

1 ENGROSSED

2 COMMITTEE SUBSTITUTE

3 FOR

4 **H. B. 2570**

5 (By Delegates Morgan, Stephens, Hartman,
6 Paxton, Eldridge and Lynch)

7
8 (Originating in the Committee on the Judiciary)

9 [March 29, 2013]

10
11 A BILL to amend and reenact §6C-2-2 and §6C-2-3 of the Code of West
12 Virginia, 1931, as amended, all relating to the West Virginia
13 Public Employees Grievance Procedure; adding definition for
14 discovery; requiring agencies to allow reasonable time for
15 representatives to appear; providing for discovery requests;
16 and clarifying that participation in proceedings is considered
17 work time.

18 *Be it enacted by the Legislature of West Virginia:*

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

21 **ARTICLE 2. WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE PROCEDURE.**

22 **§6C-2-2. Definitions.**

23 For the purpose of this article and article three of this
24 chapter:

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

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

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

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

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

1 position.

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

6 (3) "Employee" does not mean a member of the West Virginia
7 State Police employed pursuant to article two, chapter fifteen of
8 this code, but does include civilian employees hired by the
9 Superintendent of the State Police. "Employee" does not mean an
10 employee of a constitutional officer unless he or she is covered
11 under the civil service system, an employee of the Legislature or
12 a patient or inmate employed by a state institution.

13 (f) "Discovery" or "Discovery request" means a written request
14 or motion by a grievant or his or her representative for disclosure
15 of facts, documents or evidence, including written interrogatories
16 and admissions of fact.

17 ~~(f)~~ (g) "Employee organization" means an employee advocacy
18 organization with employee members that has filed with the board
19 the name, address, chief officer and membership criteria of the
20 organization.

21 ~~(g)~~ (h) "Employer" means a state agency, department, board,
22 commission, college, university, institution, State Board of
23 Education, Department of Education, county board of education,
24 regional educational service agency or multicounty vocational

1 center, or agent thereof, using the services of an employee as
2 defined in this section.

3 ~~(h)~~ (I) "Favoritism" means unfair treatment of an employee as
4 demonstrated by preferential, exceptional or advantageous treatment
5 of a similarly situated employee unless the treatment is related to
6 the actual job responsibilities of the employee or is agreed to in
7 writing by the employee.

8 ~~(i)~~ (j) (1) "Grievance" means a claim by an employee alleging
9 a violation, a misapplication or a misinterpretation of the
10 statutes, policies, rules or written agreements applicable to the
11 employee including:

12 ~~(i)~~ (A) Any violation, misapplication or misinterpretation
13 regarding compensation, hours, terms and conditions of employment,
14 employment status or discrimination;

15 ~~(ii)~~ (B) Any discriminatory or otherwise aggrieved application
16 of unwritten policies or practices of his or her employer;

17 ~~(iii)~~ (C) Any specifically identified incident of harassment;

18 ~~(iv)~~ (D) Any specifically identified incident of favoritism;

19 or

20 ~~(v)~~ (E) Any action, policy or practice constituting a
21 substantial detriment to or interference with the effective job
22 performance of the employee or the health and safety of the
23 employee.

24 (2) "Grievance" does not mean any pension matter or other

1 issue relating to public employees insurance in accordance with
2 article sixteen, chapter five of this code, retirement or any other
3 matter in which the authority to act is not vested with the
4 employer.

5 ~~(j)~~ (k) "Grievance proceeding", "proceeding" or the plural
6 means a conference, level one hearing, mediation, private
7 mediation, private arbitration or level three hearing, or any
8 combination, unless the context clearly indicates otherwise.

9 ~~(k)~~ (l) "Grievant" means an employee or group of similarly
10 situated employees filing a grievance.

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

14 ~~(m)~~ (n) "Party", or the plural, means the grievant,
15 intervenor, employer and the Director of the Division of Personnel
16 or his or her designee, for state government employee grievances.
17 The Division of Personnel shall not be a party to grievances
18 involving higher education employees.

19 ~~(n)~~ (o) "Representative" means any employee organization,
20 fellow employee, attorney or other person designated by the
21 grievant or intervenor as his or her representative and may not
22 include a supervisor who evaluates the grievant.

23 ~~(o)~~ (p) "Reprisal" means the retaliation of an employer toward
24 a grievant, witness, representative or any other participant in the

1 grievance procedure either for an alleged injury itself or any
2 lawful attempt to redress it.

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

4 (a) *Time limits.* --

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

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

12 (b) *Default.* --

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

18 (2) Within ten days of the default, the grievant may file with
19 the chief administrator a written notice of intent to proceed
20 directly to the next level or to enforce the default. If the chief
21 administrator objects to the default, then the chief administrator
22 may, within five days of the filing of the notice of intent,
23 request a hearing before an administrative law judge for the
24 purpose of stating a defense to the default, as permitted by

1 subdivision (1) of this subsection, or showing that the remedy
2 requested by the prevailing grievant is contrary to law or contrary
3 to proper and available remedies. In making a determination
4 regarding the remedy, the administrative law judge shall determine
5 whether the remedy is proper, available and not contrary to law.

