

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

Introduced

Senate Bill 616

BY SENATOR TRUMP

[Introduced January 24, 2020; referred
to the Committee on Government Organization; and
then to the Committee on the Judiciary]

1 A BILL 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 employment grievance procedure for
3 public employees; clarifying the scope of employee representation; limiting the number
4 of grievances in which an employee representative may participate; restricting an
5 employee representative's participation in disciplinary meetings; clarifying the amount of
6 paid time off allowed for grievance preparation; clarifying that employers are not required
7 to grant access to state vehicles for grievances; providing for an exception to removal of
8 a grievant's identity in employer's files; allowing waiver of the procedural level one in
9 certain circumstances; and allowing the prevailing party in appeals to recover court costs
10 and 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 §18-1-1 *et seq.* or §18A-1-1 *et seq.* of this code. Parties to grievances shall at all times act in
10 good faith and make every possible effort to resolve disputes at the lowest level of the grievance
11 procedure, which is the level one conference set forth in §6C-2-4(a)(2) of this code.

12 (d) Effective July 1, 2007, any reference in this code to the education grievance
13 procedure, the state grievance procedure, §18-29-1 *et seq.* of this code or §29-6A-1 *et seq.* of

14 this code, or any subsection thereof, shall be considered to refer to the appropriate grievance
15 procedure pursuant to this article.

§6C-2-2. Definitions.

1 For the purpose of this article and §6C-3-1 *et seq.* of this code:

2 (a) "Board" means the West Virginia Public Employees Grievance Board created in §6C-
3 3-1 *et seq.* of this code.

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

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

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

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

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

23 (3) "Employee" does not mean a member of the West Virginia State Police employed

24 pursuant to §15-2-1 *et seq.* of this code, but does include civilian employees hired by the
25 superintendent of the State Police. “Employee” does not mean an employee of a Constitutional
26 officer unless he or she is covered under the civil service system, an employee of the
27 Legislature, or a patient or inmate employed by a state institution.

28 (f) “Employee organization” means an employee advocacy organization with employee
29 members that has filed with the board the name, address, chief officer, and membership criteria
30 of the organization.

31 (g) “Employer” means a state agency, department, board, commission, college,
32 university, institution, State Board of Education, Department of Education, county board of
33 education, regional educational service agency or multicounty vocational center, or agent
34 thereof, using the services of an employee as defined in this section.

35 (h) “Favoritism” means unfair treatment of an employee as demonstrated by preferential,
36 exceptional, or advantageous treatment of a similarly situated employee unless the treatment is
37 related to the actual job responsibilities of the employee or is agreed to in writing by the
38 employee.

39 (i) (1) “Grievance” means a claim by an employee alleging a violation, a misapplication,
40 or a misinterpretation of the statutes, policies, rules, or written agreements applicable to the
41 employee including:

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

44 (ii) Any discriminatory or otherwise aggrieved application of unwritten policies or
45 practices of his or her employer;

46 (iii) Any specifically identified incident of harassment;

47 (iv) Any specifically identified incident of favoritism; or

48 (v) Any action, policy, or practice constituting a substantial detriment to or interference
49 with the effective job performance of the employee or the health and safety of the employee.

50 (2) "Grievance" does not mean any pension matter or other issue relating to public
51 employees insurance in accordance with §5-16-1 *et seq.* of this code, retirement, or any other
52 matter in which the authority to act is not vested with the employer.

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
61 the Division of Personnel or his or her designee, for state government employee grievances.
62 The Division of Personnel shall not be a party to grievances involving higher education
63 employees.

64 (n) "Representative" means any employee organization, fellow employee in the same
65 work unit as the grievant, attorney, or other person designated by the grievant or intervenor as
66 his or her representative and may not include a supervisor who evaluates the grievant. Fellow
67 employees are limited to serving as representatives for four grievants per year.

68 (o) "Reprisal" means the retaliation of an employer toward a grievant, witness,
69 representative, or any other participant in the grievance procedure either for an alleged injury
70 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 limits specified in this article.

3 (2) The specified time limits may be extended to a date certain by mutual written
4 agreement and shall be extended whenever a grievant is not working because of accident,

5 sickness, death in the immediate family, or other cause for which the grievant has approved
6 leave from employment.

