WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1985

ENROLLED

Com. Sub. for

HOUSE BILL No. 1970

(By Mr. Del. Murphy, Del. Rogers)

Passed

April 12, 1985

In Effect

July 1, 1985
ENROLLED
COMMITTEE SUBSTITUTE
FOR
H. B. 1970
(By Delegate Murphy and Delegate Rogers)

[Passed April 12, 1985; in effect July 1, 1985.]

AN ACT to amend and reenact sections eight and eleven, article two, chapter eighteen-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to amend chapter eighteen of said code by adding thereto a new article, designated article twenty-nine, all relating to providing a grievance procedure for employees of the board of regents, state institutions of higher education, state board of education, county boards of education, regional educational service agencies and multi-county vocation centers; declaring legislative purpose and intent; defining certain terms; providing for grievance procedures, hearings and appeals generally; designating procedural levels and providing for procedures at each such level; creating and providing for an education employees grievance board; delineating certain powers and duties of said board; providing for hearing examiners; providing for certain powers and duties of such hearing examiners; providing for enforcement and reviewability of decisions of the hearing examiners; providing for the allocation of costs in certain instances; authorizing mandamus proceedings upon failure to comply with the provisions of article twenty-nine of chapter eighteen; providing that employee suspended or dismissed for certain reasons have opportunity to request a hearing pursuant to said article twenty-nine; providing for recovery of attorney’s fees and court costs by
an employee prevailing in either circuit court or supreme court of appeals; and setting limitations upon such attorney's fees.

Be it enacted by the Legislature of West Virginia:

That sections eight and eleven, article two, chapter eighteen-a of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted; and that chapter eighteen of said code be amended by adding thereto a new article, designated article twenty-nine, all to read as follows:

CHAPTER 18. EDUCATION.

ARTICLE 29. GRIEVANCE PROCEDURE.

§18-29-1. Legislative purpose and intent.

The purpose of this article is to provide a procedure for employees of the board of regents, state board of education, county boards of education, regional educational service agencies and multi-county vocational centers and their employer or agents of the employer to reach solutions to problems which arise between them within the scope of their respective employment relationships to the end that good morale may be maintained, effective job performance may be enhanced and the citizens of the community may be better served. This procedure is intended to provide a simple, expeditious and fair process for resolving problems at the lowest possible administrative level and shall be construed to effectuate this purpose. Nothing herein shall prohibit 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 article two, chapter eighteen-a of this code or any other section of chapter eighteen or eighteen-a of this code: Provided, That, employees of the board of regents or of state institutions of higher education shall have the option of filing grievances in accordance with the provisions of this article or in accordance with the provisions of policy, rules and regulations of the board of regents regarding such employees. Any board decision pursuant to such sections may be appealed in accordance with the provisions of this article unless otherwise provided in such section.

§18-29-2. Definitions.

For the purpose of this article:
(a) "Grievance" means any claim by one or more affected employees of the board of regents, state board of education, county boards of education, regional educational service agencies and multi-county vocational centers alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of the board; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective classroom instruction, job performance or the health and safety of students or employees.

Any pension matter or other issue relating to the state teachers retirement system in accordance with article seven-a of this chapter or other retirement system administered outside the jurisdiction of the applicable governing board, any matter relating to public employees insurance in accordance with article sixteen, chapter five of this code, or any other matter in which authority to act is not vested with the employer shall not be the subject of any grievance filed in accordance with the provisions of this article.

(b) "Days" means days of the employee's employment term or prior to or subsequent to such employment term exclusive of Saturday, Sunday, official holidays or school closings in accordance with section two, article five, chapter eighteen-a of this code.

(c) "Employee" means any person hired by an institution either full or part time. A substitute is considered an employee only on matters related to days worked for an institution or when there is a violation, misapplication or misinterpretation of a statute, policy, rule, regulation or written agreement relating to such substitute.

(d) "Grievant" means any named employee or group of named employees filing a grievance as defined in subsection (a) of this section.

(e) "Institution" means any state institution of higher
education, the board of regents, any institution whose
employees are hired by the state board of education including
the department of education, and any public school, regional
educational service agency or multi-county vocational center.

(f) "Employer" means that institution contracting the
services of the employee.

(g) "Immediate supervisor" means that person next in rank
above the grievant possessing a degree of administrative
authority and designated as such in the employee's contract,
if any.

