

**THE WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**TREVOR PACK,**  
Grievant,

v.

**Docket No. 2020-1522-MAPS**

**ADJUTANT GENERAL'S OFFICE/  
MOUNTAINEER CHALLENGE ACADEMY,**  
Respondent.

**DISMISSAL ORDER**

On June 15, 2020, Grievant, by counsel, filed a grievance against Respondent protesting his termination from employment with the Mountaineer ChalleNGe<sup>1</sup> Academy. By letter dated July 2, 2020, Respondent, by counsel, asserted that the Grievance Board has no jurisdiction to hear the grievance and moved for its dismissal. By letter dated July 28, 2020, Grievant, by counsel, objected to the dismissal of the grievance. On August 7, 2020, Respondent, by counsel, filed *Response to Grievant's Objection*. Grievant appears by counsel, Erika Klie Kolenich and Ambria M. Britton, Klie Law Offices, PLLC. Respondent appears by counsel, LTC C. Scott Applegate, Deputy Staff Judge Advocate.

**Synopsis**

Grievant was employed by the West Virginia Military Authority at the Mountaineer ChalleNGe Academy. Grievant's employment was specifically exempted from the grievance procedure by statute. The Grievance Board lacks jurisdiction in this matter. Accordingly, the grievance is dismissed.

After review of the submissions of the parties, including the attached exhibits<sup>2</sup>, the undersigned makes the following Findings of Fact:

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<sup>1</sup> The spelling is stylized to indicate the association with the National Guard.

<sup>2</sup> The Grievance Board may properly consider exhibits attached to a grievance form or motion. See Syl. Pt. 1, *Forshey v. Jackson*, 222 W.Va. 743, 671 S.E.2d 748 (2008).

### **Findings of Fact**

1. Grievant was employed at the Mountaineer ChalleNGe Academy.
2. Grievant's pay stub from the West Virginia State Auditor's Office is designated as "WV Military Authority."
3. On March 31, 2017, Grievant signed the West Virginia Military Authority *Personnel Policies and Procedures Employee Statement of Understanding & Receipt*.
4. On June 15, 2020, Grievant, by counsel, filed a West Virginia Military Authority *Employee Grievance Form*, a form separate from the Grievance Board's grievance process.

### **Discussion**

"Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. VA. CODE § 6C-2-1 *et seq.*" W. VA. CODE ST. R. § 156-1-6.2 (2018). "Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order." W. VA. CODE ST. R. § 156-1-6.19 (2018). "Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue." W. VA. CODE ST. R. § 156-1-6.19.2. "Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits." W. VA. CODE ST. R. § 156-1-6.19.3.

Respondent has asserted this grievance must be dismissed for lack of jurisdiction as Grievant's employment was explicitly exempted from the grievance procedure by statute. Grievant asserts the statute exempting Grievant's employment from the grievance procedure is inapplicable.

"Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication." Syl. Pt. 4, *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003) (citing Syl. Pt. 3, *Mountaineer Disposal Service, Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973)). "The purpose of [the grievance statute] is to provide a procedure for the resolution of employment grievances raised by the public employees of the State of West Virginia, except as otherwise excluded in this article." W. VA. CODE § 6C-2-1(a). "'Employer'" means a state agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of education, regional educational service agency or multicounty vocational center, or agent thereof, using the services of an employee as defined in this section." W. VA. CODE § 6C-2-2(g).

Despite being paid as a West Virginia Military Authority employee, acknowledging in the receipt of polices and procedures as a West Virginia Military Authority employee, and his counsel stating in the objection to the request to dismiss that she had filed a grievance through the West Virginia Military Authority's separate grievance process,

Grievant makes a convoluted legal argument that the statute exempting West Virginia Military Authority employees from the grievance process does not apply.

Grievant was employed at the Mountaineer ChalleNGe Academy. The Mountaineer ChalleNGe Academy is operated by the Adjutant General under the provisions of the National Guard Youth Challenge Program. W. VA. CODE § 15-1B-24; 32 U.S.C. § 509. The West Virginia Military Authority is the governmental instrumentality by which the Adjutant General administers programs and hires employees. W. VA. CODE § 15-1J-4. As such, persons employed at the Mountaineer ChalleNGe Academy are employed by the West Virginia Military Authority. This is further supported by the exhibits submitted by Respondent demonstrating Grievant was, in fact, a West Virginia Military Authority employee.

