

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

Committee Substitute

for

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for

Senate Bill 616

SENATOR TRUMP, *original sponsor*

[Originating in the Committee on the Judiciary;

reported on February 24, 2020]

1 A BILL to amend and reenact §6C-2-3 and §6C-2-6 of the Code of West Virginia, 1931, as
2 amended, all relating generally to the employment grievance procedure for public
3 employees; limiting the number of grievances in which an employee representative may
4 participate per year; clarifying the amount of time an employee may spend during work
5 hours for grievance preparation; providing that employees and employee representatives
6 may not use state vehicles to travel to and from grievance proceedings or grievance
7 preparation activities; and eliminating provisions authorizing a grievant to recover court
8 costs and attorney's fees for certain grievance proceedings.

Be it enacted by the Legislature of West Virginia:

ARTICLE 2. WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE PROCEDURE.

§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
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 discussing
55 or considering disciplinary action. An employee may not serve as a representative in more than
56 four grievances per calendar year.

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

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

63 (i) *Improper classification.* — A supervisor or administrator responsible for a willful act of
64 bad faith toward an employee or who intentionally ~~works~~ requires an employee ~~out of~~ to work
65 under an improper classification may be subject to disciplinary action, including demotion or
66 discharge.

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

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

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

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

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

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

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

90 (o) *Scheduling.* — All proceedings shall be scheduled during regular work hours in a
91 convenient location accessible to all parties in accommodation to the parties' normal operations

92 and work schedules. By agreement of the parties, a proceeding may be scheduled at any time or
93 any place. Disagreements shall be decided by the administrative law judge.

94 (p) *Attendance and preparation.* —

95 (1) Subject to subdivision (3) of this subsection, the grievant, witnesses, and an employee
96 representative shall be granted reasonable and necessary time off during working hours to attend
97 grievance proceedings without loss of pay and without charge to annual or compensatory leave
98 credits.

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

106 (3) The first responsibility of any employee is the work assigned to the employee. An
107 employee representative shall not allow grievance representation activities to interfere with the
108 assigned duties and responsibilities of the employee.

109 (4) An employee or employee representative may not use a state vehicle to travel to and
110 from grievance proceedings or grievance preparation activities.

111 ~~(3)~~ (5) The grievant and an employee representative shall have access to the employer's
112 equipment for purposes of preparing grievance documents subject to the reasonable rules of the
113 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 (4) 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.~~

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

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

§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~~
6 ~~may recover from the employer court costs and reasonable attorney's fees for the appeal to be~~
7 ~~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.