

WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

Introduced

Senate Bill 461

By Senators Clements and Rucker

[Introduced January 24, 2023; referred
to the Committee on the Judiciary]

1 A BILL to amend and reenact §6C-2-1, §6C-2-2, §6C-2-3, §6C-2-4, and §6C-2-6 of the Code of
 2 West Virginia, 1931, as amended, all relating to West Virginia public employees grievance
 3 procedure; clarifying that actions by an agency taken during a declared state of
 4 preparedness or emergency are not grievable; requiring a notarized grievance form;
 5 providing that a grievance must be filed within the time limits specified or it may be
 6 dismissed at level one; authorizing refiling of grievances dismissed without prejudice;
 7 extending certain time limits; providing for appeal of dismissed grievances; providing that
 8 the grievance evaluator and the administrative law judge must hold all other proceedings
 9 in abeyance until a ruling on motion to dismiss; adding grounds for dismissal of grievance;
 10 clarifying that grievances may be consolidated so long as the initial grievance has not been
 11 dismissed; providing that proceedings may be rescheduled for good cause shown
 12 including agency attorney no longer employed by agency; requiring that grievant
 13 representatives must provide the names and work location of employees being
 14 represented; requiring that employees must provide the name and contact information of
 15 representative; providing that available annual leave will be charged for work hours used in
 16 preparing for and attending the grievance hearing in excess of certain limits; and clarifying
 17 limitation on representation is limited by work requirements and specifying employer
 18 discretion in those instances.

Be it enacted by the Legislature of West Virginia:

ARTICLE 2. WEST VIRGINIA PUBLIC EMPLOYEES' GRIEVANCE PROCEDURE.

§6C-2-1. Purpose.

1 (a) The purpose of this article is to provide a procedure for the resolution of employment
 2 grievances raised by the public employees of the State of West Virginia, except as otherwise
 3 excluded in this article.

4 (b) Resolving grievances in a fair, efficient, cost-effective, and consistent manner will
 5 maintain good employee morale, enhance employee job performance and better serve the

6 citizens of the State of West Virginia.

7 (c) Nothing in this article prohibits the informal disposition of grievances by stipulation or
8 settlement agreed to in writing by the parties, nor the exercise of any hearing right provided in
9 chapter eighteen or eighteen-a of this code. Parties to grievances shall at all times act in good faith
10 and make every possible effort to resolve disputes at the lowest level of the grievance procedure.

11 ~~(d) Effective July 1, 2007, any reference in this code to the education grievance procedure,~~
12 ~~the state grievance procedure, article twenty-nine, chapter eighteen of this code or article six-a,~~
13 ~~chapter twenty-nine of this code, or any subsection thereof, shall be considered to refer to the~~
14 ~~appropriate grievance procedure pursuant to this article~~

§6C-2-2. Definitions.

1 For the purpose of this article and article three of this chapter:

2 (a) "Board" means the West Virginia Public Employees Grievance Board created in article
3 three of this chapter.

4 (b) "Chief administrator" means, in the appropriate context, the commissioner, chancellor,
5 director, president, secretary or head of any state department, board, commission, agency, state
6 institution of higher education, commission or council, the state superintendent, the county
7 superintendent, the executive director of a regional educational service agency or the director of a
8 multicounty vocational center who is vested with the authority to resolve a grievance. A "chief
9 administrator" includes a designee, with the authority delegated by the chief administrator,
10 appointed to handle any aspect of the grievance procedure as established by this article.

11 (c) "Days" means working days exclusive of Saturday, Sunday, official holidays, and any
12 day in which the employee's workplace is legally closed under the authority of the chief
13 administrator due to weather or other cause provided for by statute, rule, policy or practice.

14 (d) "Discrimination" means any differences in the treatment of similarly situated employees
15 unless the differences are related to the actual job responsibilities of the employees or are agreed
16 to in writing by the employees.

17 (e)(1) "Employee" means any person hired for permanent employment by an employer for
18 a probationary, full- or part-time position.

19 (2) A substitute education employee is considered an "employee" only on matters related
20 to days worked or when there is a violation, misapplication, or misinterpretation of a statute, policy,
21 rule or written agreement relating to the substitute.