(h) "Chief administrator" means the president of a state
institution of higher education, the chancellor of the board of
regents only as to those employees not assigned to a state
institution of higher education, the state superintendent of
schools as to employees hired by the state board of education,
the county superintendent, the executive director of a regional
educational service agency or the director of a multi-county
vocational center.

(i) "Governing board" means the administrative board of
any state or county educational institution, including
institutions whose employees are hired by the state board of
education, and refers, as is applicable, to the board of regents,
state board of education, county boards of education, the
school board members of any board of directors of a regional
educational service agency or the school board members of any
administrative council of a multi-county vocational center.

(j) "Grievance evaluator" means that individual or govern-
ing board authorized to render a decision on a grievance.

(k) "Board" means the education employees grievance
board.

(l) "Hearing examiner" means the individual or individuals
employed by the board in accordance with section five of this
article.

(m) "Discrimination" means any differences in the treatment
of employees unless such differences are related to the actual
job responsibilities of the employees or agreed to in writing
by the employees.

(n) "Harassment" means repeated or continual disturbance,
irritation or annoyance of an employee which would be
counter to the demeanor expected by law, policy and
profession.

(o) "Favoritism" means unfair treatment of an employee as
demonstrated by preferential, exceptional or advantageous
treatment of another or other employees.

(p) "Reprisal" means the retaliation of an employer or agent
toward a grievant or any other participant in the grievance
procedure either for an alleged injury itself or any lawful
attempt to redress it.

(q) "Employee organization" means any employee advocacy
organization whose membership includes employees as defined
in this section which has filed with the board the name,
address, chief officer and membership criteria of the
organization.

(r) "Representative" means any employee organization,
fellow employee, legal counsel or other person or persons
designated by the grievant as the grievant's representative.


(a) A grievance must be filed within the times specified in
section four of this article and shall be processed as rapidly
as possible. The number of days indicated at each level
specified in section four of this article shall be considered as
the maximum number of days allowed and, if a decision is
not rendered at any level within the prescribed time limits, the
grievant may appeal to the next level: Provided, That the
specified time limits may be extended by mutual written
agreement and shall be extended whenever a grievant is not
working because of such circumstances as provided for in
section ten, article four, chapter eighteen-a of this code.

(b) If the employer or agent intends to assert the applica-
ibility of any statute, policy, rule, regulation or written
agreement or submits any written response to the filed
grievance at any level, a copy thereof shall be forwarded to
the grievant and any representative of the grievant so named
in the filed grievance. Anything so submitted and the grievant's
response thereto, if any, shall become part of the record.
Failure to assert such statute, policy, rule, regulation or written
agreement at any level shall not prevent the subsequent
(c) The grievant may file the grievance at the level vested with authority to grant the requested relief if each lower administrative level agrees in writing thereto. In the event a grievance is filed at a higher level, the employer shall provide copies to each lower administrative level.

(d) An employee may withdraw a grievance at any time by notice, in writing, to the level wherein the grievance is then current. Such grievance may not be reinstated by the grievant unless such reinstatement is granted by the grievance evaluator at the level where the grievance was withdrawn. If more than one employee is named as grievant in a particular grievance, the withdrawal of one employee shall not prejudice the rights of any other employee named in the grievance. In the event a grievance is withdrawn or an employee withdraws from a grievance, such employer shall notify in writing each lower administrative level.

(e) Grievances may be consolidated at any level by agreement of all parties.

(f) An employee may have the assistance of one or more fellow employees, an employee organization representative or representatives, legal counsel or any other person in the preparation and presentation of the grievance. At the request of the grievant, such person or persons may be present at any step of the procedure.

(g) If a grievance is filed which cannot be resolved within the time limits set forth in section four of this article prior to the end of the employment term, the time limit set forth in said section shall be reduced as agreed to in writing by both parties so that the grievance procedure may be concluded within ten days following the end of the employment term or an otherwise reasonable time.

(h) No reprisals of any kind shall be taken by any employer or agent of the employer against any interested party, or any other participant in the grievance procedure by reason of such participation. A reprisal constitutes a grievance, and any person held to be responsible for reprisal action shall be subject to disciplinary action for insubordination.
(i) Except for the informal attempt to resolve the grievance as provided for in subsection (a), section four of this article, decisions rendered at all levels of the grievance procedure shall be dated, shall be in writing setting forth the decision or decisions and the reasons therefor, and shall be transmitted within the time prescribed to the grievant and any representative named in the grievance. If the grievant is denied the relief sought, the decision shall include the name of the individual at the next level to whom appeal may be made.

