WEST virginia legislature

2021 regular session

Committee Substitute

for

Senate Bill 601

By Senator Rucker

[Originating in the Committee on the Judiciary; reported on March 23, 2021]

A BILL to amend and reenact §6C-2-2, §6C-2-3, and §6C-2-6 of the Code of West Virginia, 1931, as amended, all relating to West Virginia public employee grievance procedure; establishing exceptions to the definition of “grievance”; requiring a signed and notarized grievance form; outlining the grievance motion to dismiss procedure; and providing for the payment of attorney’s fees upon a determination that a grievance or defense was brought in bad faith.

Be it enacted by the Legislature of West Virginia:

Article 2. West virginia public employees grievance Procedure.

§6C-2-2. Definitions.

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

(a) “Board” means the West Virginia Public Employees Grievance Board created in ~~article three of this chapter~~ §6C-3-1 *et seq.* of this code.

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

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

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

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

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

(3) “Employee” does not mean a member of the West Virginia State Police employed pursuant to §15-2-1 *et seq*. of this code, but does include civilian employees hired by the superintendent of the state police. “Employee” does not mean an employee of a constitutional officer unless he or she is covered under the civil service system, an employee of the Legislature, or a patient or inmate employed by a state institution.

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

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

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

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

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

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

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

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

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

(2) “Grievance” does not mean:

~~any~~ (A) Any pension matter or other issue relating to public employees insurance in accordance with §5-16-1 *et seq.* of this code, retirement, or any other matter in which the authority to act is not vested with the employer; or

(B) Actions taken by the employer in accordance with Executive Orders issued by the Governor related to declared states of preparedness or states of emergency.

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

(k) “Grievant” means an employee or group of similarly situated employees filing a grievance.

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

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

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

(o) “Reprisal” means the retaliation of an employer toward a grievant, witness, representative, or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.

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

(a) ~~Time limits~~ *Filing*. —

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

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

(b) *Default. —*

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

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

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

(c) *Defenses and limitations*. —

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

(2) *Failure to state a claim.* — Any party may, at any time, file a motion to dismiss asserting that the board lacks jurisdiction under §6C-2-2(i) of this code; that the grievance was untimely; that the grievant has failed to state a claim under this article upon which relief may be granted; or a remedy wholly unavailable to the grievant is requested. Upon filing of the motion, the chief administrator or administrative law judge shall immediately hold in abeyance all other proceedings, and must, within 10 days of receipt of the filing, issue a ruling on the motion or schedule the motion for a hearing. In no event shall a motion to dismiss be held in abeyance while other proceedings take place. Within 10 days of receipt of an order of dismissal, the employee may refile the grievance, in accordance with this article and applicable rules of procedure, if the initial grievance was timely filed.

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

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

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

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

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

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

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

(g) *Representation and disciplinary action. —*

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

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

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

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

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

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

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

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

(n) *Grievance decisions and reports. —*

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

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

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

(p) *Attendance and preparation*. —

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

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

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

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

(q) *Grievance files. —*

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

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

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

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

§6C-2-6. Allocation of expenses and attorney’s fees.

(a) Any expenses incurred relative to the grievance procedure at levels one, two, or three shall be borne by the party incurring the expenses: *Provided*, That the prevailing party at level three may move for and request actual attorney’s fees and costs. If the administrative law judge finds that the opposing party presented a grievance or defense which lacked any basis in fact or law, was not brought in good faith, or was brought with malice or wrongful purpose, including, but not limited to, delay or harassment, then the administrative law judge may award attorney’s fees and costs to the movant.

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