

WEST VIRGINIA LEGISLATURE

2021 REGULAR SESSION

Introduced

Senate Bill 601

BY SENATOR RUCKER

[Introduced March 9, 2021; referred
to the Committee on the Judiciary]

1 A BILL to amend and reenact §6C-2-3 and §6C-2-6 of the Code of West Virginia, 1931, as
 2 amended; and to amend and reenact §6C-3-1 of said code, all relating to West Virginia
 3 public employee grievance procedure; requiring a notarized grievance form; outlining the
 4 grievance motion to dismiss procedure; providing for the payment of attorney’s fees; and
 5 providing requirements for West Virginia Public Employees Grievance Board appointees.

Be it enacted by the Legislature of West Virginia:

ARTICLE 2. WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE PROCEDURE.

§6C-2-2. Definitions.

1 For the purpose of this article and article three of this chapter:

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

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 for
 18 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, terms
41 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 with
47 the effective job performance of the employee or the health and safety of the employee.

48 (2) "Grievance" does not mean:

49 (i) Any pension matter or other issue relating to public employees insurance in accordance
50 with §5-16-1 *et seq.* of this code retirement or any other matter in which the authority to act is not
51 vested with the employer, including without limitation, actions taken by the employer in
52 accordance with Executive Orders issued by the Governor related to declared states of
53 preparedness or states of emergency; or

54 (ii) Any matter relating to the protected classes set forth in §5-11-1 *et seq.* of this code.

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

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

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

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

65 (n) "Representative" means any employee organization, fellow employee, attorney or
66 other person designated by the grievant or intervenor as his or her representative and may not
67 include a supervisor who evaluates the grievant.

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 itself
70 or any lawful attempt to redress it.

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

1 (a) ~~Time limits~~ Filing. --

2 (1) An employee shall file a notarized grievance form, signed by the employee, within the
3 time limits specified in this article. Failure to properly sign and notarize the form will result in
4 immediate dismissal of a grievance, without prejudice.

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

9 (b) *Default.* --

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

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

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

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

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

29 (2) *Motion to dismiss.* -- Any party may, at any time, file a motion to dismiss asserting that
30 the board lacks jurisdiction under §6C-2-2(i) of this code, or that grievant has otherwise failed to
31 state a claim under this article upon which relief may be granted. Upon filing of such a motion, the
32 chief administrator or administrative law judge shall immediately hold in abeyance all other
33 proceedings, and must, within 10 days of receipt of such filing, issue a ruling on the motion or
34 schedule the motion for a hearing. In no event shall a motion to dismiss be held in abeyance while
35 other proceedings take place.

36 ~~(2)~~ (3) *Back pay.* -- When it is a proper remedy, back pay may only be granted for one
37 year prior to the filing of a grievance, unless the grievant shows, by a preponderance of the
38 evidence, that the employer acted in bad faith in concealing the facts giving rise to the claim for
39 back pay, in which case an 18-month limitation on back pay applies.

40 ~~(3)~~ (4) *Statutory defense.* -- If a party intends to assert the application of any statute, policy,
41 rule, or written agreement as a defense at any level, then a copy of the materials shall be
42 forwarded to all parties.

43 (d) *Withdrawal and reinstatement of grievance.* -- An employee may withdraw a grievance
44 at any time by filing a written notice of withdrawal with the chief administrator or the administrative
45 law judge. The grievance may not be reinstated by the grievant unless reinstatement is granted
46 by the chief administrator or the administrative law judge. If more than one employee is named
47 as a grievant, the withdrawal of one employee does not prejudice the rights of any other employee
48 named in the grievance.

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

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

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

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

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

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

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

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

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

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

77 (k) *Discovery.* -- The parties are entitled to copies of all material submitted to the chief

78 administrator or the administrative law judge by any party.

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

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

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

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

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

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

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

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

104 (2) In addition to actual time spent attending grievance proceedings, the grievant and an
105 employee representative shall be granted time off during working hours, not to exceed four hours
106 per grievance, for the preparation of the grievance without loss of pay and without charge to
107 annual or compensatory leave credits. However, the first responsibility of any employee is the
108 work assigned to the employee. An employee may not allow grievance preparation and
109 representation activities to seriously affect the overall productivity of the employee.

110 (3) The grievant and an employee representative shall have access to the employer's
111 equipment for purposes of preparing grievance documents subject to the reasonable rules of the
112 employer governing the use of the equipment for nonwork purposes.

