

SB 780

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WEST VIRGINIA LEGISLATURE
SEVENTY-EIGHTH LEGISLATURE
REGULAR SESSION, 2008



ENROLLED

Senate Bill No. 780

(BY SENATORS BOWMAN, BAILEY, BARNES,
BOLEY, KESSLER, McCABE, MINARD,
PLYMALE, SYPOLT, WHITE AND YODER)

[Passed March 8, 2008; in effect ninety days from passage.]

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OFFICE WEST VIRGINIA
SECRETARY OF STATE

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AN ACT to amend and reenact §6C-2-1, §6C-2-2, §6C-2-3 and §6C-2-4 of the Code of West Virginia, 1931, as amended, all relating to the West Virginia Public Employees Grievance Procedure; clarifying definitions, general provisions and grievance proceedings; defining "conference" and "level one hearing"; increasing time to hold a level one hearing; deleting mediation-arbitration; adding private arbitration; clarifying level three hearing; and making technical corrections.

Be it enacted by the Legislature of West Virginia:

That §6C-2-1, §6C-2-2, §6C-2-3 and §6C-2-4 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-2-1. Purpose.

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

5 (b) Resolving grievances in a fair, efficient, cost-
6 effective and consistent manner will maintain good
7 employee morale, enhance employee job performance
8 and better serve the citizens of the State of West
9 Virginia.

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

18 (d) Effective the first day of July, two thousand seven,
19 any reference in this code to the education grievance
20 procedure, the state grievance procedure, article
21 twenty-nine, chapter eighteen of this code or article six-
22 a, chapter twenty-nine of this code, or any subsection
23 thereof, shall be considered to refer to the appropriate
24 grievance procedure pursuant to this article.

§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
4 Employees Grievance Board created in article three of
5 this chapter.

6 (b) "Chief administrator" means, in the appropriate

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

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

25 (d) "Discrimination" means any differences in the
26 treatment of similarly situated employees, unless the
27 differences are related to the actual job responsibilities
28 of the employees or are agreed to in writing by the
29 employees.

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

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

38 (3) "Employee" does not mean a member of the West
39 Virginia State Police employed pursuant to article two,
40 chapter fifteen of this code, but does include civilian
41 employees hired by the Superintendent of the State
42 Police. "Employee" does not mean an employee of a
43 constitutional officer unless he or she is covered under
44 the civil service system, an employee of the Legislature

45 or a patient or inmate employed by a state institution.

46 (f) "Employee organization" means an employee
47 advocacy organization with employee members that has
48 filed with the board the name, address, chief officer and
49 membership criteria of the organization.

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

56 (h) "Favoritism" means unfair treatment of an
57 employee as demonstrated by preferential, exceptional
58 or advantageous treatment of a similarly situated
59 employee unless the treatment is related to the actual
60 job responsibilities of the employee or is agreed to in
61 writing by the employee.

62 (i) (1) "Grievance" means a claim by an employee
63 alleging a violation, a misapplication or a
64 misinterpretation of the statutes, policies, rules or
65 written agreements applicable to the employee
66 including:

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

70 (ii) Any discriminatory or otherwise aggrieved
71 application of unwritten policies or practices of his or
72 her employer;

73 (iii) Any specifically identified incident of harassment;

74 (iv) Any specifically identified incident of favoritism;
75 or

76 (v) Any action, policy or practice constituting a
77 substantial detriment to or interference with the
78 effective job performance of the employee or the health

79 and safety of the employee.

80 (2) "Grievance" does not mean any pension matter or
81 other issue relating to public employees insurance in
82 accordance with article sixteen, chapter five of this
83 code, retirement or any other matter in which the
84 authority to act is not vested with the employer.

85 (j) "Grievance proceeding", "proceeding" or the plural
86 means a conference, level one hearing, mediation,
87 private mediation, private arbitration or level three
88 hearing, or any combination, unless the context clearly
89 indicates otherwise.

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

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

96 (m) "Party", or the plural, means the grievant,
97 intervenor, employer and the Director of the Division of
98 Personnel or his or her designee, for state government
99 employee grievances. The Division of Personnel shall
100 not be a party to grievances involving higher education
101 employees.

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

107 (o) "Reprisal" means the retaliation of an employer
108 toward a grievant, witness, representative or any other
109 participant in the grievance procedure either for an
110 alleged injury itself 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
3 limits 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
6 extended whenever a grievant is not working because of
7 accident, sickness, death in the immediate family or
8 other cause for which the grievant has approved leave
9 from employment.

10 (b) *Default.* —

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

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

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

38 (c) *Defenses and limitations.* —

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

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

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

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

63 (e) *Consolidation and groups of similarly situated*
64 *employees*. —

65 (1) Grievances may be consolidated at any level by
66 agreement of all parties or at the discretion of the chief
67 administrator or administrative law judge.

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

76 level one hearing.

77 (f) *Intervention.* — Upon a timely request, any
78 employee may intervene and become a party to a
79 grievance at any level when the employee demonstrates
80 that the disposition of the action may substantially and
81 adversely affect his or her rights or property and that
82 his or her interest is not adequately represented by the
83 existing parties.

