**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**MICHAEL RUTLEDGE,**

**Grievant,**

**v. DOCKET NO. 2009-0010-DOC**

**OFFICE OF Miners' HEALTH,**

**SAFETY & TRAINING,**

**Respondent.**

**DECISION**

Grievant Michael Rutledge filed this grievance on July 7, 2008, stating, “Grievant made an unintentional error in a bid process, and was demoted with a reduction in pay. This demotion and reduction in pay was excessive and overly punitive for the error that was made. Grievant acted in good faith with the advice of the head financial officer of the agency and did not intend [to] violate any rules or regulations and should not have received such severe punishment.” His stated relief sought is “to be restored to his position of mine rescue coordinator with no loss in pay or benefits.”

The lower levels of the grievance procedure were waived, and a level three hearing was held in the Grievance Board's Charleston office on September 3, 2008. Grievant appeared *pro se* and Respondent was represented by counsel, Elaine Skorich, Assistant Attorney General. The matter became mature for decision on October 6, 2008, the deadline for filing of the parties' proposed findings of fact and conclusions of law. No proposals were received from Grievant.

**Synopsis**

Grievant was dismissed from an at-will, classified exempt position, which he held at the discretion of the Director. Grievant did not allege the disciplinary action violated anypublic policy. Grievant is therefore without standing to challenge his dismissal through the grievance procedure, and his grievance must be denied.

## Findings of Fact

Based on a preponderance of the evidence, I find the following material facts have been proven:

1. Grievant was employed by Respondent Office of Miners' Health Safety and Training (OMHST) as its Mine Rescue Coordinator.

2. The Mine Rescue Coordinator position is an at-will, classified exempt position.

3. On June 24, 2008, Grievant was informed in a conference with OMHST Director Ronald Wooten that he was “being relieved of [his] responsibilities as Mine Rescue Coordinator,” and being returned to his previous title of Mine Safety Instructor.

4. Director Wooten took this action because he believed Grievant had intentionally circumvented state purchasing regulations by “stringing” (See footnote 1) two separate bids to outfit mine rescue vehicles.

5. Grievant did not allege his removal from the Mine Rescue Coordinator position violated any public policy.

## Discussion

The demotion and reassignment at issue here were disciplinary measures, so normally Respondent would bear the burden of proving the charges by a preponderanceof the evidence. (See footnote 2) However, in cases of dismissal of a classified exempt, at-will employee such as Grievant, the agency need not meet that standard. (See footnote 3)

The position of Mine Rescue Coordinator, unlike many positions within the OMHST, is not statutorily created but is one created by the Director pursuant to his authority under West Virginia Code §§ 22A-1-3(b), 22A-1-4(b)(2). The position is classified-exempt. A classified-exempt employee is not covered under the civil service system and is an at-will employee. (See footnote 4)

An at-will employee is subject to disciplinary action for any reason that does not contravene some substantial public policy. (See footnote 5) The employee bears the burden of proving the disciplinary measure contravenes a public policy principal. (See footnote 6) “To identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, we look to established precepts in our constitution, legislative enactments, legislativelyapproved regulations, and judicial opinions.” (See footnote 7) “Inherent in the term 'substantial public policy' is the concept that the policy

will provide specific guidance to a reasonable person." (See footnote 8)

The need for a public policy question and the sources of public policy are discussed and explained quite clearly in *Armstrong v. Division of Culture and History*, Docket No. 2008-0761-DEA (June 17, 2008):

> "A determination of the existence of public policy in West Virginia is a question of law, rather than a question of fact[.]" Syl. pt. 1, *Cordle v. General Hugh Mercer Corp.*, 174 W. Va. 321, 325 S.E.2d 111 (1984). Identification of the types of issues that constitute substantial public policy is often difficult, but the Supreme Court of Appeals has provided guidance on many occasions. In *Wounaris v. W. Va. State College*, 214 W. Va. 241, 588 S.E.2d 406 (2003), the Court noted that previous efforts had been made "to describe why a 'public policy' exception to the 'at-will' doctrine is necessary:"
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>> The basic rule that an employer has an absolute right to discharge an at-will employee has been subjected to several exceptions by this Court, one of which is that where an employer's motivation for the discharge is to contravene a substantial public policy, then the employer may be liable to the employee for damages. A review of these exceptions indicates that generally they were created to protect the public from threats to its health, financial well-being, or constitutional rights, or to guarantee the effective operation of the legal system. The rationale underlying each exception is that protecting the employee from discharge is necessary to uphold a substantial public interest.
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> 217 W.Va. at 247 (citing *Feliciano v. 7-Eleven, Inc.*, 210 W. Va. 740, 751, 559 S.E.2d 713, 724 (2001) (Maynard, J., dissenting)).
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> Also as noted in *Wounaris, supra*, examples of cases in which it has been held that terminations violated a substantial public policy interest include termination of an employee who refused to take a polygraph test (see *Cordle v. General Hugh Mercer Corp.*, 174 W. Va. 321, 325 S.E.2d 111 (1984) (rightto privacy)), terminating a dog warden who made a claim for overtime wages not paid to him (see *McClung v. Marion County Commission*, 178 W. Va. 444, 360 S.E.2d 221 (1987) (right to seek redress of grievances and seek access to the courts), and terminating a convenience store employee for defending himself against a robber (see *Feliciano,* [*supra*](right to self defense)).

