PHYLLIS BARNHART,

Grievant,

v. Docket No. 03-DOE-027

WEST VIRGINIA DEPARTMENT OF EDUCATION,

Respondent.

D E C I S I O N

Grievant, Phyllis Barnhart, was employed by the West Virginia Department of Education ("DOE") as an Executive Director/Science Coordinator. On November 18, 2002, she filed a grievance, and her Statement of Grievance states, "Grievant has been terminated." The relief sought stated:

> **Grievant seeks to be reinstated to her position with all back pay at 10% interest, to receive $21,000 in expense money to which she is entitled, (See footnote 1) annual leave days to be paid at the salary of executive director, and any and all benefits including retirement, reimbursement for insurance costs, return of sick days.**

Grievant had also filed a grievance on October 31, 2002. This lengthy grievance alleged discrimination, harassment, favoritism, and retaliation. She asserted she had been demoted without adequate notice and in violation of her due process rights. As relief, Grievant sought reinstatement to her prior position, the return of all previous duties, an brought to the Department and the state", among other things. (See footnote 2)

It appears these grievances were consolidated at Level II on December 13, 2002, and they were denied on January 16, 2003. Grievant appeal to Level IV on January 27,2003. Six days of hearing followed on January 29 & 30, 2004, March 18 & 19, 2004, June 3 & 4, 2004. This case became mature for decision on October 20, 2004, after receipt of the parties' proposed findings of fact and conclusions of law. (See footnote 3)

Issues and Arguments

The parties raised multiple issues. Respondent asserted Grievant was an at-will employee, and as such could be terminated for any reason that did not violate a substantial public policy. (See footnote 4) Additionally, since Grievant was an at-will employee, the burden of proof was on Grievant to demonstrate a violation of a substantial public policy. Respondent also noted Grievant had previously filed a grievance, October 31, 2001, about her demotion and had withdrawn it after appealing the Level II Decision to Level IV. Thus, that portion of the grievance was res judicata, as it had already been decided. (See footnote 5) Grievant maintains she was terminated because she engaged in whistle-blower activities and exercised her free speech rights. She asserts her performance was satisfactory at all times. (See footnote 6) Grievant asserted for the first time in her post-hearing proposals that she was also retaliated against for filing a grievance. Since this issue was not raised at hearing, it will not be addressed further. Additionally, because of Grievant's at-will status Respondent does not have to prove Grievant's unsatisfactory performance and/or insubordination. (See footnote 7) The only issues properly before the Grievance Board that remain to be addressed are whistle-blowing and free speech.

After a detailed review of the entire record, the undersigned Administrative Law Judge makes the following Findings of Fact. (See footnote 8)

Findings of Fact

1. Grievant was first employed by DOE as a Science Coordinator in 1989. Grt. No. 7 at Level IV. DOE staff members are very busy and are required to set priorities and to multi-task.

2. DOE staff are "noncontractual at will employees. The employment relationship between the Superintendent/Board and the employee may be terminated by either party." Dept. No. 12 at Level II (DOE Employee Handbook) at 6. Additionally, the DOE Employee Handbook "does not constitute a contract for employment and no representative or employee of the state is authorized to enter into any such employment contract or other agreement." Dept. No. 12 at Level II at 1.

3. DOE employees have always been at-will, non-classified employees. Accordingly, Grievant's employment with DOE was at-will. Test. Wells, Level IV Hearing.

4. In 1995, Grievant, in her capacity as Science Coordinator, applied for and received a

large grant from the National Science Foundation ("NSF"). In this grant she was listed as the Principal Investigator and Project Director.

5. Because of prior performance difficulties, DOE was worried about Grievant being in such an important position, but was basically told by NSF that barring some serious issue, the individual listed in the grant would be the Project Director. Dept. No. 1, at Level II.

6. The Project Director position was posted in early 1995. Grievant applied for and received the position. The posting did not identify the duration of the position, but themajority of the job duties were grant related. Grievant's new title was Projector Director/Science Coordinator, as she was expected to continue with her Science Coordinator duties.

7. On March 1, 1995, then Superintendent Henry Marockie wrote Grievant informing her she was selected as the Project Director and noting that Grievant, in accepting the position, agreed to address concerns about her work performance. Key issues were meeting deadlines and conducting advance planning and preparation. Dept. No. 3, at Level II.

8. A press conference was called to announce the grant and dignitaries, including Senator Rockefeller were in attendance. Grievant was late for this activity, and the announcement was made without her. Grievant was angry that everyone did not wait for her. Test. Jones, Level IV Hearing.

9. Her then supervisor, Barbara Jones, was concerned about Grievant's ability to handle this grant and wrote her two letters on June 9, 1995, pointing out the need for her to change many of her typical behaviors. In the first letter, Dr. Jones directed Grievant to start meetings on time, to engage in advance planning, and to cease making disparaging remarks about her colleagues in public. Resp. No. 1 at Level IV. In the second letter, Dr. Jones identified specifically behaviors she had seen in Grievant that must cease. Grievant was poorly prepared, conveyed inaccurate information, made negative remarks about a colleague to members of the Advisory Council, and failed to deal with staff development issues appropriately. Resp. No. 2 at Level IV.

10. On June 27, 1995, Dr. Marockie wrote Grievant noting an NSF requirement that the positions of Project Director and Project Coordinator must be handled as originallyspecified in the project application. He stated Grievant's new title was Science Coordinator/Project Director CATS. (See footnote 9) **Dept. No. 1, at Level II. He further stated that, "[a]s specified in**

your letter of employment for the position of Science Coordinator/Project Director: CATS it is imperative that you continue to address the identified concerns regarding your work performance." Dept. No. 1, at Level II. See Dept. No. 3, at Level II. Grievant was also directed to follow Department timelines for contracts, travel, and printing requests.

11. In 1999, Grievant asked for clarification of her position. Dr. Marockie wrote Grievant on March 18, 1999, and informed her she would be a member of the Coordinating Council until her "service as Director of the CATS project is complete. At that point, your position will be that of Science Coordinator, and you will no longer serve on the Coordinating Council." Dept. No. 2, at Level II.

12. Dr. Pam Cain, Assistant Superintendent, became Grievant's supervisor in October of 2001. Shortly after she received her position, Dr. Cain had meetings with all her Directors, including Grievant, to discuss duties and responsibilities. The individual who had held the position before Dr. Cain, had been ill for some time, and, as a result, there had been little supervision and direction provided to the employees within her supervisory chain.

13. Grievant continued to have difficulties with the area of "Task Management", which focused on completing tasks in a timely manner. At Grievant's February 6, 2001 evaluation, Dr. Cain noted Grievant needed improvement in this area, and stated Grievantneeded to take steps to insure priority items were dealt with in a timely manner. Dr. Cain also noted positive aspects of Grievant performance. Dept. No. 4 at Level II.

14. In early April 2001, Karen Huffman, Assistant Director of the Office of Assessment, asked Grievant to analyze a study guide developed by a teacher who was accused of violating SAT 9 test procedures. **(See footnote 10)**

15. Although Grievant was not aware of it at the time she wrote her report, this teacher admitted she had looked at the test and had written down questions from it. Resp. No. 11 at Level IV. See also Resp. Nos. 5 & 24 at Level IV. This act is a violation of testing procedures.

16. Grievant asked Dr. Huffman what would happen to the teacher, if she were found to have committed a violation of test security, and Dr. Huffman told her there were various options and confirmed Grievant's concern that one of these could be suspension of her teaching certificate. Grievant also asked if a recommendation was needed and was told, "No, her report was to be a factual analysis." Test. Grievant and Huffman, Level II and IV Hearings.

