

# **WEST VIRGINIA LEGISLATURE**

**2023 REGULAR SESSION**

**Introduced**

## **Senate Bill 538**

By Senator Woodrum

[Introduced February 01, 2023; referred  
to the Committee on the Judiciary]

1 A BILL to amend and reenact §6C-2-5, §6C-2-6, and §6C-2-8 of the Code of West Virginia, 1931,  
 2 as amended, all relating to the appellate court for appeals of level three decisions issued  
 3 by the Public Employees Grievance Board.

*Be it enacted by the Legislature of West Virginia:*

**ARTICLE 2. PUBLIC EMPLOYEES GRIEVANCE PROCEDURE.**

**§6C-2-5. Enforcement and appeal.**

1 (a) The decision of the administrative law judge is final upon the parties and is enforceable  
 2 in the ~~circuit court of Kanawha County~~ Intermediate Court of Appeals.

3 (b) A party may appeal the decision of the administrative law judge on the grounds that the  
 4 decision:

5 (1) Is contrary to law or a lawfully adopted rule or written policy of the employer;

6 (2) Exceeds the administrative law judge's statutory authority;

7 (3) Is the result of fraud or deceit;

8 (4) Is clearly wrong in view of the reliable, probative and substantial evidence on the whole  
 9 record; or

10 (5) Is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted  
 11 exercise of discretion.

12 (c) A party shall file the appeal in the ~~circuit court of Kanawha County~~ Intermediate Court of  
 13 Appeals within 30 days of receipt of the administrative law judge's decision. The decision of the  
 14 administrative law judge is not automatically stayed upon the filing of an appeal, but a stay may be  
 15 granted by the ~~circuit court~~ Intermediate Court of Appeals upon a separate motion for a stay.

16 (d) The court shall review the entire record that was before the administrative law judge,  
 17 and the court may hear oral arguments and require written briefs. The court may reverse, vacate  
 18 or modify the decision of the administrative law judge, or may remand the grievance to the  
 19 administrative law judge or the chief administrator for further proceedings.

**§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~~ Intermediate Court of Appeals, or an adverse ~~circuit court~~  
5 Intermediate Court of Appeals decision to the Supreme Court of Appeals of West Virginia, and the  
6 grievant substantially prevails upon the appeal, the grievant may recover from the employer court  
7 costs and reasonable attorney's fees for the appeal to be set by the court.

**§6C-2-8. Employee organizations may not be compelled to disclose certain  
communications; exceptions.**

1 (a) Except as otherwise provided in this section, an employee organization or an agent of  
2 an employee organization may not be compelled to disclose any communication or information the  
3 employee organization or agent received or acquired in confidence from a public employee, while  
4 the employee organization or agent was acting in a representative capacity concerning a public  
5 employee grievance or an investigation of a potential public employee grievance, regardless of  
6 whether the public employee is a member of the employee organization: *Provided*, That the  
7 confidentiality established under this section does not apply to written communications between  
8 the employee and the employee organization.

9 (b) (1) The confidentiality established under this section applies only to the extent that the  
10 communication or information is germane to a grievance or potential grievance of the employee.

11 (2) The confidentiality established under this subsection continues after termination of:

12 (A) The employee's employment; or

13 (B) The representative relationship of the employee organization or its agent with the  
14 public employee.

15 (3) The confidentiality established under this subsection protects the communication or  
16 information received or acquired by the employee organization or its agent, but does not protect  
17 the employee from being compelled to disclose, to the extent provided by law, the facts underlying

18 the communication or information.

19 (c) The protection for confidential communications provided by this section only extends to  
20 proceedings under the public employees grievance procedure. Nothing in this section may be  
21 construed to extend the confidentiality to ~~circuit court~~ Intermediate Court of Appeals proceedings  
22 or other proceedings outside of the public employees grievance procedure.

23 (d) An employee organization or its agent shall disclose to the employer as soon as  
24 possible a communication or information described in subsection (a) of this section to the extent  
25 the employee organization or its agent reasonably believes:

26 (1) It is necessary to prevent certain death or substantial bodily harm.

27 (2) It is necessary to prevent the employee from committing a crime, fraud or any act that is  
28 reasonably certain to result in substantial injury to the financial interests or property of another or  
29 to rectify or mitigate any such action after it has occurred;

30 (3) The communication or information constitutes an admission that the employee has  
31 committed a crime; or

32 (4) It is necessary to comply with a court order or other law.

33 (e) An employee organization or its agent may disclose a communication or information  
34 described in subsection (a) of this section in order to:

35 (1) Secure legal advice about the compliance of the employee organization or its agent  
36 with a court order or other law;

37 (2) Establish a claim or defense on behalf of the employee organization or its agent in a  
38 controversy between the employee and the employee organization or its agent;

39 (3) Establish a defense to a criminal charge or civil claim against the employee  
40 organization or its agent based on conduct in which the employee was involved; or

41 (4) Respond to allegations in any proceeding concerning the performance of professional  
42 duties by the employee organization or its agent on behalf of the employee.

43 (f) An employee organization or its agent may disclose a communication or information

44 described in subsection (a) of this section, without regard to whether the disclosure is made within  
45 the public employees grievance procedure, in the following circumstances:

46 (1) The employee organization has obtained the express written or oral consent of the  
47 employee;

48 (2) The employee has, by other act or conduct, waived the confidentiality of the  
49 communication or information; or

50 (3) The employee is deceased or has been adjudicated incompetent by a court of  
51 competent jurisdiction and the employee organization has obtained the written or oral consent of  
52 the personal representative of the employee's estate or of the employee's guardian.

53 (g) If there is a conflict between the application of this section and any federal or state labor  
54 law, the provisions of the federal or other state law shall control.

NOTE: The purpose of this bill is to is to correct the court for appeals of level 3 decisions. Per SB 275 (2021), effective July 1, 2022, the Intermediate Court of Appeals is the proper appellate court for appeals of level 3 decisions issued by the Public Employees Grievance Board.

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