Grievant's citation of Senate Bill 442 and the prior Grievance Board cases *Adams v. Dep't of Pub. Safety/Mountaineer Challenge Acad.*, Docket No. 00-DPS-029 (Aug. 10, 2000) and *Felix v. Dep't of Public Safety*, Docket No. 94-DPS-143 (Feb. 15, 1995) is misplaced. That the Mountaineer ChalleNGe Academy was not named in Senate Bill 442 is irrelevant as the Mountaineer ChalleNGe Academy is a program, not an agency, and so would not have been listed in the reorganizing legislation. While the Adjutant General's Office was moved from the Department of Military Affairs and Public Safety (now the Department of Homeland Security), his authority over the Mountaineer ChalleNGe Academy and the West Virginia Military Authority sprang from separate statutes and remains unchanged. The West Virginia Military Authority has been exempt from the Grievance Board's grievance process since it was established in 2008 and more recent Grievance Board cases have reflected this change. 2008 W.V. SB 634; *Samuels v.*

*Adjutant General's Office/Mountaineer Challenge Acad.*, Docket No. 2016-0769-MAPS (Dec. 14, 2015); *Piper v. Adjutant General's Office/Mountaineer Challenge Acad.*, Docket No. 2014-0827-MAPS (Mar. 21, 2014). *Adams* and *Felix* are inapplicable as they were decided before the creation of the West Virginia Military Authority.

West Virginia Military Authority employees are “exempt from both the classified services category and the classified exempt services category as set forth in section four, article six, chapter twenty-nine of this code.” W. VA. CODE § 15-1J-5(a)(1). “Each employee shall be deemed an at-will employee who may be discharged or released from his or her respective position without cause or reason.” W. VA. CODE § 15-1J-5(a)(3). “Due to the at-will employment relationship with the authority, its employees may not avail themselves of the state grievance procedure as set forth in § 29-6A-1 et seq. of this code. . . .” W. VA. CODE § 15-1J-4(d)(11).

As an employee of the West Virginia Military Authority, Grievant's employment is specifically exempted from the grievance procedure by statute. Therefore, the Grievance Board lacks jurisdiction in this matter, and the grievance must be dismissed.

The following Conclusions of Law support the dismissal of this grievance:

### **Conclusions of Law**

1. “Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. VA. CODE § 6C-2-1 et seq.” W. VA. CODE ST. R. § 156-1-6.2 (2018).

2. “Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order.” W. VA. CODE ST. R. § 156-1-6.19 (2018).

3. “Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue.” W. VA. CODE ST. R. § 156-1-6.19.2. “Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits.” W. VA. CODE ST. R. § 156-1-6.19.3.

4. “Administrative agencies and their executive officers are creatures of statute and delegates of the Legislature. Their power is dependent upon statutes, so that they must find within the statute warrant for the exercise of any authority which they claim. They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication.” Syl. Pt. 4, *McDaniel v. W. Va. Div. of Labor*, 214 W. Va. 719, 591 S.E.2d 277 (2003) (citing Syl. Pt. 3, *Mountaineer Disposal Service, Inc. v. Dyer*, 156 W. Va. 766, 197 S.E.2d 111 (1973)).

5. “The purpose of [the grievance statute] is to provide a procedure for the resolution of employment grievances raised by the public employees of the State of West Virginia, except as otherwise excluded in this article.” W. VA. CODE § 6C-2-1(a). “Employer” means a state agency, department, board, commission, college, university, institution, State Board of Education, Department of Education, county board of

education, regional educational service agency or multicounty vocational center, or agent thereof, using the services of an employee as defined in this section.” W. VA. CODE § 6C-2-2(g).

6. The Mountaineer ChalleNGe Academy is operated by the Adjutant General under the provisions of the National Guard Youth Challenge Program. W. VA. CODE § 15-1B-24; 32 U.S.C. § 509.

7. The West Virginia Military Authority is the governmental instrumentality by which the Adjutant General administers programs and hires employees. W. VA. CODE § 15-1J-4.

8. Persons employed at the Mountaineer ChalleNGe Academy are employed by the West Virginia Military Authority.

9. West Virginia Military Authority employees are “exempt from both the classified services category and the classified exempt services category as set forth in section four, article six, chapter twenty-nine of this code.” W. VA. CODE §15-1J-5(a)(1). “Each employee shall be deemed an at-will employee who may be discharged or released from his or her respective position without cause or reason.” W. VA. CODE §15-1J-5(a)(3). “Due to the at-will employment relationship with the authority, its employees may not avail themselves of the state grievance procedure as set forth in §29-6A-1 et seq. of this code. . . .” W. VA. CODE §15-1J-4(d)(11).

10. Grievant was employed by the West Virginia Military Authority.

11. As Grievant’s employment is specifically exempted from the grievance procedure by statute, the Grievance Board lacks jurisdiction in this matter, and the grievance must be dismissed.

Accordingly, this Grievance is **DISMISSED**.

Any party may appeal this Order to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Order. 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* W. VA. CODE ST. R. § 156-1-6.20 (2018).

**DATE: August 20, 2020**

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**Billie Thacker Catlett**  
**Chief Administrative Law Judge**