EVA JO PATTERSON,

Grievant,

v.

DOCKET NO. 95-DPS-572R

WEST VIRGINIA DEPARTMENT OF PUBLIC SAFETY,

Respondent.

D E C I S I O N

This case arises from the Grievant, Eva Jo Patterson's, original discharge by the West Virginia Department of Public Safety ("Department") on November 17, 1995, based on four allegations of misconduct. In Patterson v. W. Va. Dept. of Public Safety, Docket No. 95-DPS-572 (May 28, 1996), I found the Department failed to prove three of the misconduct charges, but had successfully proven the fourth charge, falsification of records. I had based my finding solely on the testimony of Sgt. Steven Cook, the officer charged with investigating the charges against Grievant. Grievant appealed that decision to the Circuit Court of Kanawha County, and The Honorable Tod J. Kaufman issued an Order on March 11, 1997, remanding the case to the Grievance Board. Judge Kaufman held there was insufficient evidence to substantiate the falsification of records charge against Grievant and ordered that additional testimony be taken on that issue. A level four hearing was held on May 1, 1997, for the limited purpose of taking additional evidence on the charge of falsification of records made against Grievant. Following receipt of the parties' proposed findings of fact and conclusions of law, this case became mature for decision on June 6, 1997.

SUMMARY OF THE EVIDENCE

Grievant's Exhibits

1. Transcript of taped interview of Joshua Riffe on September 6, 1995, by Sgt. S. M. Cook of the W. Va. State Police.

2. Diagram of Huntington DMV Driver's Testing area, prepared by Sgt. S. M. Cook, September 26, 1995.

3. State of West Virginia Division of State Policy Record of Examination for August 10, 1995.

4. Photograph of Grievant at DMV Testing Center Examination Desk, taken April 25, 1997.

Department's Exhibits

1. Photograph of DMV Testing Center Examination Desk.

2. Photograph of DMV Testing Center.

3. Photograph of DMV Testing Center Information Desk.

Testimony

The Department presented the testimony of Joshua Riffe, Leigh Ann Stephens, and Terri Bias. Grievant testified in her own behalf and offered the testimony of Melissa Darling, Joshua Riffe, and Trooper Chris Zerkle.

ISSUE

The only issue to be decided in this case is whether the Department has proven by a preponderance of the evidence its charge against Grievant that she falsified public records when she reported that Joshua Riffe failed his drivers' examination test because he improperly left the testing area with his test. I find the Department has not met its burden of proof.

BACKGROUND

On August 10, 1995, Joshua Riffe arrived at the Huntington Department of Motor Vehicles ("DMV") to take his test for his learner's permit. He was accompanied by his girlfriend, Leigh Ann Stephens, who also was being tested for her learner's permit. There is an examination desk in the DMV office, which was manned by Grievant that day. There are roped-off lines to the desk, one for taking the written test, and one for taking the driving portion of the test. R. Ex. 1. There is normally an eye-testing machine positioned on the left-hand, driving side portion of the desk. The room for taking the written test is off to the right of the examination desk.

Joshua and Leigh Ann got in line on August 10, 1995, to take their written tests. Leigh Ann went into the testing room first. Joshua proceeded to the front of the line and Grievant handed him his test, and he went into the testing room. For a portion of the time, Leigh Ann was in the testing room with him, but she finished her test first and left. After finishing her test, Leigh Ann returned it to Grievant at the examination desk. Grievant graded her test and told her she passed. Leigh Ann then walked to the other side of the DMV office to get her picture taken, and to pay for and receive her learner's permit. There are roped-off lines on that side of the office as well, and Leigh Ann got in the first line closest to Grievant's examination desk. R. Ex. 2.

When Joshua exited the testing room, he did not know what to do with his test, as it was his first time taking the test. He crossed in front of Grievant's desk, and proceeded toward Leigh Ann to ask her what to do with his test. Leigh Ann saw him coming toward her and told him to "go back" and pointed toward Grievant's desk. Leigh Ann and Joshua testified that Joshua did not go beyond the ropes which cordoned off the area around Grievant's desk. They both testified that Grievant reached out over the desk and took his test. Leigh Ann did not hear what Grievant said to Joshua, but Joshua testified she said "instant fail." Grievant told Joshua the reason he failed was because he did not return his test to the proper place. Leigh Ann and Joshua told Leigh Ann's mother, Teresa Stephens, what had happened, and she and Grievant got into an argument, with their voices raised.

Terri Bias was working the information counter at the Huntington DMV office on August 10, 1995. She testified she heard a commotion, turned to look, and saw a boy she identified as Joshua facing Grievant's desk. She saw Grievant take Joshua's test from him and heard her tell the boy he had failed. Grievant was behind the desk at the time Ms. Bias looked over. Ms. Bias did not see what happened before Grievant took the test from him.

