

WEST VIRGINIA LEGISLATURE

2023 REGULAR SESSION

Enrolled

Committee Substitute

for

Senate Bill 461

By Senator Clements and Rucker

[Passed March 11, 2023; in effect 90 days from

passage]

1 AN ACT 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 the West Virginia Public Employees
3 Grievance Procedure; defining terms; clarifying actions or any matter relating to protected
4 classes are not subject to grievances; providing that Division of Personnel may not be a
5 party in certain circumstances; providing for multiple grievant parties; providing a
6 grievance must be filed within the time limits specified or it may be dismissed; extending
7 certain time limits; providing for grievance dismissal for untimeliness, lack of jurisdiction, or
8 failure to state a claim, and appeals of such dismissal; updating default process to include
9 employer; providing the grievance evaluator and the administrative law judge may not hold
10 a motion to dismiss in abeyance while other proceedings take place; clarifying that
11 grievances may be consolidated as long as the initial grievance has not been dismissed;
12 providing that proceedings may be rescheduled for good cause shown; requiring grievant
13 representatives provide the names and work location of employees being represented;
14 requiring that employees provide the name and contact information of his or her
15 representative; directing Grievance Board to make available certain forms; providing that
16 employee annual leave will be charged for work hours used in preparing for and attending
17 the grievance hearing in excess of certain limits; providing for the chief administrator's
18 resolution of certain disputes and further providing for discretionary recording of
19 conference; limiting annual number of grievances an employee may serve as a
20 representative; providing for conference recordings; requiring grievance to be held in
21 abeyance under certain circumstances; clarifying employee representation is limited by
22 work requirements; requiring grievant to provide copies of grievance in certain cases;
23 updating appellate procedure from level three decision; and providing for award of costs
24 and attorney's fees.

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 18 or 18A of this code. Parties to grievances shall always act in good faith and make every
10 possible effort to resolve disputes at the lowest level of the grievance procedure.

§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 causes 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 (A) Any pension matter or other issue relating to public employees' insurance, in
50 accordance with §5-16-1 *et seq.* of this code, retirement, or any other matter in which the authority
51 to act is not vested with the employer;

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

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

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

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

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

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

67 (o) "Reprisal" means the retaliation of an employer toward a grievant, witness,
68 representative, or any other participant in the grievance procedure either for an alleged injury itself
69 or any lawful attempt to redress it.

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

1 (a) *Filing.* —

2 (1) Each grievant shall file a grievance form, signed by the grievant, within the time limits
3 specified in this article. If more than one grievant is a party to the grievance, they may submit one
4 signed form initiating the grievance. Grievant representatives who file on behalf of one or more
5 grievants shall provide, as part of the grievance form, the name of each grievant being
6 represented and his or her work location. Failure to properly sign the form will result in immediate
7 dismissal of a grievance, without prejudice. If the initial grievance was timely filed and then
8 dismissed without prejudice, the grievant has five days from receipt of the order of dismissal to
9 refile the grievance. The refiled grievance must meet the requirements of this article and
10 applicable rules of procedure.

11 (2) The specified time limits may be extended to a date certain by mutual written
12 agreement or the grievance evaluator, mediator, or administrative law judge at the request of any
13 party. The specified time limits shall be extended for cause whenever an agency representative,
14 intervenor, or a grievant is not working because of accident, sickness, death in the immediate
15 family, or other cause for which the agency representative or grievant has approved leave from
16 employment.

17 (b) *Default.* —

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

22 (2) Within 10 days of the default, the grievant or employer may file with the chief

23 administrator a written notice of intent to proceed directly to the next level or to enforce the default.
24 If the chief administrator objects to the default, then the chief administrator may, within five days of
25 the filing of the notice of intent, request a hearing before an administrative law judge for the
26 purpose of stating a defense to the default, as permitted by subdivision (1) of this subsection, or
27 showing that the remedy requested by the prevailing grievant is contrary to law or contrary to
28 proper and available remedies. The administrative law judge shall determine whether the remedy
29 is proper, available, and not contrary 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
32 or 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). *Timeliness.* — A grievance must be filed within the time frames established in §6C-2-4
36 of this code. If the level one evaluator determines that the grievance was not timely filed, an order
37 dismissing the grievance shall be issued. In no event shall a motion to dismiss be held in
38 abeyance while other proceedings take place. This decision may be appealed to level three, and
39 an administrative law judge shall review the order. If the dismissal is upheld an order shall be
40 issued and the grievance shall be removed from the grievance board's docket. If the dismissal is
41 overturned an order shall be entered stating with particularity the facts and the law found to be in
42 error in the order below. The grievance will be returned to level one for disposition. An
43 administrative law judge will decide an appeal of a dismissal for untimeliness within 30 days. If the
44 grievant proceeds directly to level three, the administrative law judge shall make a determination
45 on timeliness prior to scheduling the level three hearing.

46 (2) *Motion to dismiss.* — Any party may, at any time, file a motion to dismiss asserting that
47 the board lacks jurisdiction under §6C-2-2(i) of this code, that the grievant has otherwise failed to
48 state a claim under this article upon which relief may be granted, or that the grievance was not

49 timely filed. Upon filing of such a motion, the chief administrator or administrative law judge shall
50 immediately hold in abeyance all other proceedings, and within 10 days of receipt of filing, issue a
51 ruling on the motion or schedule the motion for a hearing.