17. Grievant's report found the teacher's study guide topics/concepts follow the test material in the same sequential order and the "[l]evel of specificity of the Study Guide item # 9 and # 17 reflect the SAT-9 Grade 7 Items to an extent that exceeds the general references of these topics/concepts found in WV Science IGOs." (See footnote 11) **In essence, Grievant'sreport, dated May 10, 2001, found the correlation between the study guide items and the SAT-9 questions was too high to be accidental. Test. Tinder, Level IV Hearing.**

18. DOE found Grievant's report corroborated a test security violation and proceeded to take action against the teacher's certification. Test. Tinder and Huffman, Level IV Hearing.

19. The cover letter on the May 10, 2001 report states it is addressed to Dr. Stewart, with copies to Dr. Jan Barth and Dr. Cain. Grt. No. 2 at Level IV and Resp. No. 10 at Level IV. Contrary to information on this cover letter, Grievant did not give this report to these individuals. Additionally, contrary to Grievant's testimony, she did not hand-deliver the report to Dr. Huffman, but placed it on Dr. Huffman's desk in her office without any information or note attached. Dr. Huffman is not listed on this cover letter as receiving the report. Dr. Huffman assumed Grievant had given the report to the individuals listed on the cover letter, and filed her copy in her file for that county. This hard copy was the only one at DOE, and the only other copy was on Grievant's hard drive. Grt. No. 2 at Level IV. Test. Grievant and Huffman, Level IV Hearing.

20. At some point, Grievant again asked for clarification of her position, and Dr. Cain relayed this question to Superintendent David Stewart. On August 30, 2001, he wrote Grievant informing her she would return to the position of Science Coordinator on June 30, 2002, when the CATS grant concluded, and the seven per cent of her salary that came from the grant would cease. Resp. No. 15 at Level IV.

21. Grievant met with Dr. Cain on October 2, 2001, to discuss this letter and alleged this decision was a demotion. Dr. Cain noted that Grievant's return to the Science Coordinator position had been clear for some time, and referred Grievant to Dr. Marockie'sletter dated March 18, 1999. Resp. Nos. 16 & 17 at Level IV. See Dept. No. 2, at Level II.

22. Grievant filed a grievance on this issue on October 31, 2001. This grievance was denied at Level I on November 13, 2001, and at Level II on December 7, 2001. Grievant's appeal to Level IV was dismissed at her request on February 4, 2002. This grievance asserted

DOE planned to demote her as punishment for speaking out about the Teacher of the Year award in 1995, and speaking out about the failure of the Tomblin v. Gainer Committee to include science in its assessment plans for the third grade. Resp. Nos. 19 - 23 at Level IV.

23. Four committees were developed as the result of an Agreed Order in the Tomblin v. Gainer case. One was a statewide committee developed to decide areas of educational testing. Many people were on this Committee, including Senator Lloyd Jackson. Representatives came from other educational areas, and Dr. Cain served on this Committee at the request of Dr. Stewart. She knew of Grievant's interest in the assessment of science issues, informed Grievant she believed the Committee was only going to recommend assessment for reading and math for kindergarten through third grade for the initial period, and science would not be tested until the fourth grade. She invited Grievant to address the Committee to put forth her thoughts and ideas. Grievant took advantage of this opportunity. The Committee unanimously voted to assess only reading and math at this level. When this recommendation came to Dr. Stewart, he did not take this recommendation that science and social studies should be tested later, and the Board accepted his recommendation. Resp. No. 13 at Level IV at 8. Test. Cain, Level IV Hearing. 24. Dr. Cain reevaluated Grievant on October 17, 2001, and noted Grievant continued to need improvement in the area of "Task Management", and now also needed to improve in the area of "Management" which focused on demonstrating effective management techniques and delegation to accomplish goals. Dr. Cain noted Grievant needed to complete assignments in a timely manner, follow Department guidelines for the submission of travel materials, and present grants one week before submission to Dr. Cain for review and recommendation for approval to Dr. Stewart. Dept. No. 5 at Level II.

25. Grievant continued to have difficulty meeting the required timelines established by Dr. Cain and others.

26. DOE and Grievant became aware of the possibility of a large grant from NSF in approximately November of 2001. Because of the large amount of money this grant could bring to the state's education system, Grievant was to work with others around the state to obtain a partnership grant. Grievant was to be the Principal Investigator for the grant, known as the MSP (See footnote 12) **Grant, and as such, she was placed in a leadership position in**

writing and organizing the grant. Grievant was allowed to hire the person of her choice, Dr. Jones, who was very experienced, to assist her during the writing phase of the grant.

27. Grievant was clearly told many times that she was required to submit the grant, including the budget, one week in advance to Dr. Cain. Dr. Cain had been directed by Dr. Stewart that no grant written by Grievant would receive his required letter of approval without a prior review. Dr. Stewart also asked Dr. Cain and Stan Hopkins to monitor theprogress of the grant toward completion. Of special concern were the management and budget sections. Dept. 5, at Level II. Test. Grievant and Cain, Level IV Hearing.

28. Other partners in the grant were required by their agencies to have basic information and budget information to their agencies in advance of the due date. Test. Pyles, Level IV Hearing.

29. DOE expected to be the lead agency for this grant, as it has the exclusive constitutional authority for governing the state school system. Grt. No. 4 at Level IV. Test. Cain, Hopkins, and Tinder, Level II and IV Hearings.

30. Grievant did not give Dr. Cain a copy of the grant one week in advance. Dr. Cain still did not have a complete copy of the grant, including the budget and management sections, when the grant was submitted on May 1, 2002. Dept. No. 16, at Level II; Grt. No. 36 at Level IV.

31. Grievant was called to Dr. Cain's office on May 1, 2002, at 3:00 p.m., the day the grant was due, and questioned about the proposal. Grievant stated the grant was still not ready. This statement is contrary to an e-mail Grievant sent earlier that day stating the grant was ready, but there were problems with the electronic submission, and she hoped to have it submitted by that afternoon. Grt. No. 34 at Level IV.

32. It was at this May 1, 2002 meeting when DOE first learned it was not the lead agency on the grant. Contrary to Grievant's assertion, she did not clearly tell Dr. Cain the MSP Grant Committee had decided to have the grant run out of the Governor's office. (See footnote 13) **In fact, Grievant's statements to Dr. Cain, Dr. Hopkins, and Ms. Tinder on May 1, 2002, indicate Grievant had not clearly informed them of this important decision. Grt. No. 36 at Level IV.**

33. If DOE had advance notice of this decision, if would have had time to discuss the issue with other partners and come to some meeting of the minds. Test. Hopkins, Level II Hearing.

34. Because of the placement of the grant in the Governor's Office and because Dr. Cain and Dr. Hopkins had not been able to review the grant prior to its submission, Dr. Stewart did not fully endorse the grant proposal in the letter he wrote to NSF. (See footnote 14) **Grt. No. 4 at Level IV.**

35. At the May 1, 2002 meeting, Grievant was angry, stated she was going to resign, cried, and accused the DOE in general, and Dr. Cain and Dr. Stan Hopkins, in particular, of not helping her. She asserted it was their fault the grant was not to them in time. Grievant indicated at this meeting that she planned to resign, and noted her expectation that she would be in charge of the MSP grant in the Governor's Office. Grt. No. 36 at Level IV.