7 (b) *Default.* –

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

12 (2) Within 10 days of the default, the grievant may file with the chief administrator a
13 written notice of intent to proceed directly to the next level or to enforce the default. If the chief
14 administrator objects to the default, then the chief administrator may, within five days of the filing
15 of the notice of intent, request a hearing before an administrative law judge for the purpose of
16 stating a defense to the default, as permitted by subdivision (1) of this subsection, or showing
17 that the remedy requested by the prevailing grievant is contrary to law or contrary to proper and
18 available remedies. In making a determination regarding the remedy, the administrative law
19 judge shall determine whether the remedy is proper, available, and not contrary to law.

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

24 (c) *Defenses and limitations.* –

25 (1) *Untimeliness.* – Any assertion that the filing of the grievance at level one was
26 untimely shall be made at or before level two.

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

31 (3) *Statutory defense.* – If a party intends to assert the application of any statute, policy,
32 rule, or written agreement as a defense at any level, then a copy of the materials shall be
33 forwarded to all parties.

34 (d) *Withdrawal and reinstatement of grievance.* – An employee may withdraw a
35 grievance at any time by filing a written notice of withdrawal with the chief administrator or the
36 administrative law judge. The grievance may not be reinstated by the grievant unless
37 reinstatement is granted by the chief administrator or the administrative law judge. If more than
38 one employee is named as a grievant, the withdrawal of one employee does not prejudice the
39 rights of any other employee named in the grievance.

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

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

43 (2) Class actions are not permitted. However, a grievance may be filed by one or more
44 employees on behalf of a group of similarly situated employees. Any similarly situated employee
45 shall complete a grievance form stating his or her intent to join the group of similarly situated
46 employees. Only one employee filing a grievance on behalf of similarly situated employees shall
47 be required to participate in the conference or level one hearing.

48 (f) *Intervention.* – Upon a timely request, any employee may intervene and become a
49 party to a grievance at any level when the employee demonstrates that the disposition of the
50 action may substantially and adversely affect his or her rights or property and that his or her
51 interest is not adequately represented by the existing parties.

52 (g) *Representation and disciplinary action.* –

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

56 (2) An employee may not be compelled to testify against himself or herself in a

57 disciplinary grievance hearing.

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

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

65 (j) *Forms*. – The board shall create the forms for filing grievances, giving notice, taking
66 appeals, making reports and recommendations and all other necessary documents and provide
67 them to chief administrators to make available to any employee upon request.

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

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

75 (m) *Record*. – Conferences are not required to be recorded, but all documents admitted
76 and the decision, agreement, or report become part of the record. All the testimony at a level
77 one and level three hearing shall be recorded by mechanical means and a copy of the recording
78 provided to any party upon request. The board is responsible for paying for and promptly
79 providing a certified transcript of a level three hearing to the court for a mandamus or appellate
80 proceeding.

81 (n) *Grievance decisions and reports*. –

82 (1) Any party may propose findings of fact and conclusions of law within 20 days of an

83 arbitration or a level three hearing.

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

88 (o) *Scheduling.* – All proceedings shall be scheduled during regular work hours in a
89 convenient location accessible to all parties in accommodation to the parties' normal operations
90 and work schedules. By agreement of the parties, a proceeding may be scheduled at any time
91 or any place. Disagreements shall be decided by the administrative law judge.

92 (p) *Attendance and preparation.* –

93 (1) The grievant, witnesses, and ~~an~~ fellow employee representative shall be granted
94 reasonable and necessary time off subject to §6C-2-3(p)(3) of this code, during working hours to
95 attend grievance proceedings without loss of pay and without charge to annual or compensatory
96 leave credits.

97 (2) In addition to actual time spent attending grievance proceedings, the grievant and ~~an~~
98 fellow employee representative shall be granted time off during working hours, not to exceed
99 four hours ~~per~~ for all grievance proceedings combined, regardless of how many procedural
100 levels are involved, for the preparation of the grievance without loss of pay and without charge
101 to annual or compensatory leave credits. ~~However, the first responsibility of any employee is the~~
102 ~~work assigned to the employee. An employee may not allow grievance preparation and~~
103 ~~representation activities to seriously affect the overall productivity of the employee~~

104 (3) The first responsibility of any employee is the work assigned to the employee. A
105 fellow employee representative shall not allow grievance representation activities to interfere
106 with the assigned duties and responsibilities of the employee. Fellow employee representatives
107 shall not be permitted to use state work time to perform grievance representation activities if the
108 employing state agency determines that the representation activities interfere with the assigned

109 duties and responsibilities of the fellow employee representative.

110 ~~(3)~~ (4) The grievant and an fellow employee representative shall have access to the
111 employer's equipment for purposes of preparing grievance documents subject to the reasonable
112 rules of the employer governing the use of the equipment for nonwork purposes. Access to the
113 employer's equipment for grievances does not include access to state vehicles.