52 (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 (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
76 party to a grievance at any level when the employee demonstrates that the disposition of the
77 action may substantially and adversely affect his or her rights or property and that his or her
78 interest is not 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 the
81 individual or organization of the representative who may be present at any step of the procedure,
82 as well as at any meeting that is held with the employee for the purpose of discussing or
83 considering disciplinary action.

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

86 (h) *Reprisal.* — No reprisal or retaliation of any kind may be taken by an employer against
87 a grievant or any other participant in a grievance proceeding by reason of his or her participation.
88 Reprisal or retaliation constitutes a grievance and any person held responsible is subject to
89 disciplinary action for insubordination.

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

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

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

99 (l) *Notice.* — Reasonable notice of a proceeding shall be sent at least five days prior to the
100 proceeding to all parties and their representatives and shall include the date, time, and place of the

101 proceeding. If an employer causes a proceeding to be postponed without adequate notice to
102 employees who are scheduled to appear during their normal workday, the employees may not
103 suffer any loss in pay for work time lost.

104 (m) *Record.* -- Conferences may be recorded at the discretion of the chief administrator for
105 the sole use of aiding in issuing a decision or report. The recording shall not be transcribed, nor will
106 the recording be shared with the parties, or made part of the record. The recording shall be
107 destroyed promptly after the decision has been issued. All documents admitted, and the decision,
108 agreement, or report become part of the record. All the testimony at a level one and level three
109 hearing shall be recorded by mechanical means and a copy of the recording or transcript will be
110 provided to any party upon request. The board is responsible for paying for and promptly providing
111 a certified transcript of a level three hearing to the court for a mandamus or appellate proceeding.

112 (n) *Grievance decisions and reports.* —

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

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

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

124 (p) *Attendance and preparation.* —

125 (1) The grievant, witnesses, and an employee representative shall be granted reasonable
126 and necessary time off during working hours to attend grievance proceedings without loss of pay

127 and without charge to annual or compensatory leave credits. A grievant or an intervenor may not
128 be on any type of leave time or worker compensation at the time of the conference, mediation,
129 hearing, or other proceeding. The proceedings shall be held in abeyance until the grievant returns
130 to work: *Provided*, That, where the grievant has been determined to be unable to return to work,
131 and the grievant's inability to return to work does not render the grievance moot, the grievance
132 proceedings shall be resumed and the grievance resolved upon its merits.

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

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

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

149 (q) *Grievance files.* —

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

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

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

157 (s) *Procedures and rules.* — The board shall prescribe rules and procedures in compliance
158 with this article, article three of this chapter and the state Administrative Procedures Act under
159 chapter 29A of this code for all proceedings relating to the level three grievance procedure. Chief
160 administrators may adopt procedural rules to govern level one proceedings. Chief administrators
161 and administrative law judges are governed by the West Virginia Ethics Commission's legislative
162 Code of Conduct for Administrative Law Judges, rule 158 CSR 13.

§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, within 15 days of the date upon which the event became known to the employee, or within
4 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 using 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 chief administrator or designated grievance evaluator.

11 (2) *Conference.* — The chief administrator shall hold a conference within 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 20 days of the conference.

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

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

28 (b) *Level two: Alternative dispute resolution.* —

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

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

37 (3) *Private mediation.* — The parties may agree in writing to retain their choice of a private
38 mediator and share the cost. The mediator shall schedule the mediation within 20 days of the
39 written request and shall follow standard mediation practices and any applicable board
40 procedures. Parties may be represented and shall have the authority to resolve the dispute. The
41 report of the mediation shall be documented in writing within 20 days. Agreements are binding

42 and enforceable in this state by a writ of mandamus.

43 (4) *Private arbitration.* — The parties may agree, in writing, to retain their choice of a
44 private arbitrator and share the cost. The arbitrator shall schedule the arbitration within 20 days of
45 the written request and shall follow standard arbitration practices and any applicable board
46 procedures. The arbitrator shall render a decision in writing to all parties, setting forth findings of
47 fact and conclusions of law on the issues submitted within 30 days following the arbitration. An
48 arbitration decision is binding and enforceable in this state by a writ of mandamus. The arbitrator
49 shall inform the board, in writing, of the decision within 15 days.

50 (c) *Level three hearing.* —

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

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

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

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

66 (5) Within 30 days following the hearing or the receipt of the proposed findings of fact and
67 conclusions of law, the administrative law judge shall render a decision in writing to all parties

68 setting forth findings of fact and conclusions of law on the issues submitted.

69 (6) The administrative law judge may make a determination of bad faith and, in extreme
70 instances, allocate the cost of the hearing to the party found to be acting in bad faith. The allocation
71 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 Intermediate Court of Appeals, or an adverse Intermediate Court of Appeals decision to the
5 Supreme Court of Appeals of West Virginia, and the appellant substantially prevails upon the
6 appeal, the appellant may recover court costs and reasonable attorney's fees for the appeal to be
7 set by the court: *Provided*, That the provisions of this subsection shall only allow the discretionary
8 recovery of court costs and reasonable attorney's fees from a grievant if he or she has not
9 substantially prevailed at any level of the grievance process or in any appeal to the Intermediate
10 Court of Appeals or the Supreme Court of Appeals of West Virginia.