

CHAPTER 6C. PUBLIC EMPLOYEES.

ARTICLE 2. WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE PROCEDURE.

Section 6C-2-1. Purpose.

- (a) The purpose of this article is to provide a procedure for the resolution of employment grievances raised by the public employees of the State of West Virginia, except as otherwise excluded in this article.
- (b) Resolving grievances in a fair, efficient, cost-effective and consistent manner will maintain good employee morale, enhance employee job performance and better serve the citizens of the State of West Virginia.
- (c) Nothing in this article prohibits the informal disposition of grievances by stipulation or settlement agreed to in writing by the parties, nor the exercise of any hearing right provided in chapter eighteen or eighteen-a of this code.
- (d) Effective the first day of July, two thousand seven, any reference in this code to the education grievance procedure, the state grievance procedure, article twenty-nine, chapter eighteen of this code or article six-a, chapter twenty-nine of this code, or any subsection thereof, shall be considered to refer to the appropriate grievance procedure pursuant to this article.
- (e) Any grievance proceeding which is in process on the effective date of the enactment of this article will be completed as expeditiously as possible, and all outstanding orders for hearings must be completed by the first day of July, two thousand seven. Parties to grievances for which a hearing has not been held may, by agreement, proceed to either level two or level three.

Section 6C-2-2. Definitions.

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

- (a) "Board" means the West Virginia Public Employees Grievance Board created in article three of this chapter.
- (b) "Chief administrator" means, in the appropriate context, the commissioner, chancellor, director, president 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) (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 article two, chapter fifteen 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.

(e) "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.

(f) "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.

(g) (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) Any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination, unless the discrimination is related to the actual job responsibilities of the employee or agreed to in writing by the employee;

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

(iii) Any specifically identified incident of harassment, including repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the demeanor expected by law, policy and profession, or favoritism, including unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another similarly situated employee; or

(iv) 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 pension matter or other issue relating to public employees

insurance in accordance with article sixteen, chapter five of this code, retirement or any other matter in which the authority to act is not vested with the employer.

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

(i) "Party" and "parties" mean the grievant, employer and the Director of the Division of Personnel for state government employee grievances. The Division of Personnel shall not be a party to grievances involving higher education employees.

(j) "Representative" means any employee organization, fellow employee, legal counselor or other person designated by the grievant as the grievant's representative and may not include a supervisor who evaluates the grievant.

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

(a) Time limits. --

(1) An employee shall file a grievance within the time limits specified in this article.

(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 his or her 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 ten 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 request a hearing before an administrative law judge for the purpose of stating a defense to the default, as permitted by subdivision one 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 by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer at or before level two.

(2) Back Pay. -- A one-year statute of limitations applies to the recovery of back pay. In the case of a willful violation by the employer in which it can be shown 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, an eighteen-month statute of limitations applies. Further, a grievant's right to back pay tolls from the time that the grievant has actual or constructive knowledge of his or her right to back pay.

(3) Statutory defense. -- If the employer 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 the grievant and his or her representative.

(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 board. The grievance may not be reinstated by the grievant unless reinstatement is granted by the chief administrator or the board. 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 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, but any similarly situated employee shall indicate in writing 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 level one hearing required in section four of this article.

(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. -- 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.

(h) Reprisal. -- No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in the grievance procedure 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. Further, any 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.

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

(j) Discovery. -- The parties are entitled to copies of all material submitted to the chief administrator or the administrative law judge by any party. All documents submitted become part of the record.

(k) Conferences and Hearings. -

(1) Impartiality. -- The administrative law judge shall conduct all level three hearings in an impartial manner and shall ensure that all parties are accorded procedural and substantive due process.

(2) Closed Conferences and Hearings. -- All conferences and hearings shall be conducted in private. Hearings may be public at level three at the discretion of the administrative law judge.

(3) Evidence. -- All parties may present supportive or corroborative evidence and argument with respect to the grievance at a conference or hearing. Formal rules of evidence do not apply, but parties are bound by the rules of privilege recognized by law, and the rules and procedures established by the board.

(4) Witnesses. -- At level one, the chief administrator may call witnesses and may allow parties to call witnesses during a conference or hearing upon request. The parties have the right to call, examine and cross-examine witnesses during any hearing. Administrative law judges may issue subpoenas for witnesses, limit witnesses, administer oaths and may exercise other powers granted by rule or law. No employee may be compelled to testify against himself or herself in a grievance hearing.

(5) Notice. -- Reasonable notice of a conference or hearing shall be sent at least five days prior to the hearing to all parties and their representatives and shall include the date, time and place of the hearing. If an employer causes a conference or hearing 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.

(6) Location. -- All proceedings shall be at a convenient place accessible to all parties and the location of the level three hearing shall be set by the administrative law judge.

(7) Date and Time. -- Conferences and hearings shall be scheduled within the time frames established at a reasonable time of day in accommodation to the parties' work schedules. Disagreements shall be decided by the board or the administrative law judge.

(8) Record. -- Conferences are not required to be recorded, but all evidence submitted and the decision become part of the record. All the testimony and evidence at a 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 hearing to a requesting party or the court for a mandamus or appellate proceeding.

(l) Grievance decisions. -

(1) Prior to a decision, any party may propose findings of fact and conclusions of law.

