 1](#)

Grievant is not contending these Rules have placed her in the classified service, but, rather, have altered her at-will status. See Logan v. W. Va. Regional Jail and Correctional Authority, Docket No. 94-RJA-225 (Nov. 29, 1994), for a discussion of how employees may be afforded classified service job protection.

[Footnote: 2](#)

At the beginning of the Level IV hearing, the undersigned incorrectly stated that the burden of proof was on Respondent in this matter, and Respondent proceeded to present its case on the merits. While this instruction was in error initially as regards at-will employees, due to the ultimate finding that Grievant's at-will status has been altered, and that the burden of proof thus shifted back to Respondent, this procedural ruling was harmless error.