22 (3) "Employee" does not mean a member of the West Virginia State Police employed
23 pursuant to §15-2-1 *et seq.* of this code, but does include civilian employees hired by the
24 superintendent of the State Police. "Employee" does not mean an employee of a Constitutional
25 officer unless he or she is covered under the civil service system, an employee of the Legislature
26 or a patient or inmate employed by a state institution.

27 (f) "Employee organization" means an employee advocacy organization with employee
28 members that has filed with the board the name, address, chief officer and membership criteria of
29 the organization.

30 (g) "Employer" means a state agency, department, board, commission, college, university,
31 institution, State Board of Education, Department of Education, county board of education,
32 regional educational service agency or multicounty vocational center, or agent thereof, using the
33 services of an employee as defined in this section.

34 (h) "Favoritism" means unfair treatment of an employee as demonstrated by preferential,
35 exceptional, or advantageous treatment of a similarly situated employee unless the treatment is
36 related to the actual job responsibilities of the employee or is agreed to in writing by the employee.

37 (i)(1) "Grievance" means a claim by an employee alleging a violation, a misapplication, or a
38 misinterpretation of the statutes, policies, rules, or written agreements applicable to the employee
39 including:

40 (i) Any violation, misapplication or misinterpretation regarding compensation, hours, terms
41 and conditions of employment, employment status or discrimination;

42 (ii) Any discriminatory or otherwise aggrieved application of unwritten policies or practices

43 of his or her employer;

44 (iii) Any specifically identified incident of harassment;

45 (iv) Any specifically identified incident of favoritism; or

46 (v) Any action, policy or practice constituting a substantial detriment to or interference with
47 the effective job performance of the employee or the health and safety of the employee.

48 (2) "Grievance" does not mean:

49 (i) Any pension matter or other issue relating to public employees' insurance in accordance
50 with §5-16-1 *et seq.* of this code retirement or any other matter in which the authority to act is not
51 vested with the employer, including without limitation, actions taken by the employer related to
52 declared states of preparedness or states of emergency; or

53 (ii) Any matter relating to the protected classes set forth in §5-11-1 *et seq.* of this code.

54 (j) "Grievance proceeding", "proceeding" or the plural means a conference, level one
55 hearing, mediation, private mediation, private arbitration or level three hearing, or any
56 combination, unless the context clearly indicates otherwise.

57 (k) "Grievant" means an employee or group of similarly situated employees filing a
58 grievance.

59 (l) "Harassment" means repeated or continual disturbance, irritation or annoyance of an
60 employee that is contrary to the behavior expected by law, policy, and profession.

61 (m) "Party" or the plural, means the grievant, intervenor, employer, and the Director of the
62 Division of Personnel or his or her designee, for most state government employee grievances. The
63 Division of Personnel shall not be a party to grievances involving higher education or Department
64 of Transportation employees.

65 (n) "Representative" means any employee organization, fellow employee, attorney, or
66 other person designated by the grievant or intervenor as his or her representative and may not
67 include a supervisor who evaluates the grievant.

68 (o) "Reprisal" means the retaliation of an employer toward a grievant, witness,

69 representative or any other participant in the grievance procedure either for an alleged injury itself
70 or any lawful attempt to redress it.

§6C-2-3. Grievance procedure generally.

1 (a) ~~Time limits~~ *Filing.* --

2 (1) ~~An employee~~ Each grievant shall file a notarized grievance form, duly signed by the
3 grievant, within the time limits specified in this article. If more than one grievant is party to the
4 grievance they may submit one signed and notarized form initiating the grievance. Failure to
5 properly sign and notarize the form will result in immediate dismissal of a grievance, without
6 prejudice. If the initial grievance was timely filed and then dismissed without prejudice, the grievant
7 has five days from receipt of the order of dismissal to refile the grievance. The refiled grievance
8 must meet the requirements of this article and applicable rules of procedure.

9 (2) The specified time limits may be extended to a date certain by ~~mutual written~~
10 ~~agreement and shall~~ the grievance evaluator, mediator, or administrative law judge at the request
11 of any party. The specified time limits shall be extended for cause whenever an agency
12 representative or a grievant is not working because of accident, sickness, death in the immediate
13 family, or other cause for which the agency representative or grievant has approved leave from
14 employment. Grievant representatives who file on behalf of one or more grievants shall provide, as
15 part of the grievance form, the name of each grievant and his or her work location.