36. Contrary to Grievant's sworn testimony, she was identified in this grant as both the Principal Investigator and Project Director. Grt. No. 30 at Level IV. The Project Director would work out of the Governor's office. DOE's role in this grant would be limitedto a position on the Advisory Committee with numerous other people, and the agency's status would be the same as the Advisory Committee member from the West Virginia Science Teachers Association. Grt. No. 41 at Level IV. This Advisory Committee would meet two times a year and would have no real control over the Principal Investigator or Project Director. The salary for the Principal Investigator/Project Director was to be approximately $100,000 a year. (See footnote 15) (See footnote 16) **Test. Cain and Pyles, Level IV Hearing.**

37. Grievant went on sick leave shortly after the grant was submitted because of her stress level related to work. Because Grievant was expected to be gone for a short time, Dr. Cain planned to evaluate Grievant in early May 2002, and Grievant was sent a date for her evaluation. Dr. Cain had the majority of Grievant's evaluation and Improvement Plan completed at this time. Test. Cain, Level IV Hearing. Grievant did not return to work until September 3, 2002, and the evaluation was conducted on September 4, 2002. Grt. Nos. 15 & 16 at Level IV.

38. While Grievant was at home for work-related stress, she still conducted work-related activities. When Dr. Stewart became aware of these activities, he wrote Grievanton June 12, 2002, stating that while her dedication was commendable, "sick leave is time away from work used to regain your health." Resp. No. 8 at Level IV. (See footnote 17)

39. In the Winter or Spring of 2002, there was action taken to suspend the certification of

the teacher referred to in Findings of Fact 13 through 18. The teacher's attorney requested the report written by Grievant, and DOE made repeated attempts to find this report. When it did not come to light, DOE believed Grievant had not submitted a written report, but must have given an oral report. Grt. No. 1 at Level IV. The teacher's attorney believed Grievant had filed a written report, and DOE's attorney told the teacher's attorney that the best course of action would be to call Grievant directly, which he did. Grievant confirmed the presence of the written report. Once DOE found out the report did exist and where it was, it was provided to the attorney. (See footnote 18)

40. A time was set to depose Grievant in the teacher's case. This time was changed because Grievant was still on sick leave, and it was reset for September 9, 2002.

41. While Grievant was at home, she received notice that her office would need to be moved upon her return to work. This move was necessitated by the closing of the CATS grant, and the fact Grievant would return to her Science Coordinator position. AsGrievant would no longer have additional staff to supervise, there would be no need for Grievant to have one of the larger offices that are normally assigned to Executive Directors.

42. Grievant's evaluation on September 4, 2002, resulted in an Improvement Plan, as she was rated unsatisfactory in seven out of seventeen areas. The majority of Grievant's problem areas dealt with time and task management, priority setting, and communication/interpersonal relations. This Improvement Plan was for sixty days from September 4, 2002 to November 4, 2002. The ending date was later extended due to scheduling problems. Dept. Nos. 6 & 7, at Level II.

43. Grievant disagreed with her Improvement Plan and wrote a rebuttal basically stating she did not have performance difficulties, and the Improvement Plan should not be put in place. Dept. No. 25, at Level II. Grievant did not file a grievance over either her evaluation or her Improvement Plan.

44. The Improvement Plan detailed expected behaviors in three areas: Task Management/Planning, Interpersonal/Priorities, and Management/Leadership/Initiative. Grievant was given a list of five names, and she was to select three persons from that list for her Improvement Plan team. Dept. No. 7, at Level II.

45. Approximately a week after her return to work, on September 10, 2002, and during

the first meeting for Grievant's Improvement Plan, several responsibilities were removed from Grievant. The reasons for this decrease in work load were varied. One was to decrease Grievant's work load so she could focus on her major responsibilities. Another was because the other individuals who had worked on these tasks during Grievant's absence were meeting the established deadlines for these responsibilities, and the directors in charge of these areas did not want Grievant reassigned. Test. Barth, at LevelII, Cain, at Level IV Hearing. Dept. No. 28, at Level II. Grievant's major responsibilities were the closing out of the CATS grant and planning the science teachers' convention. Grievant was very upset by these changes. Grievant's title on her return to work was Science Coordinator because of the ending of the CATS grant.

46. If the CATS grant was not closed out properly, DOE would not be able to receive another NSF grant. Test. Cain and Grievant, Level IV Hearing.

47. At the time of her evaluation, Dr. Cain gave Grievant a note to contact Rebecca Tinder, DOE's attorney. Dr. Cain did not know why. (See footnote 19)

48. Grievant contacted Ms. Tinder, and she was given an opportunity to ask questions about the deposition on the teacher certification issue scheduled for September 9, 2002. Ms. Tinder indicated DOE was seeking to suspend the teacher's teaching certificate.

49. During her deposition Grievant stated her position title had been changed and she did not understand why. (See footnote 20) **Grt. No. 2 at Level IV. In this deposition, Grievant testified to what she had written in her report, and noted she had asked if she should write a recommendation, and was told no, the report should be factual. Grievant indicated the teacher should not lose her certification because the study guide was not a good one, but did not state at this deposition that there was not a test security violation. Additionally, Grievant indicated she did not keep a hard copy in her office, but there was copy on herhard drive. Grievant was also asked if she had been given a protocol to follow and she said she had not.**

50. Grievant could not have been given a copy of this protocol discussed in Finding of Fact 49 to follow because it was not adopted until April 3, 2002, approximately one year after Grievant had written her report. Resp. No. 9 at Level IV. Test. Tinder, Level IV Hearing.

51. While on her Improvement Plan, Grievant met weekly with Dr. Cain and had to submit reports about her weekly and monthly endeavors and planned actions.

52. The MSP grant was denied on October 21, 2002, and Grievant did not inform Dr. Cain immediately as she was directed to do. The final report denying the grant application was sent October 31, 2002. Grt. Nos. 26 & 27 at Level IV. DOE decided to try again for the grant. Dr. Stewart did not place Grievant on the grant team from DOE. Grievant was incensed by Dr. Stewart's decision.

53. After this decision was made, Grievant left a voice mail message on Jay Cole's phone telling him there would be "a bloodbath" and demanding he call her back. Mr. Cole was one of the partners of the grant and is a Deputy Secretary for the Department of Education and the Arts. Test. Cain and Grievant, Level IV Hearing. Grievant then went to visit Mr. Cole, and at this meeting Grievant was emotional and angry. Test. Cain, Level IV Hearing.

54. Grievant also sent an e-mail to the co-Principal Investigators on October 25, 2002, noting her anger that she had not recevied an e-mail about the grant, that she was "paying dearly for agreeing to house the grant in the Governor's office," stated she believed the plan now was "to step over my dead carcass and move ahead without a secondthought of my professional situation," noted she would not sit still for her "professional assassination by the Department or anyone else," indicated how important her expertise was to the grant application, and she was the person "WHO HAS WORKED THE PAST DECADE TO POSITION WEST VIRGINIA TO BE IN CONSIDERATION FOR A [sic] MSP." Grievant also noted, "it is morally (and professionally) wrong to 'forget about the one that brung ya to the dance.'" Dept. No. 13, at Level II.

55. Grievant did not improve during the Improvement Plan period, and engaged in inappropriate behaviors, some of which are noted in Findings of Fact 53 and 54.

56. Grievant also did not submit some of the materials required by the Improvement Plan. For example, she did not submit a report because Dr. Cain was not in her office, Grievant did not trust the Secretary not to read the planning report as she viewed it as confidential, and did not think the document would be safe even in a sealed enveloped marked confidential. Additionally, she did not ask the Secretary where Dr. Cain was so she could ask what to do with the report. Dept. Nos. 8A, 8B, and 8C at Level II. Grievant had been directed to ask Dr. Cain's Secretary to find her if she was not in the office, and she needed to speak to her. Test. Cain and Grievant, Level IV Hearing.

