

WEST VIRGINIA LEGISLATURE

2022 REGULAR SESSION

ENGROSSED

Committee Substitute

for

Senate Bill 230

BY SENATORS RUCKER AND KARNES

[Originating in the Committee on the Judiciary;

Reported on February 18, 2022]

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 West Virginia public employees
3 grievance procedure; defining terms; providing that Division of Personnel may not be a
4 party in certain circumstances; clarifying actions by an agency taken during a declared
5 state of preparedness or emergency or any matter relating to protected classes are not
6 grievable; requiring a notarized grievance form and providing for multiple grievants;
7 providing a grievance must be filed within the time limits specified or it may be dismissed;
8 extending certain time limits; providing for appeal for grievances dismissed for timeliness
9 or lack of jurisdiction; providing the grievance evaluator and the administrative law judge
10 must hold all other proceedings in abeyance until a ruling on motion to dismiss; clarifying
11 that grievances may be consolidated as long as the initial grievance has not been
12 dismissed; providing that proceedings may be rescheduled for good cause shown;
13 requiring grievant representatives provide the names and work location of employees
14 being represented; requiring that employees provide the name and contact information of
15 his or her representative; requiring Division of Personnel receive copies of grievance in
16 certain cases; providing a prevailing party at level three may recover attorney's fees and
17 costs not to exceed \$1,000; and authorizing an administrative law judge to award
18 attorney's fees and costs based on certain findings.

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 chapter 18 or 18A of this code. Parties to grievances shall at all times act in good faith and make
10 every possible effort to resolve disputes at the lowest level of the grievance procedure.

11 ~~(d) Effective July 1, 2007, any reference in this code to the education grievance procedure,~~
12 ~~the state grievance procedure, article twenty nine, chapter eighteen of this code or article six a,~~
13 ~~chapter twenty nine of this code, or any subsection thereof, shall be considered to refer to the~~
14 ~~appropriate grievance procedure 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 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 (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;

52 (B) Actions taken by the employer related to declared states of preparedness or states of
53 emergency; or

54 (C) 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 or
65 Department of Transportation employees.

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

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

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

1 (a) ~~Time limits~~ Filing. —

2 (1) ~~An employee~~ Each grievant shall file a grievance form, signed by the grievant and
3 notarized within the time limits specified in this article. If more than one grievant is a party to the
4 grievance, each grievant must submit a signed and notarized form initiating the grievance:
5 Provided, That each may submit a signed and notarized signature page appended to the
6 grievance form. Failure to properly sign and notarize the form will result in immediate dismissal of
7 a grievance, without prejudice. Within five days of receipt of an order of dismissal of a grievance
8 without prejudice, the employee may refile the grievance, in accordance with this article and
9 applicable rules of procedure, if the initial grievance was timely filed.

10 (2) The specified time limits may be extended to a date certain by mutual written
11 ~~agreement and shall~~ or the grievance evaluator, mediator, or administrative law judge at the
12 request of any party. The specified time limits shall be extended for cause whenever an agency
13 representative or a grievant is not working because of accident, sickness, death in the immediate
14 family, or other cause for which the agency representative or grievant has approved leave from
15 employment. Grievant representatives who file on behalf of one or more grievants shall provide,
16 as part of the grievance form, the name of each employee and his or her work location for each
17 employee being represented.

18 (b) Default. —

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

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

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

36 (c) *Defenses and limitations.* —

37 (1) ~~*Untimeliness.*— Any assertion that the filing of the grievance at level one was untimely~~
38 ~~shall be made at or before level two.~~ *Timeliness.* — A grievance must be filed within the time
39 frames established in §6C-2-4 of this code. If the level one evaluator determines that the
40 grievance was not timely filed, he or she shall issue an order dismissing the grievance. The
41 grievant may appeal the dismissal to level three, and an administrative law judge shall review the
42 order. If the administrative law judge overturns the order of dismissal, he or she shall issue an
43 order stating with particularity the facts and the law found to be in error in the order below, and
44 the grievance will be returned to level one for disposition. An administrative law judge will decide

45 an appeal of a dismissal for untimeliness within 30 days. If the grievance proceeds directly to
46 level three, the administrative law judge shall make a determination of timeliness prior to
47 proceeding with the level three hearing.

48 (2) Motion to dismiss. — Any party may, at any time, file a motion to dismiss asserting that
49 the board lacks jurisdiction under §6C-2-2(i) of this code, or that grievant has otherwise failed to
50 state a claim under this article upon which relief may be granted, the grievance was not timely
51 filed, or a remedy wholly unavailable to the grievant is requested. Upon filing of such a motion,
52 the chief administrator or administrative law judge shall hold in abeyance all other proceedings,
53 and must, within 10 days of receipt of such filing, issue a ruling on the motion or schedule the
54 motion for a hearing. In no event shall a motion to dismiss be held in abeyance while other
55 proceedings take place.