(j) Once a grievance has been filed, supportive or corroborative evidence may be presented at any conference or hearing conducted pursuant to the provisions of this article. Whether evidence substantially alters the original grievance and renders it a different grievance is within the discretion of the grievance evaluator at the level wherein the new evidence is presented. If the grievance evaluator rules that the evidence renders it a different grievance, the party offering the evidence may withdraw same, the parties may consent to such evidence, or the grievance evaluator may decide to hear the evidence or rule that the grievant must file a new grievance. The time limitations for filing the new grievance shall be measured from the date of such ruling.

(k) Any change in the relief sought by the grievant shall be consented to by all parties or may be granted at level four within the discretion of the hearing examiner.

(l) Forms for filing grievances, giving notice, taking appeals, making reports and recommendations, and all other necessary documents shall be made available by the immediate supervisor to any employee upon request. Such forms shall include information as prescribed by the board. The grievant shall have access to the institution's equipment for purposes of preparing grievance documents subject to the reasonable rules of the employer governing the use of such equipment.

(m) Notwithstanding the provisions of section three, article nine-a, chapter six of this code, or any other provision relating to open proceedings, all conferences and hearings pursuant to this article shall be conducted in private except that, upon the grievant's request, conferences and hearings at levels two and three shall be public. Within the discretion of the hearing examiner, conferences and hearings may be public at level
(n) No person or governing board to which appeal has been made shall confer or correspond with a grievance evaluator at a previous level regarding the merits of the grievance unless all parties to the grievance are present.

(o) Grievances may be processed at any reasonable time, but attempts shall be made to process the grievance in a manner which does not interfere with the normal operation of the institution or with employees' normal working hours. Grievances processed on work time shall not result in any reduction in salary, wages, rate of pay or other benefits of the employee and shall be counted as time worked.

Should any employer or the employer's agent cause a conference or hearing to be postponed without adequate notice to employees who are scheduled to appear during their normal work day, such employees will not suffer any loss in pay for work time lost.

(p) Any grievance evaluator may be excused from participation in the grievance process for reasonable cause, including, but not limited to, conflict of interest or incapacitation, and in such case the grievance evaluator at the next higher level shall designate an alternate grievance evaluator if such is deemed reasonable and necessary.

(q) No less than one year following resolution of a grievance at any level, the grievant may by request in writing have removed any record of the grievance from any file kept by the employer.

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

(s) The number of grievances filed against an employer or agent or by an employee shall not, per se, be an indication of such employer's or agent's or such employee's job performance.

(t) Any chief administrator or governing board of an institution in which a grievance was filed may appeal such decision on the grounds that the decision (1) was contrary to
law or lawfully adopted rule, regulation or written policy of
the chief administrator or governing board, (2) exceeded the
hearing examiner’s statutory authority, (3) was the result of
fraud or deceit, (4) was clearly wrong in view of the reliable,
probative and substantial evidence on the whole record, or (5)
was arbitrary or capricious or characterized by abuse of
discretion. Such appeal shall follow the procedure regarding
appeal provided the grievant in section four of this article and
provided both parties in section seven of this article.

§18-29-4. Procedural levels and procedure at each level.

(a) Level one.

(1) Before a grievance is filed and within fifteen days
following the occurrence of the event upon which the grievance
is based, or within fifteen days of the date on which the event
became known to the grievant or within fifteen days of the
most recent occurrence of a continuing practice giving rise to
a grievance, the grievant or the designated representative shall
schedule a conference with the immediate supervisor to discuss
the nature of the grievance and the action, redress or other
remedy sought.

The conference with the immediate supervisor concerning
the grievance shall be conducted within three days of the
request therefor, and any discussion shall be by the grievant
in the grievant's own behalf or by both the grievant and the
designated representative.

(2) The immediate supervisor shall respond to the grievance
within two days of the conference.

(3) Within ten days of receipt of the response from the
immediate supervisor following the informal conference, a
written grievance may be filed with said supervisor by the
grievant or the designated representative on a form furnished
by the employer or agent.

(4) The immediate supervisor shall state the decision to such
filed grievance within five days after the grievance is filed.

(b) Level two.

Within five days of receiving the decision of the immediate
supervisor, the grievant may appeal the decision to the chief
administrator, and such administrator or his or her designee
shall conduct a hearing in accordance with section six of this
article within five days of receiving the appeal and shall issue
a written decision within five days of such hearing. Such
decision may affirm, modify or reverse the decision appealed
from.