57. Further, Grievant did not submit the Science Teacher Association program to printing in a timely manner, and overtime was required. Grievant had been directed to plan ahead so overtime would not be needed. Grievant then paid this employee for this overtime work in cash, stated she did not know this was wrong, and the policy must have changed while she was on sick leave. There had been no change in the overtime policy, and it is wrong to pay DOE employees cash for DOE work. Dept. Nos. 29, 30, 31, 32, at Level II. Test. Cordeiro at Level II hearing; Cain, Level IV Hearing. 58. Both before and after her return to work, Grievant was directed to submit all her travel expenses in a timely manner. In September 2002, Grievant turned in travel expenses, some dating back as far as four and one half years, totaling $21,000. These reports were verified by DOE, and they were sent to the Auditor's Office for payment. They were rejected with a letter saying they would not even be considered without DOE's explanation. When Grievant heard about this response, she requested to talk to Dave Tincher, the Director of Purchasing. Dr. Cain, knowing Grievant's tendency to have difficulty with her self-control, told her she was not to contact Mr. Tincher, and DOE was handling the situation according to Department policy. Dept. No. 14, at Level II. DOE sent an explanation from Dr. Stewart to Mr. Tincher with a memo from Grievant. This request was again denied, and more data was sent to try and get these monies to Grievant. Grievant again requested to speak to Mr. Tincher and was told not to call him. On November 8, 2002, Grievant tried to call Dr. Cain, could not reach her and then called Ms. Tinder to tell her she was going to call Mr. Tincher. Resp. No. 14 at Level IV. Grievant then called Mr. Tincher, was very emotional during this conversation, did not listen to what he said, and basically did not want to stop talking until he agreed to pay the money. He did not agree. Test. Tincher Level II Hearing; Cain and Grievant, Level IV Hearing.

59. The state requires that travel be submitted within fifteen days. Test. Tincher, Level II Hearing.

60. Unless Purchasing agrees to authorize payment of this money to Grievant, DOE cannot pay Grievant for this travel.

61. Grievant and Dr. Cain met on November 12, 2002, to discuss the outcome of the Improvement Plan. Prior to the incident with Mr. Tincher, Dr. Cain was undecidedwhether she wanted to extend the Improvement Plan or recommend Grievant's termination. After the

Tincher incident, Dr. Cain recommended Grievant's immediate suspension and subsequent termination. She sent Dr. Stewart this recommendation on November 12, 2002, with a copy of the September 4, 2002 evaluation and the outcome of the Improvement Plan. Dept. No.10, at Level II.

62. Dr. Stewart wrote Grievant on November 13, 2002, informing her she was suspended immediately, and her termination would be effective November 14, 2002. He specified the reasons as insubordination and unsatisfactory performance. He noted Dr. Cain's recommendation had been "corroborated by members of the West Virginia Department of Education staff, and the problems noted in the attached documentation [Improvement Plan final results and September 4, 2003 evaluation] have been corroborated by members of the public who have contacted me directly about their concerns." Dept. No. 11 at Level II.

Discussion

In termination cases involving classified employees, the burden of proof is upon the employer to establish the charges relied upon by a preponderance of the evidence and to establish good cause for suspending an employee. W. Va. Code § 29-6A-6; Broughton v. W. Va. Div. of Highways, Docket No. 92-DOH-325 (Dec. 31, 1992). However, in cases involving the dismissal of classified-exempt, at-will employees, state "agencies do not have to meet this legal standard." Logan v. W. Va. Regional Jail & Correctional Auth., Docket No. 94-RJA-225 (Nov. 29, 1994). Indeed, an at-will employee is subject to disciplinary action for any reason which does not contravene some substantial public policy Principal. See Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978); Dufficy v. Div. ofMilitary Affairs, Docket No. 93-DPS-370 (June 16, 1994). See also 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).

Grievant was a classified-exempt employee and as such served at the will and pleasure of Respondent. Dye v. Dep't of Educ., Docket No. 99-DOE-217 (Sept. 16, 1999). See Wilhelm, supra; Logan, supra; 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). Grievant's at-will status denotes she could be fired for good reasons, bad

reasons, or no reasons, provided she was not terminated for a reason that violated a substantial public policy. Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1993). See Wilhelm, supra; Williams v. Precision Coil, Inc., 194 W. Va. 52, 459 S.E.2d 329 (1995); Harless, supra. Under West Virginia law, an implied covenant of good faith and fair dealing is not recognized in the context of at-will employment. Roach v. Reg. Jail Auth., 482 S.E.2d 679 (W. Va. 1996). A general assertion of discrimination, harassment, retaliation, and/or favoritism, without identifying a violation of a substantial public policy, is insufficient as a claim for relief in an at-will employment grievance. (See footnote 21) **Wilhelm, supra.**

The burden of proof is on an at-will employee to establish a violation of substantial public policy. If this burden is not met, the reasons for the termination are not at issue, and the termination stands. Wilhelm, supra. "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it;that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Black's Law Dictionary, 5th ed. at 1064. In other words, "[t]he preponderance standard generally requires proof that a reasonable person would accept as sufficient that a contested fact is more likely true than not." Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993). See Loundman-Clay v. Higher Educ. Policy Comm'n/Bluefield State College, Docket No. 02-HEPC-013 (Aug. 26, 2002).

Even at-will employees are not completely at the mercy of their employer. In this regard, the West Virginia Supreme Court of Appeals has declared:

> **The rule that an employer has an absolute right to discharge an at-will employee must be tempered by the Principal that where the employer's motivation for the discharge is to contravene some substantial public policy Principal, then the employer may be liable to the employee for damages occasioned by this discharge.**

Syl.,Harless, supra. Subsequently, in Birthisel v. Tri-Cities Health Serv., 188 W. Va. 371, 377, 424 S.E.2d 606, (1992), the Court discussed sources of public policy and stated:

> **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, legislatively approved regulations, and judicial opinions. Inherent in the term "substantial public policy" is the concept that the policy will provide specific guidance to a reasonable person.**

Courts have recognized that substantial public policy interests are implicated in such actions as submitting a claim for back wages under the Veterans Reemployment Rights Act (Mace v. Charleston Area Med. Ctr. Found., 188 W. Va. 57, 422 S.E.2d 624 (1992)); refusing to conceal alleged environmental violations committed by the employer (Bell v. Ashland Petroleum, Inc., 812 F. Supp. 639 (S.D. W. Va. 1993)); filing a workers'compensation claim (Powell v. Wyoming Cable Co., 184 W. Va. 700, 403 S.E.2d 717 (1991); Shanholtz v. Monongahela Power Co., 165 W. Va. 305, 270 S.E.2d 178 (1980)); and attempting to enforce warranty rights granted under the West Virginia Consumer Protection and Credit Act (Reed v. Sears, Roebuck & Co., 188 W. Va. 747, 426 S.E.2d 539 (1992)). See Roberts v. Adkins, 191 W. Va. 215, 444 S.E.2d 725 (1994).

Grievant alleges she was terminated because of a violation of her free speech rights and because she was a whistle-blower. If these allegations are true, Grievant's termination would contravene substantial public policy. Grievant has the burden of proof to establish her termination was for these reasons.

A. Credibility

An issue that must be addressed is credibility, as the testimony of Grievant is not in agreement with numerous other witnesses and documentation. In situations where the existence or nonexistence of certain material facts hinges on witness credibility, detailed findings of fact and explicit credibility determinations are required. Jones v. W. Va. Dep't of Health & Human Res., Docket No. 96-HHR-371 (Oct. 30, 1996); Pine v. W. Va. Dep't of Health & Human Res., Docket No. 95-HHR-066 (May 12, 1995). An Administrative Law Judge is charged with assessing the credibility of the witnesses. See Lanehart v. Logan County Bd. of Educ., Docket No. 95-23-235 (Dec. 29, 1995); Perdue v. Dep't of Health and Human Res./Huntington State Hosp., Docket No. 93-HHR-050 (Feb. 4, 1993). "The fact that this testimony is offered in written form does not alter this responsibility." Browning v. Mingo County Bd. of Educ., Docket No. 96-29-154 (Sept. 30, 1996). See Nalle v. Workers' Compensation Comm'n, 04-WCC-113 (July 30, 2004). The Grievance Board has applied the following factors to assess a witness's testimony: 1) demeanor; 2) opportunity or capacity to perceive and communicate; 3) reputation for honesty; 4) attitude toward the action; and 5) admission of untruthfulness.