16 (b) *Default.* --

17 (1) The grievant or the employer prevails by default if a required response is not made by
18 the grievant or the employer within the time limits established in this article, unless ~~the employer is~~
19 ~~prevented from doing so directly as a result of injury, illness, or a justified delay not caused by~~
20 ~~negligence or intent to delay the grievance process.~~

21 (2) Within 10 days of the default, the grievant or employer may file with the chief
22 administrator a written notice of intent to proceed directly to the next level or to enforce the default.
23 If the chief administrator objects to the default, then the chief administrator may, within five days of

24 the filing of the notice of intent, request a hearing before an administrative law judge for the
25 purpose of stating a defense to the default, as permitted by subdivision (1) of this subsection, or
26 showing that the remedy requested by the prevailing grievant is contrary to law or contrary to
27 proper and available remedies. ~~In making a determination regarding the remedy, the~~ The
28 administrative law judge shall determine whether the remedy is proper, available, and not contrary
29 to law.

30 (3) If the administrative law judge finds that the grievant or the employer has a defense to
31 the default as permitted by subdivision (1) of this subsection or that the remedy is contrary to law or
32 not proper or available at law, the administrative law judge may deny the default or modify the
33 remedy to be granted to comply with the law or otherwise make the grievant or employer whole.

34 (c) *Defenses and limitations.* -

35 (1) ~~*Untimeliness.*— Any assertion that the filing of the grievance at level one was untimely~~
36 ~~shall be made at or before level two.~~ Timeliness – A grievance must be filed within the timeframes
37 established in §6C-2-4 of this code. If the Level 1 evaluator determines that the grievance was not
38 timely filed, an order dismissing the grievance shall be issued. This decision may be appealed to
39 Level 3 and an administrative law judge shall review the order. If the dismissal is upheld an order
40 shall be issued and the grievance shall be removed from the grievance board's docket. If the
41 dismissal is overturned an order shall be entered stating with particularity the facts and the law
42 found to be in error in the order below. The grievance will be returned to Level 1 for disposition. If
43 the grievant proceeds directly to Level 3, the administrative law judge shall make a determination
44 on timeliness prior to scheduling the Level 3 hearing.

45 (2) *Motion to dismiss.* – Any party may, at any time, file a motion to dismiss asserting that
46 the board lacks jurisdiction under §6C-2-2(i) of this code, or that grievant has otherwise failed to
47 state a claim under this article upon which relief may be granted, or that the grievance was not
48 timely filed. Upon filing of such a motion, the chief administrator or administrative law judge shall
49 immediately hold in abeyance all other proceedings, and must, within 10 days of receipt of such

50 filing, issue a ruling on the motion or schedule the motion for a hearing. In no event shall a motion
51 to dismiss be held in abeyance while other proceedings take place.

52 (2) ~~(3)~~ (3) *Back pay.* -- When it is a proper remedy, back pay may only be granted for one year
53 prior to the filing of a grievance, unless the grievant shows, by a preponderance of the evidence,
54 that the employer acted in bad faith in concealing the facts giving rise to the claim for back pay, in
55 which case an 18-month limitation on back pay applies.

56 ~~(3)~~ (4) *Statutory defense.* -- If a party intends to assert the application of any statute, policy,
57 rule, or written agreement as a defense at any level, then a copy of the materials shall be
58 forwarded to all parties.

59 (d) *Withdrawal and reinstatement of grievance.* -- An employee may withdraw a grievance
60 at any time by filing a written notice of withdrawal with the chief administrator or the administrative
61 law judge. The grievance may not be reinstated by the grievant unless reinstatement is granted by
62 the chief administrator or the administrative law judge. If more than one employee is named as a
63 grievant, the withdrawal of one employee does not prejudice the rights of any other employee
64 named in the grievance.

65 (e) *Consolidation and groups of similarly situated employees.* --

66 (1) Grievances may be consolidated at any level by agreement of all parties or at the
67 discretion of the chief administrator or administrative law judge: Provided, That a grievance that
68 has been dismissed under the provisions of subdivisions (1) or (2) of this subsection may not be
69 revived or consolidated with another grievance.