Grievant's complaint in this case did not even allude to a public policy violation, but simply indicated Grievant's disagreement with his supervisor's decision. "'A grievant's belief that his supervisor's management decisions are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the

employee's effective job performance or health and safety." (See footnote 9) As an at-will employee, without an allegation of a public policy violation, Grievant lacks standing to challenge his discipline through the grievance procedure. (See footnote 10) Further, a grievance must allege "a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee," including discrimination, harassment, favoritism or a substantial detriment to effective job performance or safety. (See footnote 11) Grievant made no such allegations.

Accordingly, this grievance must be denied as Grievant has failed to state any claim upon which relief may be granted.

The following conclusions of law support this discussion:

**Conclusions of Law**

1. In cases of dismissal of a classified exempt, at-will employee, the agency need not meet the standard of proving the charges by a preponderance of the evidence. *Logan v. W. Va. Regional Jail & Correctional Auth.*, Docket No. 94-RJA-225 (Nov. 29, 1994). Instead, the employee bears the burden of proving the disciplinary measure contravenes a public policy principal. *Wilhelm v. Dep't of Tax and Revenue/Lottery Comm'n*, Docket No. 94-L-038 (Sept. 30, 1994), *aff'd sub. nom. Wilhelm v. W. Va. Lottery*, 198 W. Va. 92, 479 S.E.2d 602 (1996).

2. The position of Mine Rescue Coordinator is a classified exempt, at-will position.

3. An at-will employee is subject to disciplinary action for any reason that does not contravene some substantial public policy. *Harless v. First Nat'l Bank*, 162 W. Va. 116, 246 S.E. 2d 270 (1978); *Dufficy v. Div. of Military Affairs*, Docket No. 93-DPS-370 (June 16, 1994). *See Armstrong v. Div. of Culture and History*, Docket No. 2008-0761-DEA (June 17, 2008).

4. A grievance must allege "a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee," including discrimination, harassment, favoritism or a substantial detriment to effective job performance or safety. W. Va. Code § 6C-2-1(I). See *Rice v. Div. of Highways*, Docket No. 96-DOH-247 (Aug. 29, 1997); *Viski v. Preston County Bd. of Educ.,* Docket No. 99-39-271 (Nov. 30, 1999).

5. Unless an at-will employee alleges a substantial public policy violation, he may not challenge his discipline through the grievance procedure. *Willis v. W. Va. Bureauof Commerce, Ofc. of Miners' Health, Safety and Training*, Docket No. 97-MHST-136 (June 9, 1997), *Armstrong v. Division of Culture and History*, Docket No. 2008-0761-DEA (June 17, 2008).

For the foregoing reasons, this grievance is hereby **DENIED.**

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. *See* W. Va. Code § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. Va. Code § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. *See also* 156 C.S.R. 1 § 6.20 (2008).

**October 31, 2008**

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Figure

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**M. Paul Marteney**

**Administrative Law Judge**

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Footnote: 1

*According to the West Virginia Purchasing Division's Procedures Handbook, "stringing" is defined as "Issuing a series of requisitions or purchase orders to circumvent competitive bidding or to defeat the State Purchasing Card transaction or delegated purchasing limit." http://www.state.wv.us/admin/purchase/Handbook/2007R4/ hand2.htm*

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Footnote: 2

*156 C.S.R. 1 § 3 (2008).*

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Footnote: 3

*Logan v. W. Va. Regional Jail & Correctional Auth., Docket No. 94-RJA-225 (Nov. 29, 1994).*

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Footnote: 4

*Bellinger v. W. Va. Dep't of Pub. Safety, Docket No. 95-DPS- 119 (Aug. 15, 1995); Parker v. W. Va. Health Care Cost Review Auth., Docket No. 91- HHR-400 (June 30, 1992).*

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Footnote: 5

*Harless v. First Nat'l Bank, 162 W. Va. 116, 246 S.E. 2d 270 (1978); Dufficy v. Div. of Military Affairs, Docket No. 93-DPS-370 (June 16, 1994).*

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Footnote: 6

*Wilhelm v. Dep't of Tax and Revenue/Lottery Comm'n, Docket No. 94-L-038 (Sept. 30, 1994).*

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Footnote: 7

*Birthisel v. Tri-Cities Health Services Corp., 188 W. Va. 371, 424 S.E.2d 606 (1992).*

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Footnote: 8

*Id.*

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Footnote: 9

*Viski v. Preston County Bd. of Educ., Docket No. 99-39-271 (Nov. 30, 1999), citing Rice v. Div. of Highways, Docket No. 96-DOH-247 (Aug. 29, 1997).*

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Footnote: 10

*Willis v. W. Va. Bureau of Commerce, Ofc. of Miners' Health, Safety and Training, Docket No. 97-MHST-136 (June 9, 1997).*

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Footnote: 11

*W. Va. Code § 6C-2-1(I).*