

**Senate Bill No. 446**

(By Senators Miller, Cann and Laird)

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[Introduced January 29, 2014; referred to the Committee on Labor;  
and then to the Committee on Government Organization.]

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10 A BILL to amend and reenact §6C-2-2 and §6C-2-3 of the Code of West  
11 Virginia, 1931, as amended, all relating to the West Virginia  
12 public employees grievance procedure; adding definition for  
13 "discovery"; requiring agencies to allow reasonable time for  
14 representatives to appear; providing for discovery requests;  
15 increasing possible penalties for acts of reprisal; and  
16 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

1 chapter:

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

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

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

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

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

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

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

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

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

23 ~~(g)~~ (h) "Employer" means a state agency, department, board,

1 commission, college, university, institution, State Board of  
2 Education, Department of Education, county board of education,  
3 regional educational service agency or multicounty vocational  
4 center, or agent thereof, using the services of an employee as  
5 defined in this section.

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

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

15 ~~(i)~~ (A) Any violation, misapplication or misinterpretation  
16 regarding compensation, hours, terms and conditions of employment,  
17 employment status or discrimination;

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

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

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

22 or

23 ~~(v)~~ (E) Any action, policy or practice constituting a

1 substantial detriment to or interference with the effective job  
2 performance of the employee or the health and safety of the  
3 employee.

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

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

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

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

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

22 ~~(n)~~ (o) "Representative" means any employee organization,  
23 fellow employee, attorney or other person designated by the grievant

1 or intervenor as his or her representative and may not include a  
2 supervisor who evaluates the grievant.

3 ~~(o)~~ (p) "Reprisal" means the retaliation of an employer toward  
4 a grievant, witness, representative or any other participant in the  
5 grievance procedure either for an alleged injury itself or any  
6 lawful attempt to redress it.

7 **§6C-2-3. Grievance procedure generally.**

8 (a) *Time limits.* --

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

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

16 (b) *Default.* --

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

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

1 directly to the next level or to enforce the default. If the chief  
2 administrator objects to the default, then the chief administrator  
3 may, within five days of the filing of the notice of intent, request  
4 a hearing before an administrative law judge for the purpose of  
5 stating a defense to the default, as permitted by subdivision (1)  
6 of this subsection, or showing that the remedy requested by the  
7 prevailing grievant is contrary to law or contrary to proper and  
8 available remedies. In making a determination regarding the remedy,  
9 the administrative law judge shall determine whether the remedy is  
10 proper, available and not contrary to law.

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

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

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

21 (2) *Back pay.* -- When it is a proper remedy, back pay may only  
22 be granted for one year prior to the filing of a grievance, unless  
23 the grievant shows, by a preponderance of the evidence, that the

1 employer acted in bad faith in concealing the facts giving rise to  
2 the claim for back pay, in which case an eighteen-month limitation  
3 on back pay applies.

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

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

16 (e) *Consolidation and groups of similarly situated employees.*  
17 --

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

21 (2) Class actions are not permitted. However, a grievance may  
22 be filed by one or more employees on behalf of a group of similarly  
23 situated employees. Any similarly situated employee shall complete



1 a grievance form stating his or her intent to join the group of  
2 similarly situated employees. Only one employee filing a grievance  
3 on behalf of similarly situated employees shall be required to  
4 participate in the conference or level one hearing.

5 (f) *Intervention.* -- Upon a timely request, any employee may  
6 intervene and become a party to a grievance at any level when the  
7 employee demonstrates that the disposition of the action may  
8 substantially and adversely affect his or her rights or property and  
9 that his or her interest is not adequately represented by the  
10 existing parties.

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

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

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

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

20 (h) *Reprisal.* -- No reprisal or retaliation of any kind may be  
21 taken by an employer against a grievant or any other participant in  
22 a grievance proceeding by reason of his or her participation.  
23 Reprisal or retaliation constitutes a grievance and any person held

1 responsible is subject to disciplinary action for insubordination,  
2 up to and including termination.

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

7 (j) *Forms.* -- The board shall create the forms for filing  
8 grievances, giving notice, taking appeals, making reports and  
9 recommendations and all other necessary documents and provide them  
10 to chief administrators to make available to any employee upon  
11 request.

12 (k) *Discovery.* --

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

16 (2) A grievant or an employee representative may request  
17 discovery in writing prior to any hearing, conference or mediation.

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

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

1 proceeding. If an employer causes a proceeding to be postponed  
2 without adequate notice to employees who are scheduled to appear  
3 during their normal work day, the employees may not suffer any loss  
4 in pay for work time lost.

5 (m) *Record.* -- Conferences are not required to be recorded, but  
6 all documents admitted and the decision, agreement or report become  
7 part of the record. All the testimony at a level one and level  
8 three hearing shall be recorded by mechanical means and a copy of  
9 the recording provided to any party upon request. The board is  
10 responsible for paying for and promptly providing a certified  
11 transcript of a level three hearing to the court for a mandamus or  
12 appellate proceeding.

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

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

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

22 (o) *Scheduling.* --

23 All proceedings shall be scheduled during regular work hours

1 in a convenient location accessible to all parties in accommodation  
2 to the parties' normal operations and work schedules. By agreement  
3 of the parties, a proceeding may be scheduled at any time or any  
4 place. Disagreements shall be decided by the administrative law  
5 judge.

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

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

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

20 (3) For employees covered by this article who participate as  
21 a grievant, witness or representative in any grievance proceeding  
22 or at any step of the grievance process, participation shall be  
23 compensated as paid work time and the days or any part of the day

1 that the employee participates shall be compensated as if the  
2 employee was scheduled to work for the duration of such  
3 participation.

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

8 ~~(4)~~ (5) Disagreements regarding preparation time shall be  
9 decided by the administrative law judge.

10 (q) *Grievance files.* --

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

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

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

21 (s) *Procedures and rules.* -- The board shall prescribe rules  
22 and procedures in compliance with this article, article three of  
23 this chapter and the State Administrative Procedures Act under

1 chapter twenty-nine-a of this code for all proceedings relating to  
2 the grievance procedure.

NOTE: The purpose of this bill is to require an agency to allow a grievant a reasonable time for a representative to be summoned and appear, and to clarify that participation in grievance proceedings is considered work time. The bill also adds a definition for discovery and provides for discovery requests and increases possible penalties for acts of reprisal.

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