

ENGROSSED

COMMITTEE SUBSTITUTE

FOR

H. B. 2570

(BY DELEGATE(S) MORGAN, STEPHENS, HARTMAN,
PAXTON, ELDRIDGE AND LYNCH)

(Originating in the Committee on the Judiciary)

[March 29, 2013]

A BILL to amend and reenact §6C-2-2 and §6C-2-3 of the Code of West Virginia, 1931, as amended, all relating to the West Virginia Public Employees Grievance Procedure; adding definition for discovery; requiring agencies to allow reasonable time for representatives to appear; providing for discovery requests; and clarifying that participation in proceedings is considered work time.

Be it enacted by the Legislature of West Virginia:

That §6C-2-2 and §6C-2-3 of the Code of West Virginia, 1931, as amended, be amended and reenacted, all to read as follows:

ARTICLE 2. WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE PROCEDURE.

§6C-2-2. Definitions.

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

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

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

16 (c) “Days” means working days exclusive of Saturday,
17 Sunday, official holidays and any day in which the employee’s
18 workplace is legally closed under the authority of the chief
19 administrator due to weather or other cause provided for by
20 statute, rule, policy or practice.

21 (d) “Discrimination” means any differences in the treatment
22 of similarly situated employees, unless the differences are
23 related to the actual job responsibilities of the employees or are
24 agreed to in writing by the employees.

25 (e) (1) “Employee” means any person hired for permanent
26 employment by an employer for a probationary, full- or part-
27 time position.

28 (2) A “substitute education employee” is considered an
29 “employee” only on matters related to days worked or when
30 there is a violation, misapplication or misinterpretation of a
31 statute, policy, rule or written agreement relating to the substi-
32 tute.

33 (3) “Employee” does not mean a member of the West
34 Virginia State Police employed pursuant to article two, chapter
35 fifteen of this code, but does include civilian employees hired by

36 the Superintendent of the State Police. “Employee” does not
37 mean an employee of a constitutional officer unless he or she is
38 covered under the civil service system, an employee of the
39 Legislature or a patient or inmate employed by a state institution.

40 (f) “Discovery” or “Discovery request” means a written
41 request or motion by a grievant or his or her representative for
42 disclosure of facts, documents or evidence, including written
43 interrogatories and admissions of fact.

44 ~~(f)~~ (g) “Employee organization” means an employee
45 advocacy organization with employee members that has filed
46 with the board the name, address, chief officer and membership
47 criteria of the organization.

48 ~~(g)~~ (h) “Employer” means a state agency, department, board,
49 commission, college, university, institution, State Board of
50 Education, Department of Education, county board of education,
51 regional educational service agency or multicounty vocational
52 center, or agent thereof, using the services of an employee as
53 defined in this section.

54 ~~(h)~~ (i) “Favoritism” means unfair treatment of an employee
55 as demonstrated by preferential, exceptional or advantageous

56 treatment of a similarly situated employee unless the treatment
57 is related to the actual job responsibilities of the employee or is
58 agreed to in writing by the employee.

59 (†) (j) (1) “Grievance” means a claim by an employee
60 alleging a violation, a misapplication or a misinterpretation of
61 the statutes, policies, rules or written agreements applicable to
62 the employee including:

63 (†) (A) Any violation, misapplication or misinterpretation
64 regarding compensation, hours, terms and conditions of employ-
65 ment, employment status or discrimination;

66 (††) (B) Any discriminatory or otherwise aggrieved applica-
67 tion of unwritten policies or practices of his or her employer;

68 (†††) (C) Any specifically identified incident of harassment;

69 (††††) (D) Any specifically identified incident of favoritism; or

70 (†††††) (E) Any action, policy or practice constituting a substan-
71 tial detriment to or interference with the effective job perfor-
72 mance of the employee or the health and safety of the employee.

73 (2) “Grievance” does not mean any pension matter or other
74 issue relating to public employees insurance in accordance with
75 article sixteen, chapter five of this code, retirement or any other

76 matter in which the authority to act is not vested with the
77 employer.

78 ~~(j)~~ (k) “Grievance proceeding”, “proceeding” or the plural
79 means a conference, level one hearing, mediation, private
80 mediation, private arbitration or level three hearing, or any
81 combination, unless the context clearly indicates otherwise.