Additionally, the administrative law judge should consider 1) the presence or absence of bias, interest, or motive; 2) the consistency of prior statements; 3) the existence or nonexistence of any fact testified to by the witness; and 4) the plausibility of the witness's information. **(See footnote 22)** **See Holmes v. Bd. of Directors/W. Va. State College, Docket No. 99-BOD- 216 (Dec. 28, 1999); Perdue, supra.**

Grievant has an interest and/or bias in the outcome of this case. As previously stated by this Grievance Board, "[A] [f]actor to be considered in making and explaining credibility determinations is [the] possibility that [the] witness is biased and may consciously or unconsciously shade his or her testimony for or against one of the other witnesses or parties." Chin v. Dep't of Treasury, 44 M.S.P.R. 201 (1990). See Loundman-Clay v. Higher Educ. Policy Comm'n, Docket No. 02-HEPC-013 (Aug. 29, 2002).

The undersigned Administrative Law Judge had an opportunity to observe the demeanor of many of the witnesses and to assess their words and actions during their testimony. Other credibility assessments were made from the Level II record. The statements of the majority of these witnesses were consistent with each other, consistent with their prior statements, internally consistent, and consistent with the documentary evidence. There was no indication that any of the witnesses were untruthful. Thedemeanor of the majority of these witnesses was straightforward, and their testimony was plausible.

The same cannot be said for Grievant, and her testimony is not considered credible. Grievant's responses to questions were frequently not on point and evasive. Some of her statements were just not plausible, and it was unclear whether Grievant was lying, shading the truth, suffered from inadequate insight, or incorrectly assessed events in which she was involved. It was obvious Grievant had a strong tendency to personalize events, and also placed her own interpretation on these occurrences. Additionally, Grievant was unable to accept that any of her actions were incorrect or inappropriate. She clearly believed everyone else was at fault, and any problems that occurred were created by the actions of others.

Examples may be useful in understanding this finding. First, Grievant did not see anything wrong with her calling her colleague on the MSP grant, Jay Cole, and telling him there would be a "bloodbath" because she was not selected to be the Principal Investigator on the second writing of this grant. Grievant testified she was just trying to get him to call her back. Second,

Grievant was unable to admit Dr. Stewart agreed with her stand on the testing for science, and her testimony in this regard is quite confusing and surprising. It was clear the answer to the question was yes, but Grievant was unable to say this. Grievant almost appeared to be playing word games, was unduly selective with her responses, and could not seem to answer directly. See Test. Grievant, Level IV Hearing. Third, Grievant's explanations frequently did not make sense. For example, Grievant, a well-educated professional, could not figure out how to submit her October report to Dr. Cain, and basically saw no problem with her behavior. She in essence blamed Dr. Cainfor this problem. Fourth, Grievant stated the agenda for the Science Teachers' Convention was ready for submission a week in advance, but Grievant still had not given it to the Printing Department the Tuesday before the convention was to start on Thursday. (See footnote 23) **Grievant appeared to rationalize all of her behavior and to blame everyone else no matter what the facts presented to her.**

B. Whistle-Blowing

Grievant asserts she was a whistle-blower when she gave her deposition and when she reported interference with the Teacher of the Year award in 1995. A "'Whistle-blower' means a person who witnesses or has evidence of wrongdoing or waste while employed with a public body, and who makes a good faith report of, or testifies to, the wrongdoing or waste, verbally or in writing, to one of the employee's superiors, to an agent of the employer or to an appropriate authority." W. Va. Code § 6C-1-2(g). Information helpful in clarifying this definition is:

> **"Wrongdoing" means a violation which is not of a merely technical or minimal nature of a federal or state statute or regulation, of a political subdivision ordinance or regulation or of a code of conduct or ethics designed to protect the interest of the public or the employer.**

W. Va. Code § 6C-1-2(h).

> **"Waste" means an employer or employee's conduct or omissions which result in substantial abuse, misuse, destruction or loss of funds or resources belonging to or derived from federal, state or political subdivision sources.**

W. Va. Code § 6C-1-2(f).

> **"Good faith report" means a report of conduct defined in this article as**

> **wrongdoing or waste which is made without malice or consideration of personal benefit and which the person making the report has reasonable cause to believe is true.**

W. Va. Code § 6C-1-2(d).

> **"Appropriate authority" means a federal, state, county or municipal government body, agency or organization having jurisdiction over criminal law enforcement, regulatory violations, professional conduct or ethics, or waste; or a member, officer, agent, representative or supervisory employee of the body, agency or organization. The term includes, but is not limited to, the office of the attorney general, the office of the state auditor, the commission on special investigations, the Legislature and committees of the Legislature having the power and duty to investigate criminal law enforcement, regulatory violations, professional conduct or ethics, or waste.**

W. Va. Code § 6C-1-2(a).

Additionally, W. Va. Code § 6C-1-3 indicates that discriminatory and retaliatory actions against whistle-blowers are prohibited, and states:

> **(a) No employer may discharge, threaten or otherwise discriminate or retaliate against an employee by changing the employee's compensation, terms, conditions, location or privileges of employment because the employee, acting on his own volition, or a person acting on behalf of or under the direction of the employee, makes a good faith report or is about to report, verbally or in writing, to the employer or appropriate authority an instance of wrongdoing or waste.**

> **(b) No employer may discharge, threaten or otherwise discriminate or retaliate against an employee by changing the employee's compensation, terms, conditions, location or privileges of employment because the employee is requested or subpoenaed by an appropriate authority to participate in an investigation, hearing or inquiry held by an appropriate authority or in a court action.**

An employer may not retaliate against a whistle-blower, and any such act would be seen as an act of reprisal. W. Va. Code § 6C-1-3. W. Va. Code § 6C-1-4 states that: "An employee alleging a violation of this article must show by a preponderance of the evidence that, prior to the alleged reprisal, the employee had reported or was about to report in goodfaith, verbally or in writing, an instance of wrongdoing or waste to the employer or an appropriate authority." This Code section further identifies that "[i]t shall be a defense to an action under this section if the defendant proves by a preponderance of the evidence that the action complained of

occurred for separate and legitimate reasons, which are not merely pretexts."

Grievant contends her reporting of Dr. Marockie's action regarding the Teacher of the Year Awards in 1995, and her testimony in her deposition were acts of whistle-blowing, and the real reasons she was terminated.

1. Teacher of the Year Awards

Grievant has not met her burden of proof on this assertion. First, the undersigned Administrative Law Judge is uncertain if this action meets the definition of wrongdoing. Second, the testimony was unclear as to whom she reported her allegations. Grievant stated she believed Dr. Marockie was doing the wrong thing, but it appears she did not inform him, but went along with his decision. Eventually this issue was in the paper, but it was unclear from the testimony exactly how it got there. Third, this event occurred seven years before Grievant's termination, Dr. Marockie is no longer at the DOE, Grievant's then supervisor is no longer with the DOE, and Grievant's current supervisor was not employed by DOE at the time of this event. Accordingly, Grievant has not demonstrated her termination was related to her action surrounding the Teacher of the Year Awards.