(2) Decisions rendered at all levels of the grievance procedure shall be dated, in writing, setting forth the decision or decisions and the reasons for the decision, and transmitted to the board, the employer and the grievant within the time limits prescribed. If the grievant is denied the relief sought, the decision shall include the procedure for the next level of appeal for the grievant.

(m) Preparation time. -

(1) The grievance shall be processed during regular working hours with minimal interference with the normal operations of the employer and schedule of the employee.

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

(3) In addition to actual time spent in grievance conferences and hearings, 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.

(4) 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 non-work purposes.

(5) Disagreements regarding preparation time shall be decided by the board or the presiding administrative law judge.

(n) Grievance files. -

(1) All grievance forms 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.

(o) 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.

(p) Procedures and Rules. -- The board shall prescribe rules and procedures in compliance with this article, article three of this chapter and the State Administrative Procedures Act under chapter twenty-nine-a of this code for all matters relating to the grievance procedure.

Section 6C-2-4. Grievance procedural levels.

(a) Level one: Chief Administrator. -

(1) Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the chief administrator stating the nature of the grievance and the relief requested and request either a conference or a hearing. The employee shall also file a copy of the grievance with the board. State government employees shall further file a copy of the grievance with the Director of the Division of Personnel, who may participate at any level in person or by a designee.

(2) The chief administrator shall hold the conference or hearing, as requested by the grievant, within ten days of receiving the grievance and issue a written decision within fifteen days of the

conference or hearing.

(3) An employee may proceed directly to level three upon the agreement of the employee and the chief administrator or when discharged, suspended without pay or demoted or reclassified resulting in a loss of compensation or benefits.

(b) Level two: Alternative dispute resolution. -

(1) Within ten days of receiving an adverse written decision at level one, the grievant shall file a written request for mediation, private mediation or mediation-arbitration with the board if the grievant desires to continue the grievance process.

(A) Mediation. -- The board shall schedule the mediation between the parties within twenty days of the request. Mediation shall be conducted by an administrative law judge pursuant to standard mediation practices and board procedures at no cost to the parties. Parties may be represented and shall have the authority to resolve the dispute. Agreements reached through mediation shall be documented in writing within fifteen days. Agreements are binding and enforceable in this state by a writ of mandamus.

(B) Private Mediation. -- The parties may agree in writing to retain their choice of a private mediator and share the cost. The mediator shall schedule the mediation within twenty days of the written request and shall follow standard mediation practices and any applicable board procedures. Parties may be represented and shall have the authority to resolve the dispute. Agreements reached through mediation shall be documented in writing within fifteen days. Agreements are binding and enforceable in this state by a writ of mandamus.

(C) Mediation-arbitration. -- The parties may agree in writing to participate in mediation-arbitration. The board shall schedule the mediation-arbitration between the parties within twenty days of the request. Mediation-arbitration shall be conducted by an administrative law judge pursuant to standard mediation and arbitration practices and board procedures, at no cost to the parties. In the event the mediation does not result in a resolution, the mediator may become an arbitrator and proceed to decide the matter. The parties may be represented and may resolve the dispute. Agreements reached through mediation and decisions issued through arbitration are to be documented in writing within fifteen days, and are binding and enforceable in this state by a writ of mandamus.

(2) Neutral Evaluation. -- Within fifteen days of the conclusion of an unsuccessful mediation or mediation-arbitration, the administrative law judge serving as the mediator or mediator-arbitrator may provide a written summary to the parties as a neutral evaluator stating the issues presented, and issue

a scheduling and discovery order that is binding upon the parties in preparation for level three.

(c) Level three: Adjudication. -

(1) Within ten days of receiving a written report stating that alternative dispute resolution at level two was unsuccessful, the grievant may file a written appeal with the employer and the board requesting a hearing and adjudication on the grievance. The administrative law judge shall schedule the hearing, and any other proceedings or deadlines, within a reasonable time in consultation with the parties. State government employees shall also serve a copy of the appeal upon the Director of the Division of Personnel, or his or her designee, who may appear at the hearing and submit oral or written evidence upon matters at issue.

(2) Both the employer and the employee shall at all times act in good faith and make every possible effort to resolve disputes at the lowest level of the grievance procedure. The administrative law judge may make a determination of bad faith and in extreme instances allocate the cost of the hearing to the party found to be acting in bad faith. The allocation of costs shall be based on the relative ability of the party to pay the costs.

(3) Within thirty days following the hearing, the administrative law judge shall render a decision in writing to all parties setting forth findings of fact and conclusions of law on the issues submitted.

Section 6C-2-5. Enforcement and appeal.

(a) The decision of the administrative law judge is final upon the parties and is enforceable in the circuit court of Kanawha County.

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

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

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

(3) Is the result of fraud or deceit;

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

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

(c) A party shall file the appeal in the circuit court of Kanawha County within thirty days of receipt of the administrative law judge's decision. The decision of the administrative law judge is

not automatically stayed upon the filing of an appeal, but a stay may be granted by the circuit court upon a separate motion for a stay.

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

Section 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.

(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.

Section 6C-2-7. Mandamus proceeding.

Any employer failing to comply with the provisions of this article may be compelled to do so by a mandamus proceeding and may be liable to a prevailing party for court costs and reasonable attorney's fees to be set by the court.