70 (2) Class actions are not permitted. However, a grievance may be filed by one or more
71 employees on behalf of a group of similarly situated employees. Any similarly situated employee
72 shall complete a grievance form stating his or her intent to join the group of similarly situated
73 employees. Only one employee filing a grievance on behalf of similarly situated employees shall
74 be required to participate in the conference or level one hearing.

75 (f) *Intervention.* -- Upon a timely request, any employee may intervene and become a party

76 to a grievance at any level when the employee demonstrates that the disposition of the action may
77 substantially and adversely affect his or her rights or property and that his or her interest is not
78 adequately represented by the existing parties.

79 (g) *Representation and disciplinary action.* --

80 (1) An employee may designate and shall provide the name and contact information for a
81 representative who may be present at any step of the procedure as well as at any meeting that is
82 held with the employee for the purpose of discussing or considering disciplinary action.

83 (2) An employee may not be compelled to testify against himself or herself in a disciplinary
84 grievance hearing.

85 (h) *Reprisal.* -- No reprisal or retaliation of any kind may be taken by an employer against a
86 grievant or any other participant in a grievance proceeding by reason of his or her participation.

87 Reprisal or retaliation constitutes a grievance and any person held responsible is subject to
88 disciplinary action for insubordination.

89 (i) *Improper classification.* -- A supervisor or administrator responsible for a willful act of
90 bad faith toward an employee or who intentionally works an employee out of classification may be
91 subject to disciplinary action, including demotion or discharge.

92 (j) *Forms.* -- The board shall create the forms for filing grievances, giving notice, taking
93 appeals, making reports and recommendations, and all other necessary documents and provide
94 them on the Grievance Board's website to be downloaded for completed and submitted and to
95 chief administrators to make available to any employee upon request.

96 (k) *Discovery.* -- The parties are entitled to copies of all material submitted to the chief
97 administrator or the administrative law judge by any party.

98 (l) *Notice.* -- Reasonable notice of a proceeding shall be sent at least five days prior to the
99 proceeding to all parties and their representatives and shall include the date, time, and place of the
100 proceeding. If an employer causes a proceeding to be postponed without adequate notice to
101 employees who are scheduled to appear during their normal workday, the employees may not

102 suffer any loss in pay for work time lost.

103 (m) *Record.* -- Conferences ~~are not required to~~ may be recorded at the discretion of the
104 grievance evaluator to aid in issuing a decision or report. ~~but all~~ All documents admitted and the
105 decision, agreement or report become part of the record. All the testimony at a level one and level
106 three hearing shall be recorded by mechanical means and a copy of the recording or transcript will
107 provided to any party upon request. The board is responsible for paying for and promptly providing
108 a certified transcript of a level three hearing to the court for a mandamus or appellate proceeding.

109 (n) Grievance decisions and reports. -

110 (1) Any party may propose findings of fact and conclusions of law within 20 days of an
111 arbitration or a level three hearing.

112 (2) A decision, agreement, or report shall be dated, in writing, setting forth the reasons for
113 the decision or outcome and transmitted to the parties and, in a private arbitration, to the board,
114 within the time limits prescribed. If the grievance is not resolved, the written decision or report shall
115 include the address and procedure to appeal to the next level.

116 (o) Scheduling. -- All proceedings shall be scheduled during regular work hours in a
117 convenient location accessible to all parties in accommodation to the parties' normal operations
118 and work schedules. By agreement of the parties, a proceeding may be scheduled at any time or
119 any place. Disagreements shall be decided by the chief administrator or administrative law judge
120 presiding in the case.

121 (p) *Attendance and preparation.* --

122 (1) The grievant, witnesses and an employee representative shall be granted reasonable
123 and necessary time off during working hours to attend grievance proceedings without loss of pay
124 and without charge to annual or compensatory leave credits. Grievants may not be on any type of
125 leave time or worker compensation at the time of the conference, mediation, hearing, or other
126 proceeding. The proceed shall be held in abeyance until the grievant returns to work.