2. Deposition testimony

Grievant asserts she was terminated for her deposition testimony. As stated in W. Va. Code § 6C-1-3(b):

> **No employer may discharge, threaten or otherwise discriminate or retaliate against an employee by changing the employee's compensation, terms, conditions, location or privileges of employment because the employee is requested or subpoenaed by an appropriate authority to participate in an investigation, hearing or inquiry held by an appropriate authority or in a court action.**

The case of Page v. Columbia Natural Resources, 198 W. Va. 378, 480 S.E.2d 817 (1996) is instructive on this issue. In this case, Ms. Page was discharged after she gave testimony in a deposition. The West Virginia Supreme Court of Appeals held, "it is against substantial public policy of West Virginia to discharge an at-will employee because such employee has given or may be called to give truthful testimony in a legal action." Id. at Syl. Pt. 1. Once an employee has established by a preponderance of the evidence that her discharge was motivated by an unlawful factor contravening a substantial public policy, liability will be imposed unless the

employer proves by a preponderance of the evidence that the same result would have occurred even in the absence of the unlawful motive. Id. at Syl. Pt. 8.

Grievant's testimony does not meet the definitions and elements outlined in the statutes. First, Grievant did not report any waste or wrongdoing. Grievant stated she was not asked to give an opinion, and DOE only wanted a factual report. The undersigned Administrative Law Judge cannot see where this truthful statement is a problem. Second, Grievant stated she disagreed with DOE's decision to suspend the teacher's license, but not because she did not find a testimony security violation, but because it was such a poor study guide. Third, Grievant confirmed she was not given the protocol to guide her in writing her report, and this is exactly true. The protocol did not come into being until April of 2002, approximately one year after Grievant wrote her report. Fourth, a review ofGrievant's report even to the untrained eye, appears to support a test security violation, as does the teacher's own written admission. Fifth, Grievant's assertion that this deposition testimony caused her to receive the poor evaluation that resulted in her placement on the Improvement Plan does not follow chronologically.

Grievant was going to receive this poor evaluation and resulting Improvement Plan in May 2002. The only reason she did not was her extended sick leave. Dr. Cain gave Grievant her evaluation and Improvement Plan before the deposition, and she was only tangentially aware Grievant had a deposition and did not know why. She only found out much later the reasons for the deposition. While it is true some of Grievant's duties were decreased after this deposition, in the September 10, 2002 Improvement Plan meeting, this was because the directors in these areas were pleased with the people they had worked with over the summer, and they wanted them to remain on these committees. Given this set of facts, the undersigned Administrative Law Judge cannot find a violation of the whistle blowing statute.

Accordingly, Grievant has not demonstrated: 1) she met the requirements to be considered a "whistle-blower" under the Act; and/or 2) her allegations played a part in her termination.

(See footnote 24)

C. Violations of Grievant's Right to Free Speech

Grievant asserts it was a violation of her right to free speech when she was directed not to call Mr. Tincher, she called him, and her failure to follow this directive was used asone of the

reasons for her termination. Although not clearly pled, Grievant's testimony at her deposition will also be considered under this section.

"[P]ublic employees are to be protected from firings, demotions and other adverse employment consequences resulting from the exercise of their free speech rights." Orr v. Crowder, 315 S.E.2d 593 (W. Va. 1983)(citing Pickering v. Bd. of Educ., 391 U.S. 563 (1968)). However, this right is not absolute, and an employer's "interest in the efficient and orderly operation of its affairs must be balanced with the public employees' right to free speech . . .". Orr at 601. Three general restrictions on a public employee's right to free speech were identified in Pickering. First, for this speech to be protected it "must be made with regard to a matter of public concern." Second, statements made "'with the knowledge [that they]. . . were false or with reckless disregard to whether [they were]. . . false or not' are not protected." Orr at 602 (citing Pickering at 569). Third, statements "about persons with whom [the speaker has] close personal contact which would disrupt 'discipline. . . or harmony among co-workers' or destroy 'personal loyalty and confidence' may not be protected." Id.

The burden of proof is on a grievant to demonstrate by a preponderance of the evidence that her conduct is constitutionally protected, and that this conduct was "a substantial factor" in the employer's decision to discipline her. Orr at 62 (citing Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)). "The employer may defeat the claim by showing that the same decision would have been reached even in the absence of the protected conduct." Orr, Syl. Pt. 4, in part. In Mt. Healthy, the Supreme Court noted the conduct must be of a substantial nature; to rule otherwise would be to:place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing . . .. The constitutional Principal at stake is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct . . .. [An employee] ought not to be able to, by engaging in such conduct, prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

Id. at 286.

"The fact that the government may have considered an employee's protected speech or conduct in reaching an adverse decision does not necessarily render that decision constitutionally infirm." Mazaleski v. Trensdell, 562 F.2d 701, 715 (D. C. Cir. 1977). In making that decision, the key is "to consider the employee's job performance in its entirety." Id. An employee's frequent bickering and disagreements with his superiors and co-workers is not the kind of speech protected by the First Amendment, and it may be considered in terminating an employee. Chitwood v. Feaster, 468 F.2d 359 (4th Cir. 1972). "[An employer] has a right to expect [an employee] to follow instructions and to work cooperatively and harmoniously with the head of the department. If one cannot or does not, if one undertakes to seize the authority and prerogatives of the department head, he does not immunize himself against loss of his position simply because his noncooperation and aggressive conduct are verbalized." Id. at 360-61. See also English v. Powell, 592 F.2d 727 (4th Cir. 1979).

Grievant's actions in talking to Mr. Tincher do not meet the first prong of the Pickering test. For this speech to be protected it "must be made with regard to a matter of public concern." Clearly, whether Grievant gets her travel money is of great concern to her, but it is not a matter of public concern. Chitwood, supra. Grievant's testimony during her deposition could be considered a matter of public concern, as it deals with test security. However, this testimony was not negative, and Grievant's opinion about the certification suspension was based on incomplete facts, as she did not know the teacher had admitted to looking at the test. While Grievant disagreed with her employer about the certification suspension, a disagreement with a supervisor, especially about issues outside the employee's area of expertise, is not the kind of speech protected by the First Amendment. Chitwood, supra. There is no violation of Grievant's right to free speech in these sets of facts.

Additionally, even if Grievant were able to prove her statements during her deposition were protected, the next question is whether these statements were a substantial, motivating factor in her termination. Again, it must be noted that Grievant's argument she recevied a negative evaluation and was placed on the Improvement Plan because of her deposition has a "time problem." The decision to place Grievant on an Improvement Plan was made by Dr. Cain in May, 2002, months before Grievant gave her deposition. The only reason these event occurred closely in time is because Grievant was on sick leave and could not be placed on the

Improvement Plan until her return to work. Given this problem, Grievant's deposition was not a substantial motivating factor in her evaluation or her Improvement Plan. Grievant's subsequent termination was based on her inability to meet the expectations identified in her Improvement Plan and her insubordination.

Further, DOE considered Grievant's "job performance in its entirety" as required by Mazaleski, supra. Although DOE may not appreciate Grievant's belief the teacher committed no wrongdoing, especially when Grievant's assessment corroborated a testsecurity violation, these remarks were not a substantial, motivating factor in her dismissal. DOE had multiple reasons to terminate Grievant both before and after these remarks.

Accordingly, the undersigned Administrative Law Judge finds Grievant's statements are not protected by the First Amendment. Additionally, even if this Administrative Law Judge had found the statements to be protected, they were not a substantial motivating factor in Grievant's suspension and did not play a part at all in her discharge. Thus, Grievant's rights to free speech have not been violated.

D. Insubordination and unsatisfactory performance

Although it is unnecessary to address the charges against Grievant in the dismissal letter, as she was an at-will employee and has not demonstrated a substantial public policy violation, the undersigned Administrative Law Judge will examine these issues briefly.