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

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

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

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

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

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

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

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

119 (m) *Record.* — Conferences are not required to be
120 recorded, but all documents admitted and the decision,
121 agreement or report become part of the record. All the
122 testimony at a level one and level three hearing shall be
123 recorded by mechanical means and a copy of the
124 recording provided to any party upon request. The
125 board is responsible for paying for and promptly
126 providing a certified transcript of a level three hearing
127 to the court for a mandamus or appellate proceeding.

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

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

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

139 (o) *Scheduling.* — All proceedings shall be scheduled
140 during regular work hours in a convenient location
141 accessible to all parties in accommodation to the
142 parties' normal operations and work schedules. By
143 agreement of the parties, a proceeding may be
144 scheduled at any time or any place. Disagreements
145 shall be decided by the administrative law judge.

146 (p) *Attendance and preparation.* —

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

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

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

168 (4) Disagreements regarding preparation time shall be
169 decided by the administrative law judge.

170 (q) *Grievance files.* —

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

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

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

183 performance.

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

§6C-2-4. Grievance procedural levels.

1 (a) *Level one: Chief administrator.* —

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

15 (2) *Conference.* — The chief administrator shall hold
16 a conference within ten days of receiving the grievance.
17 A conference is a private, informal meeting between the
18 grievant and the chief administrator to discuss the
19 issues raised by the grievance, exchange information
20 and attempt to resolve the grievance. The chief
21 administrator may permit other employees and
22 witnesses to attend and participate in a conference to
23 reach a resolution. The chief administrator shall issue
24 a written decision within fifteen days of the conference.

25 (3) *Level one hearing.* — The chief administrator shall
26 hold a level one hearing within fifteen days of receiving
27 the grievance. A level one hearing is a recorded
28 proceeding conducted in private in which the grievant
29 is entitled to be heard and to present evidence; the

30 formal rules of evidence and procedure do not apply,
31 but the parties are bound by the rules of privilege
32 recognized by law. The parties may present and cross-
33 examine witnesses and produce documents, but the
34 number of witnesses, motions and other procedural
35 matters may be limited by the chief administrator. The
36 chief administrator shall issue a written decision within
37 fifteen days of the level one hearing.

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

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

45 (1) Within ten days of receiving an adverse written
46 decision at level one, the grievant shall file a written
47 request for mediation, private mediation or private
48 arbitration.

49 (2) *Mediation.* — The board shall schedule the
50 mediation between the parties within twenty days of the
51 request. Mediation shall be conducted by an
52 administrative law judge pursuant to standard
53 mediation practices and board procedures at no cost to
54 the parties. Parties may be represented and shall have
55 the authority to resolve the dispute. The report of the
56 mediation shall be documented in writing within fifteen
57 days. Agreements are binding and enforceable in this
58 state by a writ of mandamus.

59 (3) *Private mediation.* — The parties may agree in
60 writing to retain their choice of a private mediator and
61 share the cost. The mediator shall schedule the
62 mediation within twenty days of the written request
63 and shall follow standard mediation practices and any
64 applicable board procedures. Parties may be
65 represented and shall have the authority to resolve the
66 dispute. The report of the mediation shall be
67 documented in writing within fifteen days. Agreements

68 are binding and enforceable in this state by a writ of
69 mandamus.

70 (4) *Private arbitration.* — The parties may agree, in
71 writing, to retain their choice of a private arbitrator and
72 share the cost. The arbitrator shall schedule the
73 arbitration within twenty days of the written request
74 and shall follow standard arbitration practices and any
75 applicable board procedures. The arbitrator shall
76 render a decision in writing to all parties, setting forth
77 findings of fact and conclusions of law on the issues
78 submitted within thirty days following the arbitration.
79 An arbitration decision is binding and enforceable in
80 this state by a writ of mandamus. The arbitrator shall
81 inform the board, in writing, of the decision within ten
82 days.

83 (c) *Level three hearing.* —

84 (1) Within ten days of receiving a written report
85 stating that level two was unsuccessful, the grievant
86 may file a written appeal with the employer and the
87 board requesting a level three hearing on the grievance.
88 State government employees shall further file a copy of
89 the grievance with the Director of the Division of
90 Personnel.

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

95 (3) The administrative law judge shall schedule the
96 level three hearing and any other proceedings or
97 deadlines within a reasonable time in consultation with
98 the parties. The location of the hearing and whether the
99 hearing is to be made public are at the discretion of the
100 administrative law judge.

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

104 (5) Within thirty days following the hearing or the
105 receipt of the proposed findings of fact and conclusions
106 of law, the administrative law judge shall render a
107 decision in writing to all parties setting forth findings
108 of fact and conclusions of law on the issues submitted.

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

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

[Signature]
.....
Chairman Senate Committee

[Signature]
.....
Chairman House Committee

Originated in the Senate.

In effect ninety days from passage.

[Signature]
.....
Clerk of the Senate

[Signature]
.....
Clerk of the House of Delegates

[Signature]
.....
President of the Senate

[Signature]
.....
Speaker House of Delegates

The within is approved this
the 28th Day of March, 2008.

[Signature]
.....
Governor

PRESENTED TO THE
GOVERNOR

MAR 24 2008

Time 3:08pm