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

115 (q) *Grievance files.* —

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

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

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

123 (s) *Procedures and rules.* -- The board shall prescribe rules and procedures in compliance
124 with this article, article three of this chapter and the state Administrative Procedures Act under
125 chapter 29A of this code for all proceedings relating to the 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: Provided, that upon motion by a prevailing
3 respondent, the grievant may be ordered to pay the respondent's reasonable actual attorney fees

4 and actual costs if the administrative law judge finds that the grievance lacked substantial
5 justification; the grievance was not brought in good faith; or that the grievance was brought with
6 malice or wrongful purpose, including, but not limited to, delay or harassment.

7 (b) In the event a grievant or employer appeals an adverse level three decision to the
8 circuit court of Kanawha County, or an adverse circuit court decision to the Supreme Court of
9 Appeals of West Virginia, and the grievant substantially prevails upon the appeal, the grievant
10 may recover from the employer court costs and reasonable attorney's fees for the appeal to be
11 set by the court.

ARTICLE 3. WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD.

§6C-3-1. West Virginia Public Employees Grievance Board.

1 (a) Effective June 30, 2007, the Education and State Employees Grievance Board, and
2 the employment of the hearing examiners and administrative law judges under the board,
3 terminate.

4 (b) Effective July 1, 2007, the West Virginia Public Employees Grievance Board is created
5 as an independent entity under the Department of Administration and all references to the
6 Education and State Employees Grievance Board in the code shall be considered to refer to the
7 West Virginia Public Employees Grievance Board.

8 (c) On or before July 1, 2007, the Governor, by and with the advice and consent of the
9 Senate, shall appoint the following five members to the board for the following terms:

10 (1) One person representing the largest labor organization in the state for a term of three
11 years;

12 (2) One person representing an education employee organization in the state for a term
13 of two years;

14 (3) One employer representative from the executive branch for a term of two years;

15 (4) One employer representative from secondary or higher education for a term of three
16 years; and

17 (5) One citizen member, who is not a current employee, employer or a representative of
18 employees in a workplace in the public, educational or higher educational sector of this state, for
19 a term of one year.

20 (d) Upon expiration of the terms of the members set forth in §6C-3-1(c)(1) and §6C-3-
21 1(c)(2) of this code:

22 (i) Whichever term expires first on or after June 30, 2021, shall be succeeded thereafter
23 by a retired circuit judge, appointed by the Governor with the advice and consent of the Senate;
24 and

25 (ii) The remaining member whose term expires thereafter shall be succeeded thereafter
26 by a person representing the largest labor organization in the state or an education employee
27 organization, appointed by the Governor with the advice and consent of the Senate.

28 ~~(d)~~ (e) After the initial appointment, the The board term shall be three years.

29 ~~(e)~~ (f) No member may serve more than two consecutive full terms and any member
30 having served two consecutive full terms may not be appointed for one year after completion of
31 his or her second full term. A member shall continue to serve until his or her successor has been
32 appointed and qualified.

33 ~~(f)~~ (g) A vacancy on the board, whether due to expiration of a full term or for an unexpired
34 term, shall be filled by the Governor by appointment of a like member ~~for the unexpired term~~ of
35 the member whose office is vacant.

36 ~~(g)~~ (h) The membership of the board shall represent each congressional district, with no
37 more than two members from any one district and no more than three members may be from the
38 same political party.

39 ~~(h)~~ (i) Each member of the board, at the time of his or her appointment, must have been
40 a resident of this state for a period of not less than one year immediately preceding the
41 appointment and each member of the board shall remain a resident of this state during the
42 appointment term.

43 ~~(j)~~ (i) The Governor may remove any member from the board for neglect of duty,
44 incompetency, criminal convictions, or official misconduct.

45 ~~(j)~~ (k) Any member of the board immediately and automatically forfeits his or her
46 membership if he or she is convicted of a felony under the laws of any state or the United States,
47 or becomes a nonresident of this state.

48 ~~(k)~~ (l) The board shall hold at least four meetings per year. Other meetings shall be held
49 at the call of the chairperson or upon the written request of two members, at such time and place
50 as designated in the call or request.

51 ~~(l)~~ (m) The board shall designate one of its members as chairperson and one member as
52 secretary-treasurer who shall serve at the will of the board.

53 ~~(m)~~ (n) A majority of the members of the board constitute a quorum.

54 ~~(n)~~ (o) Each member of the board is entitled to receive compensation and expense
55 reimbursement as is accorded legislators in the performance of their duties.

NOTE: The purpose of this bill is to require a notarized grievance form; outline the grievance motion to dismiss procedure; provide for the payment of attorney's fees; and provide requirements for West Virginia Public Employees Grievance Board appointees.

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