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

12 (c) *Defenses and limitations.* --

13 (1) *Untimeliness.* -- Any assertion that the filing of the
14 grievance at level one was untimely shall be made at or before
15 level two.

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

22 (3) *Statutory defense.* -- If a party intends to assert the
23 application of any statute, policy, rule or written agreement as a
24 defense at any level, then a copy of the materials shall be

1 forwarded to all parties.

2 (d) *Withdrawal and reinstatement of grievance.* -- An employee
3 may withdraw a grievance at any time by filing a written notice of
4 withdrawal with the chief administrator or the administrative law
5 judge. The grievance may not be reinstated by the grievant unless
6 reinstatement is granted by the chief administrator or the
7 administrative law judge. If more than one employee is named as a
8 grievant, the withdrawal of one employee does not prejudice the
9 rights of any other employee named in the grievance.

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

11 --

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

15 (2) Class actions are not permitted. However, a grievance may
16 be filed by one or more employees on behalf of a group of similarly
17 situated employees. Any similarly situated employee shall complete
18 a grievance form stating his or her intent to join the group of
19 similarly situated employees. Only one employee filing a grievance
20 on behalf of similarly situated employees shall be required to
21 participate in the conference or level one hearing.

22 (f) *Intervention.* -- Upon a timely request, any employee may
23 intervene and become a party to a grievance at any level when the
24 employee demonstrates that the disposition of the action may

1 substantially and adversely affect his or her rights or property
2 and that his or her interest is not adequately represented by the
3 existing parties.

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

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

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

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

13 (h) *Reprisal.* -- No reprisal or retaliation of any kind may be
14 taken by an employer against a grievant or any other participant in
15 a grievance proceeding by reason of his or her participation.
16 Reprisal or retaliation constitutes a grievance and any person held
17 responsible is subject to disciplinary action for insubordination,
18 up to and including termination.

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

23 (j) *Forms.* -- The board shall create the forms for filing
24 grievances, giving notice, taking appeals, making reports and

1 recommendations and all other necessary documents and provide them
2 to chief administrators to make available to any employee upon
3 request.

4 (k) *Discovery.* --

5 (1) The parties are entitled to copies of all material
6 submitted to the chief administrator or the administrative law
7 judge by any party.

8 (2) A grievant or an employee representative may request
9 discovery in writing prior to any hearing, conference or mediation.
10 The board shall by July 1, 2013, promulgate a procedural rule
11 regulating the discovery process consistent with and pursuant to
12 article three, chapter twenty-nine-a of the code.

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

16 (l) *Notice.* -- Reasonable notice of a proceeding shall be sent
17 at least five days prior to the proceeding to all parties and their
18 representatives and shall include the date, time and place of the
19 proceeding. If an employer causes a proceeding to be postponed
20 without adequate notice to employees who are scheduled to appear
21 during their normal work day, the employees may not suffer any loss
22 in pay for work time lost.

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

1 become part of the record. All the testimony at a level one and
2 level three hearing shall be recorded by mechanical means and a
3 copy of the recording provided to any party upon request. The
4 board is responsible for paying for and promptly providing a
5 certified transcript of a level three hearing to the court for a
6 mandamus or appellate proceeding.

7 (n) *Grievance decisions and reports.* --

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

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

16 (o) *Scheduling.* --

17 All proceedings shall be scheduled during regular work hours
18 in a convenient location accessible to all parties in accommodation
19 to the parties' normal operations and work schedules. By agreement
20 of the parties, a proceeding may be scheduled at any time or any
21 place. Disagreements shall be decided by the administrative law
22 judge.

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

24 (1) The grievant, witnesses and an employee representative

1 shall be granted reasonable and necessary time off during working
2 hours to attend grievance proceedings without loss of pay and
3 without charge to annual or compensatory leave credits.

4 (2) In addition to actual time spent attending grievance
5 proceedings, the grievant and an employee representative shall be
6 granted time off during working hours, not to exceed four hours per
7 grievance, for the preparation of the grievance without loss of pay
8 and without charge to annual or compensatory leave credits.
9 However, the first responsibility of any employee is the work
10 assigned to the employee. An employee may not allow grievance
11 preparation and representation activities to seriously affect the
12 overall productivity of the employee.

13 (3) For employees covered by this article who participate as
14 a grievant, witness or representative in any grievance proceeding
15 or at any step of the grievance process, participation shall be
16 compensated as paid work time and the days or any part of the day
17 that the employee participates shall be compensated as if the
18 employee was scheduled to work for the duration of such
19 participation.

20 ~~(3)~~ (4) The grievant and an employee representative shall have
21 access to the employer's equipment for purposes of preparing
22 grievance documents subject to the reasonable rules of the employer
23 governing the use of the equipment for nonwork purposes.

24 ~~(4)~~ (5) Disagreements regarding preparation time shall be

1 decided by the administrative law judge.

2 (q) *Grievance files.* --

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

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

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

14 (s) *Procedures and rules.* -- The board shall prescribe rules
15 and procedures in compliance with this article, article three of
16 this chapter and the State Administrative Procedures Act under
17 chapter twenty-nine-a of this code for all proceedings relating to
18 the grievance procedure.