1. Insubordination

Grievant asserts her behavior of failing to follow a direct order was not insubordination, because the order was wrong or no longer valid. Insubordination "includes, and perhaps requires, a wilful disobedience of, or refusal to obey, a reasonable and valid rule, regulation, or order issued . . . [by] an administrative superior." Butts v. Higher Educ. Interim Governing Bd., 212 W. Va. 209, 569 S.E.2d 456 (2002)(per curiam). See Riddle v. Bd. of Directors, So. W. Va. Community College, Docket No. 93-BOD-309 (May 31, 1994); Webb v. Mason County Bd. of Educ., Docket No. 26-89-004 (May 1, 1989). Insubordination involves a reasonable order given by a superior entitled to give such order. Riddle, supra; Webb, supra.

In order to establish insubordination, an employer must demonstrate a policy or directive that applied to the employee was in existence at the time of the violation, and theemployee's failure to comply was sufficiently knowing and intentional to constitute the defiance of

authority inherent in a charge of insubordination. Conner v. Barbour County Bd. of Educ, Docket No. 94-01-394 (Jan. 31, 1995). "Employees are expected to respect authority and do not have the unfettered discretion to disobey or ignore clear instructions." Reynolds v. Kanawha-Charleston Health Dep't, Docket No. 90-H-128 (Aug. 8, 1990).

An employee's belief that management's decisions are incorrect or the result of incompetence, absent a threat to the employee's health and safety, does not confer upon him the right to ignore or disregard the order, rule, or directive. Vickers v. Bd. of Directors/W. Va. State College, Docket No. 97-BOD-122B (Aug. 7, 1998). See Parker v. W. Va. Dep't of Health and Human Res., Docket No. 97-HHR-042B (Sept. 30, 1997). Additionally, an employer has the right to expect subordinate personnel "to not manifest disrespect toward supervisory personnel which undermines their status, prestige, and authority . . .". McKinney v. Wyoming County Bd. of Educ., Docket No. 92-55-112 (Aug. 3, 1992) (citing In re Burton Mfg. Co., 82 L.A. 1228 (Feb. 2, 1984)).

Grievant was ordered not to contact Mr. Tincher for good reasons. As demonstrated in the Findings of Fact, Grievant frequently acted in an inappropriate manner. It was also clear DOE was trying very hard to get Grievant the money it knew she was owed. She disobeyed her supervisor's direct order and did not follow DOE or state policies regarding her travel. Grievant was insubordinate.

2. Unsatisfactory performance

Respondent has demonstrated Grievant failed to perform the required duties of the position to which she was assigned. Although it is true Grievant successfully completed some of the duties of the position, this is insufficient. Markley v. Div. of Rehab., DocketNo.01-RS-087 (Sept. 24, 2001). The duties of planning, organizing, and prioritizing were key to Grievant's position, and were the same as those expected of others in similar positions. The expectations of meeting deadlines and keeping a supervisor informed are normal work practices and are those ordinarily required from any employee. Respondent clearly demonstrated Grievant failed to perform many of the essential duties of her position. Markley, supra.

The above-discussion will be supplemented by the following Conclusions of Law.

Conclusions of Law

1. A classified-exempt employee is not covered under the civil service system and is an at-will employee. 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).

2. In cases involving the dismissal of classified-exempt, at-will employees, state agencies do not have the burden of proof to establish reasons for the termination and do not have to establish good cause for discharging an employee. Logan v. W. Va. Regional Jail & Correctional Auth., Docket No. 94-RJA-225 (Nov. 29, 1994).

3. Because Grievant was an at-will employee at the time of her termination, this dismissal could occur for "no reason" or a "bad reason", unless a substantial public policy is violated. Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1993). See Harless v. First Nat'l Bank, 169 W. Va. 673, 246 S.E.2d 270 (1978); Higginbotham v. W. Va. Dep't of Pub. Safety/W. Va. State Police, Docket No. 97-DPS-018 (Mar. 31, 1997); Myer v. W. Va. Racing Comm'n, Docket No. 95-RC-290 (May 3, 1996); Samples v. Glenville StateCollege, Docket No. 94-BOD-564 (July 28, 1995); Dufficy v. Div. of Military Affairs, Docket No. 93-DPS-370 (June 16, 1994).

4. The burden of proof is on an at-will employee to establish a violation of substantial public policy. If this burden is not met, the reasons for the termination are not at issue, and the termination stands. Wilhelm, supra.

5. "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Petry v. Kanawha County Bd. of Educ., Docket No. 96-20-380 (Mar. 18, 1997). See Leichliter v. W. Va. Dep't of Health and Human Res., Docket No. 92-HHR-486 (May 17, 1993); Black's Law Dictionary, 5th ed. at 1064.

6. Where the evidence equally supports both sides, the employee has not met her burden. Id. See Adkins v. Smith, 142 W. Va. 772, 98 S.E.2d 712 (1957); Burchell v. Bd. of Trustees/Marshall Univ., Docket No. 97-BOT-011 (Aug. 29, 1997). See Loundman- Clay v. Higher Educ, Policy Comm'n/Bluefield State College, Docket No. 02-HEPC-013 (Aug. 26, 2002).

7. If Grievant's allegations of whistle-blowing, on her part, and a violation of her free

speech rights by Respondent are proven, Grievant will have established a substantial public policy violation.

8. A "'Whistle-blower' means a person who witnesses or has evidence of wrongdoing or waste while employed with a public body, and who makes a good faith report of, or testifies to, the wrongdoing or waste, verbally or in writing, to one of theemployee's superiors, to an agent of the employer or to an appropriate authority." W. Va. Code § 6C-1-2(g).

9. W. Va. Code § 6C-1-3(b) states:

> **No employer may discharge, threaten or otherwise discriminate or retaliate against an employee by changing the employee's compensation, terms, conditions, location or privileges of employment because the employee is requested or subpoenaed by an appropriate authority to participate in an investigation, hearing or inquiry held by an appropriate authority or in a court action.**

10. "[I]t is against substantial public policy of West Virginia to discharge an at-will employee because such employee has given or may be called to give truthful testimony in a legal action." Syl. Pt. 1, Page v. Columbia Natural Res., 198 W. Va. 378, 480 S.E.2d 817 (1996).

11. Once an employee establishes by a preponderance of the evidence that her discharge was motivated by an unlawful factor contravening a substantial public policy, liability will be imposed unless the employer proves by a preponderance of the evidence the same result would have occurred even in the absence of the unlawful motive. Page at Syl. Pt. 8.

12. Grievant did not demonstrate that her actions regarding the Teacher of the Year awards met the definitions and elements outlined in the whistle-blowing statutes.

13. Grievant's testimony in her deposition does not meet the definitions and elements outlined in the whistle-blowing statutes, primarily because Grievant did not report any waste or wrongdoing. She reported what happened, and DOE agreed with her statement of these facts in that she was asked to give a factual report and she did. 14. Grievant's statement that she disagreed with DOE's decision to suspend the teacher's license is not covered under the whistle-blowing statutes as this only her opinion, based on incomplete data, and not a statement of fact.

15. Grievant did not establish her deposition testimony resulted in a poor evaluation and

Improvement Plan because these decisions had already been made in May 2002.

16. "[P]ublic employees are to be protected from firings, demotions and other adverse employment consequences resulting from the exercise of their free speech rights." Orr v. Crowder, 315 S.E.2d 593 (W. Va. 1983)(citing Pickering v. Bd. of Educ., 391 U.S. 563 (1968)).

17. Speech, to be protected, "must be made with regard to a matter of public concern." Pickering, supra.

18. Grievant's remarks to Mr. Tincher was not on a "matter of public concern." Accordingly, it was not protected speech. Pickering, supra.

19. Testimony about test security, arguably could be protected, as it pertains to a matter of public concern. Pickering, supra.

20. Grievant's opinion about the certification suspension is not protected speech as it was merely her opinion based on incomplete facts.