82 ~~(k)~~ (l) “Grievant” means an employee or group of similarly
83 situated employees filing a grievance.

84 ~~(l)~~ (m) “Harassment” means repeated or continual distur-
85 bance, irritation or annoyance of an employee that is contrary to
86 the behavior expected by law, policy and profession.

87 ~~(m)~~ (n) “Party”, or the plural, means the grievant, intervenor,
88 employer and the Director of the Division of Personnel or his or
89 her designee, for state government employee grievances. The
90 Division of Personnel shall not be a party to grievances involv-
91 ing higher education employees.

92 ~~(n)~~ (o) “Representative” means any employee organization,
93 fellow employee, attorney or other person designated by the
94 grievant or intervenor as his or her representative and may not
95 include a supervisor who evaluates the grievant.

96 (p) “Reprisal” means the retaliation of an employer
97 toward a grievant, witness, representative or any other partici-
98 pant in the grievance procedure either for an alleged injury itself
99 or any lawful attempt to redress it.

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

1 (a) *Time limits.* —

2 (1) An employee shall file a grievance within the time limits
3 specified in this article.

4 (2) The specified time limits may be extended to a date
5 certain by mutual written agreement and shall be extended
6 whenever a grievant is not working because of accident, sick-
7 ness, death in the immediate family or other cause for which the
8 grievant has approved leave from employment.

9 (b) *Default.* —

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

15 (2) Within ten days of the default, the grievant may file with
16 the chief administrator a written notice of intent to proceed

17 directly to the next level or to enforce the default. If the chief
18 administrator objects to the default, then the chief administrator
19 may, within five days of the filing of the notice of intent, request
20 a hearing before an administrative law judge for the purpose of
21 stating a defense to the default, as permitted by subdivision (1)
22 of this subsection, or showing that the remedy requested by the
23 prevailing grievant is contrary to law or contrary to proper and
24 available remedies. In making a determination regarding the
25 remedy, the administrative law judge shall determine whether
26 the remedy is proper, available and not contrary to law.

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

33 (c) *Defenses and limitations.* —

34 (1) *Untimeliness.* — Any assertion that the filing of the
35 grievance at level one was untimely shall be made at or before
36 level two.

37 (2) *Back pay.* — When it is a proper remedy, back pay may
38 only be granted for one year prior to the filing of a grievance,
39 unless the grievant shows, by a preponderance of the evidence,
40 that the employer acted in bad faith in concealing the facts
41 giving rise to the claim for back pay, in which case an eighteen-
42 month limitation on back pay applies.

43 (3) *Statutory defense.* — If a party intends to assert the
44 application of any statute, policy, rule or written agreement as a
45 defense at any level, then a copy of the materials shall be
46 forwarded to all parties.

47 (d) *Withdrawal and reinstatement of grievance.* — An
48 employee may withdraw a grievance at any time by filing a
49 written notice of withdrawal with the chief administrator or the
50 administrative law judge. The grievance may not be reinstated
51 by the grievant unless reinstatement is granted by the chief
52 administrator or the administrative law judge. If more than one
53 employee is named as a grievant, the withdrawal of one em-
54 ployee does not prejudice the rights of any other employee
55 named in the grievance.

56 (e) *Consolidation and groups of similarly situated employ-*
57 *ees.* —

58 (1) Grievances may be consolidated at any level by agree-
59 ment of all parties or at the discretion of the chief administrator
60 or administrative law judge.

61 (2) Class actions are not permitted. However, a grievance
62 may be filed by one or more employees on behalf of a group of
63 similarly situated employees. Any similarly situated employee
64 shall complete a grievance form stating his or her intent to join
65 the group of similarly situated employees. Only one employee
66 filing a grievance on behalf of similarly situated employees shall
67 be required to participate in the conference or level one hearing.

68 (f) *Intervention.* — Upon a timely request, any employee
69 may intervene and become a party to a grievance at any level
70 when the employee demonstrates that the disposition of the
71 action may substantially and adversely affect his or her rights or
72 property and that his or her interest is not adequately represented
73 by the existing parties.

74 (g) *Representation and disciplinary action.* —

75 (1) An employee may designate a representative who may be
76 present at any step of the procedure as well as at any meeting
77 that is held with the employee for the purpose of discussing or
78 considering disciplinary action.