127 (2) In addition to actual time spent attending grievance proceedings, the grievant and an

128 employee representative shall be granted time off during working hours, not to exceed four hours
129 per grievance, for the preparation of the grievance without loss of pay and without charge to
130 annual or compensatory leave credits. However, the first responsibility of any employee is the
131 work assigned to the employee. An employee may not allow grievance preparation and
132 representation activities to seriously affect the overall productivity of the employee as determined
133 by the employer. An employee may be the representative in no more than five grievances per year.
134 Time spent in preparing for and attending grievance proceeding will be accounted for on leave
135 request forms by stating the amount of time expended in such activities. Each employee
136 representative shall request annual leave for any time in excess of four hours per grievance spent
137 in grievance preparation.

138 (3) The grievant and an employee representative shall have access to the employer's
139 equipment for purposes of preparing grievance documents subject to the reasonable rules of the
140 employer governing the use of the equipment for nonwork purposes.

141 (4) Disagreements regarding preparation time shall be decided by the chief administrator
142 or administrative law judge presiding in the case.

143 (q) *Grievance files.* -

144 (1) All grievance forms decisions, agreements, and reports shall be kept in a file separate
145 from the personnel file of the employee and may not become a part of the personnel file, but shall
146 remain confidential except by mutual written agreement of the parties.

147 (2) The grievant may file a written request to have ~~the grievant's~~ his or her identity removed
148 from any files kept by the employer one year following the conclusion of the grievance.

149 (r) *Number of grievances.* -- The number of grievances filed against an employer by an
150 employee is not, per se, an indication of the employer's or the employee's job performance.

151 (s) *Procedures and rules.* -- The board shall prescribe rules and procedures in compliance
152 with this article, article three of this chapter and the state Administrative Procedures Act under
153 chapter 29A of this code for all proceedings relating to the level three grievance procedure. Chief

154 administrators may adopt procedural rules to govern level one proceedings. Chief administrators
 155 and administrative law judges are governed by the West Virginia Ethics Commission's legislative
 156 rule 158 CSR 13, Code of Conduct for Administrative Law Judges.

§6C-2-4. Grievance procedural levels.

1 (a) Level one: Chief administrator. --

2 (1) Within 15 days following the occurrence of the event upon which the grievance is
 3 based, or within 15 days of the date upon which the event became known to the employee, or
 4 within 15 days of the most recent occurrence of a continuing practice giving rise to a grievance, an
 5 employee may file a written grievance with the chief administrator stating the nature of the
 6 grievance and the relief requested and request either a conference or a hearing. The employee
 7 shall also file a copy of the grievance with the board. State government employees utilizing the
 8 services of the Division of Personnel shall further file a copy of the grievance with the Director of
 9 the Division of Personnel. Employees of the Department of Transportation shall file a copy of the
 10 grievance with the Transportation Director of Human Resources.

11 (2) *Conference.* -- The chief administrator shall hold a conference within ~~ten~~ 20 days of
 12 receiving the grievance. A conference is a private, informal meeting between the grievant and the
 13 chief administrator to discuss the issues raised by the grievance, exchange information and
 14 attempt to resolve the grievance. The chief administrator may permit other employees and
 15 witnesses to attend and participate in a conference to reach a resolution. The chief administrator
 16 shall issue a written decision within ~~fifteen~~ 20 days of the conference.

17 (3) *Level one hearing.* -- The chief administrator shall hold a level one hearing within ~~fifteen~~
 18 20 days of receiving the grievance. A level one hearing is a recorded proceeding conducted in
 19 private in which the grievant is entitled to be heard and to present evidence; the formal rules of
 20 evidence and procedure do not apply, but the parties are bound by the rules of privilege
 21 recognized by law. The parties may present and cross-examine witnesses and produce
 22 documents, but the number of witnesses, motions and other procedural matters may be limited by

23 the chief administrator. The chief administrator shall issue a written decision within ~~fifteen~~ 20 days
24 of the level one hearing.

25 (4) An employee may proceed directly to level three upon the agreement of the parties or
26 when the grievant has been discharged, suspended without pay or demoted or reclassified
27 resulting in a loss of compensation or benefits. Level one and level two proceedings are waived in
28 these matters.

29 (b) Level two: Alternative dispute resolution. --

30 (1) Within ~~ten~~ 15 days of receiving an adverse written decision at level one, the grievant
31 shall file a written request for mediation, private mediation, or private arbitration.