21. Disagreements with a superior, especially about issues outside the employee's area of expertise, is not the kind of speech protected by the First Amendment. Chitwood, supra.

22. Grievant did not prove she was terminated because she engaged in whistle- blower activities or because she exercised her free speech rights. 23. Even if Grievant had established a substantial public policy in regards to whistle-blowing and free speech, she did not establish her conduct was "a substantial factor" in the employer's decision to terminate her. Orr v. Crowder, 315 S.E.2d 593, 602 (W. Va. 1983)(citing Pickering v. Bd. of Educ., 391 U.S. 563 (1968) and Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)).

24. "The employer may defeat the [employee's] claim by showing that the same decision would have been reached even in the absence of the protected conduct." Orr, Syl. Pt. 4, in part.

25. "The fact that the government may have considered an employee's protected speech or conduct in reaching an adverse decision does not necessarily render that decision constitutionally infirm." Mazaleski v. Trensdell, 562 F.2d 701, 715 (D. C. Cir. 1977).

26. In assessing an agency's decision to terminate an employee who engaged in protected conduct, the key is "to consider the employee's job performance in its entirety." Id.

Accordingly, this grievance is DENIED.

Any party may appeal this decision to the Circuit Court of Kanawha County or to the circuit

court of the county in which the grievance occurred. Any such appeal must be filed within thirty (30) days of receipt of this decision. W. Va. Code §29-6A-7 (1998). Neitherthe 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. 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 appealing party must also provide the Board with the civil action number so that the record can be prepared and properly transmitted to the appropriate circuit court.

JANIS I. REYNOLDS

ADMINISTRATIVE LAW JUDGE

Dated: December 17, 2004

Footnote: 1

The parties agreed at hearing that DOE could do nothing further to assist Grievant in obtaining these monies.

Footnote: 2

In this grievance, Grievant alleged violations of the Americans with Disabilities Act. As this issue was not addressed at either the Level II or Level IV hearing, it will not be addressed further.

Footnote: 3

Grievant was represented by Ellen Golden, Esq. at Level IV and James Haviland, Esq. at both the Level III hearing and at the Level IV Motion hearing. Respondent was represented by Kelli Talbott, Esq., Deputy Attorney General.

Footnote: 4

Respondent filed a Motion to Dismiss on this issue, and a pre-hearing conference was held on this issue by Administrative Law Judge Mary Jo Swartz. Before this grievance came to hearing at Level IV, it was assigned to the undersigned Administrative Law Judge.

Footnote: 5

As revealed by the Findings of Fact, it is clear Grievant filed a grievance on her return to the Science Coordinator's position in October 31, 2001, and requested it be withdrawn from Level IV in January 2002. This request was granted by Administrative Law Judge Brenda Gould by Order dated February 4, 2002. Accordingly, this issue cannot be relitigated under the rules of res judicata. Grievant abandoned this grievance and the issues surrounding her return to the Science Coordinator position. Additionally, as noted in the Level I response to her

October 21, 2002 grievance, her attempt to relitigate this issue is also untimely, as Grievant clearly knew she would be returned to the Science Coordinator position by the letters she had received from Dr. Marockie and Dr. Stewart. See Findings of Fact 10 &19. Accordingly, the issue of the alleged demotion will not be addressed further.

Footnote: 6

It is somewhat unclear from the post-hearing proposals what Grievant viewed as violations of her free speech rights. It appears Grievant believed that any time her opinion differed with anyone at DOE, she was treated in a negative manner, and this a violation of her free speech rights. In the interest of fairness, the major examples identified by Grievant will be addressed. It should also be noted that disagreements in a workplace with so many highly educated professionals with different areas of expertise, would be expected, and that these differences in opinion would normally not be viewed as anything other than lively discussions and exchanges.

Footnote: 7

Grievant did list the Improvement Plan as negative treatment in her list of nineteen negative actions by her employer in her October 31, 2002 grievance, but did not list the negative evaluation that was the impetus for the Improvement Plan. Grievant was placed on the Improvement Plan on September 4, 2002. She did not complain about this action or her evaluation until the Improvement Plan was completed, and she was terminated. Accordingly, these assertions are untimely and will not be discussed further. It is noted Grievant was clearly aware of the grievance procedure as she had filed a prior grievance on October 31, 2001, about her demotion.

Footnote: 8

The record in this grievance consisted of over seven days of hearing, numerous witnesses, and approximately 108 exhibits. Much of this evidence focused on Grievant's unsatisfactory performance and insubordination. Because Grievant was clearly an at-will employee, she could be dismissed for good cause, bad cause, or no cause as long as that reason did not violate a substantial public policy. Williams v. Brown, 190 W. Va. 202, 437 S.E.2d 775 (1993). As this Decision finds the termination of Grievant did not violate anysubstantial public policy, the majority of the evidence presented need not be addressed.

Footnote: 9

This acronym stands for Coordinated and Thematic Science.

Footnote: 10

This acronym stands for Standard Assessment Test.

Footnote: 11

This acronym stands for Instructional Goals and Objectives. In general, instructional areas have identified material to be covered.

Footnote: 12

This acronym stands Math Science Partnership.

Footnote: 13

Dr. Cain did not remember Grievant telling her on April 22, 2001, about this decision. Dr. Cain did admit Grievant could have mentioned something about it, and because of Grievant's circular and confusing method of relaying information, she may not have understood what Grievant told her. At the Level IV hearing, Grievant's inability ordifficulty in clearly answering questions was noted.

Footnote: 14

Dr. Stewart was sent a letter for his signature by Grievant, but he did not sign it. Instead he drafted another letter. Grievant was upset because preciously Superintendents had signed these letters without a review of the grant proposals.

Footnote: 15

As noted in Finding of Fact 5, once the Principal Investigator/Project Director is identified in the approved grant proposal, this individual cannot be changed.

Footnote: 16

Although not discussed at any length by the parties, it would appear Grievant intentionally withheld information from her employer. This supposition by the undersigned Administrative Law Judge is supported by Grievant's comments at the May 1, 2002 meeting, the May 1, 2002 e-mail sent prior to the meeting stating the grant was ready, and the statements within the grant listing Grievant as the Principal Investigator and Project Director with a large salary, and identifying the Governor's Office as the lead agency.

Footnote: 17

Grievant was upset by this letter because she knew other employees had conducted work while on sick leave, however there was no indication their sick leave was connected to work-related stress.

Footnote: 18

Although not discussed by the parties, the inability to find this report was hindered by the fact Grievant had not given it to any of the people she listed on the cover sheet. Because DOE had not been able to find the report, and the teacher's attorney had to submit various requests for this information, DOE made an offer to pay attorney fees. Grt. No. 3 at Level IV.

Footnote: 19

It should be noted that Dr. Cain was on sick leave for a least six weeks during the Summer of 2002.

Footnote: 20

Although this statement was not discussed by the parties, this testimony was untruthful. See Findings of

Fact 10 & 19.

Footnote: 21

Grievant had asserted she has been treated unjustly by Respondent, and she had been harassed, subjected to retaliation, and treated in a discriminatory manner, while other employees were treated more favorably. These issues will not be addressed as Grievant is an at-will employee. See Findings of Fact 2 & 3.

Footnote: 22

The United States Merit System Protection Board Handbook ("MSPB Handbook") set out these as factors to examine when assessing credibility. Harold J. Asher and William C. Jackson, Representing the Agency before the United States Merit Systems Protection Board 152-53 (1984).

Footnote: 23

It is noted that a problem occurred later, but the point is she was to turn it in a week in advance and she did not.

Footnote: 24

Additionally, even if Grievant had been able to demonstrate she was terminated because of her whistle-blowing activities, Respondent has established by a preponderance of the evidence that the same result would have occurred even in the absence of an unlawful motive. Page at Syl. Pt. 8.