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

81 (3) An agency shall allow an employee reasonable time for
82 a representative to be summoned and appear.

83 (h) *Reprisal.* — No reprisal or retaliation of any kind may be
84 taken by an employer against a grievant or any other participant
85 in a grievance proceeding by reason of his or her participation.
86 Reprisal or retaliation constitutes a grievance and any person
87 held responsible is subject to disciplinary action for insubordina-
88 tion, up to and including termination.

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

94 (j) *Forms.* — The board shall create the forms for filing
95 grievances, giving notice, taking appeals, making reports and
96 recommendations and all other necessary documents and provide
97 them to chief administrators to make available to any employee
98 upon request.

99 (k) *Discovery.* —

100 (1) The parties are entitled to copies of all material submit-
101 ted to the chief administrator or the administrative law judge by
102 any party.

103 (2) A grievant or an employee representative may request
104 discovery in writing prior to any hearing, conference or media-
105 tion. The board shall be July 1, 2013, promulgate a procedural
106 rule regulating the discovery process consistent with and
107 pursuant to article three, chapter twenty-nine-a of the code.

108 (3) Discovery may be requested verbally in any proceeding:
109 Provided, That a grievant may be required to consent in writing
110 to a delay caused by his or her discovery request.

111 (l) *Notice.* — Reasonable notice of a proceeding shall be sent
112 at least five days prior to the proceeding to all parties and their
113 representatives and shall include the date, time and place of the
114 proceeding. If an employer causes a proceeding to be postponed
115 without adequate notice to employees who are scheduled to
116 appear during their normal work day, the employees may not
117 suffer any loss in pay for work time lost.

118 (m) *Record.* — Conferences are not required to be recorded,
119 but all documents admitted and the decision, agreement or report

120 become part of the record. All the testimony at a level one and
121 level three hearing shall be recorded by mechanical means and
122 a copy of the recording provided to any party upon request. The
123 board is responsible for paying for and promptly providing a
124 certified transcript of a level three hearing to the court for a
125 mandamus or appellate proceeding.

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

127 (1) Any party may propose findings of fact and conclusions
128 of law within twenty days of an arbitration or a level three
129 hearing.

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

136 (o) *Scheduling.* —

137 All proceedings shall be scheduled during regular work
138 hours in a convenient location accessible to all parties in
139 accommodation to the parties' normal operations and work

140 schedules. By agreement of the parties, a proceeding may be
141 scheduled at any time or any place. Disagreements shall be
142 decided by the administrative law judge.

143 (p) *Attendance and preparation.* —

144 (1) The grievant, witnesses and an employee representative
145 shall be granted reasonable and necessary time off during
146 working hours to attend grievance proceedings without loss of
147 pay and without charge to annual or compensatory leave credits.

148 (2) In addition to actual time spent attending grievance
149 proceedings, the grievant and an employee representative shall
150 be granted time off during working hours, not to exceed four
151 hours per grievance, for the preparation of the grievance without
152 loss of pay and without charge to annual or compensatory leave
153 credits. However, the first responsibility of any employee is the
154 work assigned to the employee. An employee may not allow
155 grievance preparation and representation activities to seriously
156 affect the overall productivity of the employee.

157 (3) For employees covered by this article who participate as
158 a grievant, witness or representative in any grievance proceeding
159 or at any step of the grievance process, participation shall be

160 compensated as paid work time and the days or any part of the
161 day that the employee participates shall be compensated as if the
162 employee was scheduled to work for the duration of such
163 participation.

164 (↔) (4) The grievant and an employee representative shall
165 have access to the employer's equipment for purposes of
166 preparing grievance documents subject to the reasonable rules of
167 the employer governing the use of the equipment for nonwork
168 purposes.

169 (↔) (5) Disagreements regarding preparation time shall be
170 decided by the administrative law judge.

171 (q) *Grievance files.* —

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

177 (2) The grievant may file a written request to have the
178 grievant's identity removed from any files kept by the employer
179 one year following the conclusion of the grievance.

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

183 (s) *Procedures and rules.* — The board shall prescribe rules
184 and procedures in compliance with this article, article three of
185 this chapter and the State Administrative Procedures Act under
186 chapter twenty-nine-a of this code for all proceedings relating to
187 the grievance procedure.