32 (2) *Mediation.* -- The board shall schedule the mediation between the parties within 20
33 days of the request. Mediation shall be conducted by an administrative law judge pursuant to
34 standard mediation practices and board procedures at no cost to the parties. Parties may be
35 represented and the representative shall have the authority to resolve the dispute. The report of
36 the mediation shall be documented in writing within ~~45~~ 20 days. Agreements are binding and
37 enforceable in this state by a writ of mandamus.

38 (3) *Private mediation.* -- The parties may agree in writing to retain their choice of a private
39 mediator and share the cost. The mediator shall schedule the mediation within ~~twenty~~ 20 days of
40 the written request and shall follow standard mediation practices and any applicable board
41 procedures. Parties may be represented and shall have the authority to resolve the dispute. The
42 report of the mediation shall be documented in writing within ~~45~~ 20 days. Agreements are binding
43 and enforceable in this state by a writ of mandamus.

44 (4) *Private arbitration.* -- The parties may agree, in writing, to retain their choice of a private
45 arbitrator and share the cost. The arbitrator shall schedule the arbitration within 20 days of the
46 written request and shall follow standard arbitration practices and any applicable board
47 procedures. The arbitrator shall render a decision in writing to all parties, setting forth findings of
48 fact and conclusions of law on the issues submitted within 30 days following the arbitration. An

49 arbitration decision is binding and enforceable in this state by a writ of mandamus. The arbitrator
50 shall inform the board, in writing, of the decision within ~~40~~ 15 days.

51 (c) Level three hearing. --

52 (1) Within 10 days of receiving a written report stating that level two was unsuccessful, the
53 grievant may file a written appeal with the employer and the board requesting a level three hearing
54 on the grievance. State government employees who utilize the services of the Division of
55 Personnel shall further file a copy of the grievance with the Director of the Division of Personnel.
56 Employees of the Department of Transportation shall file a copy of the grievance with the
57 Transportation Director of Human Resources.

58 (2) The administrative law judge shall conduct all proceedings in an impartial manner and
59 shall ensure that all parties are accorded procedural and substantive due process.

60 (3) The administrative law judge shall schedule the level three hearing and any other
61 proceedings or deadlines within ~~a reasonable time~~ 30 days of receipt of the appeal from a lower
62 level decision in consultation with the parties. The location of the hearing and whether the hearing
63 is to be made public are at the discretion of the administrative law judge. Hearings may be
64 rescheduled at the request of either party for good cause shown or by the administrative law judge.

65 (4) The administrative law judge may issue subpoenas for witnesses, limit witnesses,
66 administer oaths and exercise other powers granted by rule or law.

67 (5) Within 30 days following the hearing or the receipt of the proposed findings of fact and
68 conclusions of law, the administrative law judge shall render a decision in writing to all parties
69 setting forth findings of fact and conclusions of law on the issues submitted.

70 (6) The administrative law judge may make a determination of bad faith and, in extreme
71 instances, allocate the cost of the hearing to the party found to be acting in bad faith. The allocation
72 of costs shall be based on the relative ability of the party to pay the costs.

§6C-2-6. Allocation of expenses and attorney's fees.

1 (a) Any expenses incurred relative to the grievance procedure at levels one, two or three

2 shall be borne by the party incurring the expenses.

3 (b) In the event a grievant or employer appeals an adverse level three decision to the
4 ~~circuit court of Kanawha County~~ Intermediate Court of Appeals, or an adverse circuit court
5 decision to the Supreme Court of Appeals of West Virginia, and the grievant appellant
6 substantially prevails upon the appeal, the ~~grievant~~ appellant may recover from the ~~employer~~
7 appellate court costs and reasonable attorney's fees for the appeal to be set by the court.

NOTE: The purpose of this bill is to extend certain time limits throughout the process, to require a notarized grievance form; outline the grievance motion to dismiss procedure; allow employer to develop procedural policy; require adjudicators at all levels to abide by the Code of Conduct for Administrative Law Judges; require disclosure of representatives of employees; require representatives to disclose each employee being represented; charging annual leave for work hours spent preparing for and attending grievances in excess of four hours; and update language to the current drafting requirements.

Strike-throughs indicate language that would be stricken from a heading or the present law and underscoring indicates new language that would be added.