56 ~~(2)~~ (3) *Back pay.* — When it backpay is a proper remedy, ~~back pay~~ it may only be granted
57 for one year prior to the filing of a grievance unless the grievant shows, by a preponderance of
58 the evidence, that the employer acted in bad faith ~~in concealing~~ or fraudulently concealed the
59 facts giving rise to the claim for back pay, in which case an 18-month limitation on back pay
60 applies.

61 ~~(3)~~ (4) *Statutory defense.* — If a party intends to assert the application of any statute,
62 policy, rule, or written agreement as a defense at any level, then a copy of the materials shall be
63 forwarded to all parties.

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

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

71 (1) Grievances may be consolidated at any level by agreement of all parties or at the
72 discretion of the chief administrator or administrative law judge: Provided, That a grievance that
73 has been dismissed under the provisions of subdivision (1) or (2) of this section may not be
74 revived or consolidated with another grievance.

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

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

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

85 (1) An employee may designate and shall provide the contact information for the individual
86 or organization of the representative who may be present at any step of the procedure as well as
87 at any meeting that is held with the employee for the purpose of discussing or considering
88 disciplinary action.

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

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

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

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

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

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

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

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

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

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

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

124 (p) *Attendance and preparation*. —

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

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

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

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

139 (q) *Grievance files*. —

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

143 (2) The grievant may file a written request to have ~~the grievant's~~ his or her identity removed
144 from any files kept by the employer one year following the conclusion of the grievance.

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

147 (s) *Procedures and rules.* — The board shall prescribe rules and procedures in compliance
148 with this article, §6C-3-1 *et seq.* of this code, and the state Administrative Procedures Act under
149 chapter 29A 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 fifteen 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 using the
8 services of the Division of Personnel shall further file a copy of the grievance with the Director of
9 the Division of Personnel.

10 (2) *Conference.* — The chief administrator shall hold a conference within ~~ten~~ 20 days of
11 receiving the grievance. A conference is a private, informal meeting between the grievant and the
12 chief administrator to discuss the issues raised by the grievance, exchange information, and
13 attempt to resolve the grievance. The chief administrator may permit other employees and
14 witnesses to attend and participate in a conference to reach a resolution. The chief administrator
15 shall issue a written decision within 15 days of the conference.

16 (3) *Level one hearing.* — The chief administrator shall hold a level one hearing within
17 ~~fifteen~~ 20 days of receiving the grievance. A level one hearing is a recorded proceeding conducted
18 in private in which the grievant is entitled to be heard and to present evidence; the formal rules of
19 evidence and procedure do not apply, but the parties are bound by the rules of privilege
20 recognized by law. The parties may present and cross-examine witnesses and produce

21 documents, but the number of witnesses, motions and other procedural matters may be limited
22 by the chief administrator. The chief administrator shall issue a written decision within 15 days of
23 the level one hearing.

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

28 (b) Level two: Alternative dispute resolution. —

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

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

37 (3) *Private mediation.* — The parties may agree in writing to retain their choice of a private
38 mediator and share the cost. The mediator shall schedule the mediation within 20 days of the
39 written request and shall follow standard mediation practices and any applicable board
40 procedures. Parties may be represented and shall have the authority to resolve the dispute. The
41 report of the mediation shall be documented in writing within 15 days. Agreements are binding
42 and enforceable in this state by a writ of mandamus.

43 (4) *Private arbitration.* — The parties may agree, in writing, to retain their choice of a
44 private arbitrator and share the cost. The arbitrator shall schedule the arbitration within 20 days
45 of the written request and shall follow standard arbitration practices and any applicable board
46 procedures. The arbitrator shall render a decision in writing to all parties, setting forth findings of

47 fact and conclusions of law on the issues submitted within 30 days following the arbitration. An
48 arbitration decision is binding and enforceable in this state by a writ of mandamus. The arbitrator
49 shall inform the board, in writing, of the decision within 10 days.

50 (c) *Level three hearing.* —

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

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

57 (3) The administrative law judge shall schedule the level three hearing and any other
58 proceedings or deadlines within ~~a reasonable time~~ 30 days of receipt of the appeal from a lower
59 level decision in consultation with the parties. The location of the hearing and whether the hearing
60 is to be made public are at the discretion of the administrative law judge. Hearings may be
61 rescheduled at the request of either party or the administrative law judge for good cause shown.

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

64 (5) Within 30 days following the hearing or the receipt of the proposed findings of fact and
65 conclusions of law, the administrative law judge shall render a decision in writing to all parties
66 setting forth findings of fact and conclusions of law on the issues submitted.

67 (6) The administrative law judge may make a determination of bad faith and, in extreme
68 instances, allocate the cost of the hearing to the party found to be acting in bad faith. The
69 allocation of costs shall be based on the relative ability of the party to pay the costs.

§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 if the administrative law judge

3 at level three finds that the opposing party presented a grievance or defense which lacked any
4 basis in fact or law, was not brought in good faith, or was brought with malice or wrongful purpose,
5 including, but not limited to, delay or harassment, then the administrative law judge may award
6 the prevailing party actual attorney's fees and costs not to exceed \$1,000.

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.