

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]

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

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~~ §6C-3-1 et seq. of this code:

2 (a) “Board” means the West Virginia Public Employees Grievance Board created in ~~article~~
3 ~~three of this chapter~~ §6C-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 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)(A)~~ Any violation, misapplication, or misinterpretation regarding compensation, hours,
41 terms and conditions of employment, employment status, or discrimination;

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

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

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

46 (v) (E) 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:

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

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

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

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

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

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

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

67 (o) "Reprisal" means the retaliation of an employer toward a grievant, witness,
68 representative, or any other participant in the grievance procedure either for an alleged injury itself
69 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 or
3 representative, within the time limits specified in this article. Failure to properly sign and notarize
4 the form will result in 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) *Failure to state a claim.* — Any party may, at any time, file a motion to dismiss asserting
30 that the board lacks jurisdiction under §6C-2-2(i) of this code; that the grievance was untimely;
31 that the grievant has failed to state a claim under this article upon which relief may be granted; or
32 a remedy wholly unavailable to the grievant is requested. Upon filing of the motion, the chief
33 administrator or administrative law judge shall immediately hold in abeyance all other
34 proceedings, and must, within 10 days of receipt of the filing, issue a ruling on the motion or
35 schedule the motion for a hearing. In no event shall a motion to dismiss be held in abeyance while
36 other proceedings take place. Within 10 days of receipt of an order of dismissal, the employee
37 may refile the grievance, in accordance with this article and applicable rules of procedure, if the
38 initial grievance was timely filed.

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

43 ~~(3)~~ (4) *Statutory defense.* — If a party intends to assert the application of any statute,
44 policy, rule, or written agreement as a defense at any level, then a copy of the materials shall be
45 forwarded to all parties.

46 (d) *Withdrawal and reinstatement of grievance.* — An employee may withdraw a grievance
47 at any time by filing a written notice of withdrawal with the chief administrator or the administrative

48 law judge. The grievance may not be reinstated by the grievant unless reinstatement is granted
49 by the chief administrator or the administrative law judge. If more than one employee is named
50 as a grievant, the withdrawal of one employee does not prejudice the rights of any other employee
51 named in the grievance.

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

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

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

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

64 (g) *Representation and disciplinary action.* —

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

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

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

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

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

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

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

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

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

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

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

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

103 (p) *Attendance and preparation.* —

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

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

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

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

118 (q) *Grievance files.* —

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

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

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

126 (s) *Procedures and rules.* — The board shall prescribe rules and procedures in compliance
127 with this article, ~~article three of this chapter~~ §6C-3-1 et seq. of this code, and the state
128 Administrative Procedures Act under ~~chapter 29A~~ §29A-3-1 et seq. of this code for all proceedings
129 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 the prevailing party at level
3 three may move for and request actual attorney’s fees and costs. If the administrative law judge
4 finds that the opposing party presented a grievance or defense which lacked any basis in fact or
5 law, was not brought in good faith, or was brought with malice or wrongful purpose, including, but
6 not limited to, delay or harassment, then the administrative law judge may award attorney’s fees
7 and costs to the movant.

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