

# **WEST VIRGINIA LEGISLATURE**

**2020 REGULAR SESSION**

**Committee Substitute**

**for**

**Senate Bill 616**

SENATOR TRUMP, *original sponsor*

[Originating in the Committee on Government  
Organization; reported on February 6, 2020]

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 of  
4 grievances in which an employee representative may participate; restricting an employee  
5 representative's participation in disciplinary meetings; clarifying the amount of paid time  
6 off allowed for grievance preparation; clarifying that employers are not required to grant  
7 access to state vehicles for grievances; providing for an exception to removal of a  
8 grievant's identity in employer's files; allowing waiver of the procedural level one in certain  
9 circumstances; and allowing the prevailing party in appeals to recover court costs and  
10 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 procedure,  
13 the state grievance procedure, §18-29-1 *et seq.* of this code or §29-6A-1 *et seq.* of this code, or

14 any subsection thereof, shall be considered to refer to the appropriate grievance procedure  
15 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, chancellor,  
5 director, president, secretary, or head of any state department, board, commission, agency, state  
6 institution of higher education, commission or council, the state superintendent, the county  
7 superintendent, the executive director of a regional educational service agency, or the director of  
8 a multicounty vocational center who is vested with the authority to resolve a grievance. A "chief  
9 administrator" includes a designee, with the authority delegated by the chief administrator,  
10 appointed to handle any aspect of the grievance procedure as established by this article.

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

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

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

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

22 (3) "Employee" does not mean a member of the West Virginia State Police employed  
23 pursuant to §15-2-1 *et seq.* of this code, but does include civilian employees hired by the

24 superintendent of the State Police. "Employee" does not mean an employee of a Constitutional  
25 officer unless he or she is covered under the civil service system, an employee of the Legislature,  
26 or a patient or inmate employed by a state institution.

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

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

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

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

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

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

44 (iii) Any specifically identified incident of harassment;

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

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

48 (2) "Grievance" does not mean any pension matter or other issue relating to public  
49 employees insurance in accordance with §5-16-1 *et seq.* of this code, retirement, or any other

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

51 (j) "Grievance proceeding," "proceeding" or the plural means a conference, level one  
52 hearing, mediation, private mediation, private arbitration, or level three hearing, or any  
53 combination, unless the context clearly indicates otherwise.

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

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

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

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

65 (o) "Reprisal" means the retaliation of an employer toward a grievant, witness,  
66 representative, or any other participant in the grievance procedure either for an alleged injury itself  
67 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 leave  
6 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 delay  
11 the grievance process.

12           (2) Within 10 days of the default, the grievant may file with the chief administrator a written  
13 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 that  
17 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 judge  
19 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 be  
23 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 untimely  
26 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 grievance  
35 at any time by filing a written notice of withdrawal with the chief administrator or the administrative  
36 law judge. The grievance may not be reinstated by the grievant unless reinstatement is granted  
37 by the chief administrator or the administrative law judge. If more than one employee is named  
38 as a grievant, the withdrawal of one employee does not prejudice the rights of any other employee  
39 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 party  
49 to a grievance at any level when the employee demonstrates that the disposition of the action  
50 may substantially and adversely affect his or her rights or property and that his or her interest is  
51 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 discussing~~  
55 ~~or considering disciplinary action~~

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

60 Reprisal or retaliation constitutes a grievance and any person held responsible is subject to  
61 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 the  
71 proceeding to all parties and their representatives and shall include the date, time, and place of  
72 the proceeding. If an employer causes a proceeding to be postponed without adequate notice to  
73 employees who are scheduled to appear during their normal work day, the employees may not  
74 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 one  
77 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 providing  
79 a certified transcript of a level three hearing to the court for a mandamus or appellate proceeding.

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

81 (1) Any party may propose findings of fact and conclusions of law within 20 days of an  
82 arbitration or a level three hearing.

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



86 shall include the address and procedure to appeal to the next level.

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

91 (p) *Attendance and preparation.* –

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

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

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

109 (4) Access to the employer's equipment for grievances does not include access to state  
110 vehicles if it is outside the normal course of employment.

111 ~~(3)~~ (5) The grievant and ~~an~~ fellow employee representative shall have access to the

112 employer's equipment for purposes of preparing grievance documents subject to the reasonable  
113 rules of the employer governing the use of the equipment for nonwork purposes.

114 ~~(4)~~ (6) 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 separate  
118 from the personnel file of the employee and may not become a part of the personnel file, but shall  
119 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 cases  
122 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 compliance  
126 with this article, §6C-3-1 *et seq.* and the state Administrative Procedures Act under §29-1-1 *et*  
127 *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 the  
11 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 administrator  
14 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 private  
17 in which the grievant is entitled to be heard and to present evidence; the formal rules of evidence  
18 and procedure do not apply, but the parties are bound by the rules of privilege recognized by law.  
19 The parties may present and cross-examine witnesses and produce documents, but the number  
20 of witnesses, motions, and other procedural matters may be limited by the chief administrator.  
21 The chief administrator shall issue a written decision within 15 days of the level one hearing.

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

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

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

29 (2) *Mediation.* – The board shall schedule the mediation between the parties within 20  
30 days of the request. Mediation shall be conducted by an administrative law judge pursuant to  
31 standard mediation practices and board procedures at no cost to the parties. Parties may be  
32 represented and shall have the authority to resolve the dispute. The report of the mediation shall  
33 be documented in writing within 15 days. Agreements are binding and enforceable in this state  
34 by a writ of mandamus.

35 (3) *Private mediation.* – The parties may agree in writing to retain their choice of a private

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

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

48 (c) Level three hearing. –

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

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

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

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

61 (5) Within 30 days following the hearing or the receipt of the proposed findings of fact and

62 conclusions of law, the administrative law judge shall render a decision in writing to all parties  
63 setting forth findings of fact and conclusions of law on the issues submitted.

64 (6) The administrative law judge may make a determination of bad faith and, in extreme  
65 instances, allocate the cost of the hearing to the party found to be acting in bad faith. The  
66 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 three  
2 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 the~~  
6 prevailing party may recover ~~from the employer~~ court costs and reasonable attorney's fees from  
7 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.