114 ~~(4)~~ (5) Disagreements regarding preparation time shall be decided by the administrative
115 law judge.

116 (q) *Grievance files.* –

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

120 (2) The grievant may file a written request to have the grievant's identity removed from
121 any files kept by the employer one year following the conclusion of the grievance, except in
122 cases resulting in suspension or termination of the employee.

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

125 (s) *Procedures and rules.* – The board shall prescribe rules and procedures in
126 compliance with this article, §6C-3-1 *et seq.* and the state Administrative Procedures Act under
127 §29-1-1 *et seq.* of this code for all proceedings relating to the grievance procedure.

§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, or within 15 days of the date upon which the event became known to the employee, or
4 within 15 days of the most recent occurrence of a continuing practice giving rise to a grievance,
5 an 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 shall further
8 file a copy of the grievance with the Director of the Division of Personnel.

9 (2) *Conference.* – The chief administrator shall hold a conference within 10 days of
10 receiving the grievance. A conference is a private, informal meeting between the grievant and
11 the chief administrator to discuss the issues raised by the grievance, exchange information, and
12 attempt to resolve the grievance. The chief administrator may permit other employees and
13 witnesses to attend and participate in a conference to reach a resolution. The chief
14 administrator shall issue a written decision within 15 days of the conference.

15 (3) *Level one hearing.* – The chief administrator shall hold a level one hearing within 15
16 days of receiving the grievance. A level one hearing is a recorded proceeding conducted in
17 private in which the grievant is entitled to be heard and to present evidence; the formal rules of
18 evidence and procedure do not apply, but the parties are bound by the rules of privilege
19 recognized by law. The parties may present and cross-examine witnesses and produce
20 documents, but the number of witnesses, motions, and other procedural matters may be limited
21 by the chief administrator. The chief administrator shall issue a written decision within 15 days
22 of the level one hearing.

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

27 (b) Level two: Alternative dispute resolution. –

28 (1) Within 10 days of receiving an adverse written decision at level one, the grievant
29 shall file a written request for mediation, private mediation, or private arbitration.

30 (2) *Mediation.* – The board shall schedule the mediation between the parties within 20
31 days of the request. Mediation shall be conducted by an administrative law judge pursuant to
32 standard mediation practices and board procedures at no cost to the parties. Parties may be

33 represented and shall have the authority to resolve the dispute. The report of the mediation shall
34 be documented in writing within 15 days. Agreements are binding and enforceable in this state
35 by a writ of mandamus.

36 (3) *Private mediation.* – The parties may agree in writing to retain their choice of a
37 private mediator and share the cost. The mediator shall schedule the mediation within 20 days
38 of the written request and shall follow standard mediation practices and any applicable board
39 procedures. Parties may be represented and shall have the authority to resolve the dispute. The
40 report of the mediation shall be documented in writing within 15 days. Agreements are binding
41 and enforceable in this state by a writ of mandamus.

42 (4) *Private arbitration.* – The parties may agree, in writing, to retain their choice of a
43 private arbitrator and share the cost. The arbitrator shall schedule the arbitration within 20 days
44 of the written request and shall follow standard arbitration practices and any applicable board
45 procedures. The arbitrator shall render a decision in writing to all parties, setting forth findings of
46 fact and conclusions of law on the issues submitted within 30 days following the arbitration. An
47 arbitration decision is binding and enforceable in this state by a writ of mandamus. The
48 arbitrator shall inform the board, in writing, of the decision within 10 days.

49 (c) Level three hearing. –

50 (1) Within 10 days of receiving a written report stating that level two was unsuccessful,
51 the grievant may file a written appeal with the employer and the board requesting a level three
52 hearing on the grievance. State government employees shall further file a copy of the grievance
53 with the Director of the Division of Personnel.

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

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

59 administrative law judge.

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

62 (5) Within 30 days following the hearing or the receipt of the proposed findings of fact
63 and conclusions of law, the administrative law judge shall render a decision in writing to all
64 parties setting forth findings of fact and conclusions of law on the issues submitted.

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

§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
2 three 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 circuit court of Kanawha County, or an adverse circuit court decision to the Supreme Court of
5 Appeals of West Virginia, ~~and the grievant substantially prevails upon the appeal, the grievant~~
6 the prevailing party may recover ~~from the employer~~ court costs and reasonable attorney's fees
7 from the opposing party for the appeal to be set by the court.

NOTE: The purpose of this bill is to revise the West Virginia Public Employees Grievance Procedure statute to add clarification and to lessen certain employee grievance representation activities.

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