Melissa Darling was also at the DMV office that day to take her written test. She testified she was in the DMV office around Noon that day, and that Joshua was in the testing room with her. (See footnote 1) She completed her test first, and was at Grievant's desk waiting for her test to be graded when Joshua came out of the testing room. She saw him walk approximately the length of the examination room, and beyond the ropes around Grievant's examination area. She saw Grievant come from around the desk and go after Joshua and take the test from him. Grievant then returned behind her desk. G. Ex. 2. Grievant testified that when Joshua came out of the testing room, he walked out beyond the ropes into the permit area of the office. She said she put her hand up and told him to stop and wait, but he proceeded into the permit area. She came from around the desk and took the test from him, and told him he failed the test. Grievant testified that she was authorized by her supervisor to fail people if they left the testing area with their tests.

Trooper Chris Zerkle, Grievant's supervisor, testified that he told her she could fail someone if they were cheating or stealing a test. He testified that Mrs. Stephens had called him to complain about Grievant's failing Joshua. When Grievant told him what happened, he said he would support her, because it was not unusual for tests to be “lost” and the kids would pass them around to each other.

Leigh Ann and Joshua testified that Joshua did not leave the roped area of Grievant's examination desk. Grievant and Melissa Darling testified that he did. Terri Bias did not see what had transpired before she saw Grievant behind her desk with Joshua's test in her hand. Trooper Zerkle had given Grievant the authority to fail applicants if she believed they were cheating or stealing tests, and indicated he would support Grievant's decision to fail Joshua. Grievant believed Joshua was going to his girlfriend to ask her answers to the test, or to just leave the building with the test in hand.

Despite whether Joshua had left the roped area or not, what is evident is that he walked past Grievant's desk toward his girlfriend with his test in hand. This is more a matter of perception than of

credibility, so the question is, what did Grievant reasonably believe was occurring at the time Joshua walked past her desk with the test. Obviously, from Joshua's point of view, Grievant acted hastily and unreasonably. However, given Trooper Zerkle's testimony that it was not unusual for tests to disappear and be passedaround, and his permission to fail applicants on that basis, it was not entirely unreasonable for Grievant to take the course of action she did. Grievant's actions could be described as harsh in light of the circumstances, but if Grievant, as the tester for the DMV, decides to adhere strictly by the rules she is authorized to operate under, I cannot find that her decision to fail Joshua was unreasonable, and certainly does not constitute a falsification of records. It was not a falsification for Grievant to record that Joshua had failed the test: he did. It is only Grievant's rationale for failing him that is subject to differing opinion. A difference of opinion does not constitute falsification of records.

FINDINGS OF FACT

I find, by a preponderance of the evidence, the following facts.

1. Grievant, at all times relevant, was a civilian driver's examiner employed by the Department, and had been so employed for approximately two years prior to her dismissal on December 14, 1995. (See footnote 2)

2. Grievant was the subject of four complaints in July and August, 1995, involving rudeness and improperly failing drivers' license applicants.

3. Sgt. Steven Cook, Motor Vehicle Drivers' License Supervisor, was assigned to conduct investigations into the four complaints, and found those complaints “sustained.”

4. Grievant was dismissed on December 14, 1995, by letter from Superintendent Colonel Thomas Lee Kirk, which stated, in pertinent part:

> 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:
>
> . . .
>
> “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.

5. An employee can be discharged immediately for misconduct falling within the Group III category of offenses.

6. Trooper Zerkle authorized Grievant to fail applicants who were cheating or stealing the tests.

7. Grievant had failed applicants before who had gone beyond the roped area of the examination desk with their tests.

8. Grievant believed Joshua Riffe was either going to ask his girlfriend answers to the test, or leave the office with the test, and failed him.

9. Grievant reported that Joshua Riffe had failed the written test for his learner's permit on August 10, 1995.

CONCLUSION OF LAW

The Department has failed to prove by a preponderance of the evidence that Grievant falsified public records when she reported that Joshua Riffe had failed the written test for his learner's permit on August 10, 1995. Accordingly, this grievance is **GRANTED** and the Department is hereby **ORDERED** to reinstate Grievant to her former position at the Department, with all back pay, plus interest, and benefits.

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: July 21, 1997

Footnote: 1

The official log of applicants taking their driver's examinations on August 10, 1995, indicates Melissa Darling was logged in after 2:45 p.m., and Leigh Ann Stephens and Joshua Riffe were logged in after Ms. Darling. G. Ex. 3.

Footnote: 2

Grievant was a classified-exempt employee of the Department, and thus, an employee at will. In Patterson I, I found the Department had altered Grievant's at-will employment status through its promulgation and adoption of legislative rules by extending additional rights to its civilian employees with regard to discipline for misconduct. This ruling was not disturbed by Judge Kaufman and it will not be addressed again here.