(c) Level three.

Except as to faculty and classified employees of the board
of regents or any state institution of higher education who
shall have the option to proceed directly to level four, within
five days of receiving the decision of the chief administrator,
the grievant may appeal the decision to the governing board
of the institution. Within five days of receiving the appeal,
such governing board may conduct a hearing in accordance
with section six of this article, may review the record submitted
by the chief administrator and render a decision based on such
record, or may waive the right granted herein and shall notify
the grievant of such waiver. Any decision by the governing
board, including a decision to waive participation in the
grievance, must be in writing, and, if a hearing be held under
the provisions of this subsection, the governing board shall
issue a decision affirming, modifying or reversing the decision
of the chief administrator within five days of such hearing.

(d) Level four.

(1) If the grievant is not satisfied with the action taken by
the governing board, within five days of the written decision
the grievant may request, in writing, on a form furnished by
the employer, that the grievance be submitted to a hearing
examiner as provided for in section five of this article, such
hearing to be conducted in accordance with section six of this
article within ten days following the request therefor:  
Provided, however, That such hearing may be held within
thirty days following the request, or within such time as is
mutually agreed upon by the parties, if the hearing examiner
gives reasonable cause, in writing, as to the necessity for such
delay.

(2) Within thirty days following the hearing, the hearing
examiner shall render a decision in writing to all parties setting
forth findings and conclusions on the issues submitted. Subject
to the provisions of section seven of this article, the decision
of the hearing examiner shall be final upon the parties and
§18-29-5. Education employees grievance board; hearing examiners.

(a) There is hereby created and shall be an education employees grievance board which shall consist of three members who shall be citizens of the state appointed by the governor by and with the advice and consent of the Senate for overlapping terms of three years, except that the original appointments shall be for a period of one, two and three years, respectively, commencing on the first day of July, one thousand nine hundred eighty-five. No two members shall be from the same congressional district, and no more than two of the appointed members shall be from the same political party. No person shall be appointed to membership on the board who is a member of any political party executive committee or holds any other public office or public employment under the federal government or under the government of this state. Members shall be eligible for reappointment, and any vacancy on the board shall be filled within thirty days of the vacancy by the governor by appointment for the unexpired term.

A member of the board may not be removed from office except for official misconduct, incompetence, neglect of duty, gross immorality or malfeasance, and then only in the manner prescribed in article six, chapter six of this code for the removal by the Governor of state elected officers.

The board shall hold at least two meetings yearly at such times and places as it may prescribe and may meet at such other times as may be necessary, such meetings to be agreed to in writing by at least two of the members. Members of the board shall each be paid seventy-five dollars for each calendar day devoted to the work of the board, but not more than seven hundred and fifty dollars during any one fiscal year. Each member shall be reimbursed for all reasonable and necessary expenses actually incurred in the performance of board duties, but shall submit a request therefor upon sworn itemized statement.

The board is hereby authorized and required to administer the grievance procedure at level four as provided for in section four of this article and shall employ at least two full-time hearing examiners on an annual basis and such clerical help...
as is necessary to implement the legislative intent expressed in
section one of this article.

The board shall hire hearing examiners who reside in
different regional educational service agency areas unless and
until the number of hearing examiners exceeds the number of
such areas, at which time two hearing examiners may be from
the same such area. These hearing examiners shall serve at the
will and pleasure of the board.

The board shall submit a yearly budget and shall report
annually to the governor and Legislature regarding receipts
and expenditures, number of level four hearings conducted,
synopses of hearing outcomes and such other information as
the board may deem appropriate. The board shall further
evaluate on an annual basis the level four grievance process
and the performance of all hearing examiners and include such
evaluation in the annual report to the governor and
Legislature. In making such evaluation, the board shall notify
all institutions, employee organizations and all grievants
participating in level four grievances in the year for which
evaluation is being made and shall provide for the submission
of written comment and/or the hearing of testimony regarding
the grievance process. The board shall provide suitable office
space for all hearing examiners in space other than that
utilized by any institution as defined in section two of this
article and shall ensure that reference materials are generally
available.

The board is authorized to promulgate rules and regulations
consistent with the provisions of this article, such rules and
regulations to be adopted in accordance with chapter twenty-
ine-a of this code.

(b) Hearing examiners are hereby authorized and shall have
the power to consolidate grievances, allocate costs among the
parties in accordance with section eight of this article,
subpoena witnesses and documents in accordance with the
provisions of section one, article five, chapter twenty-nine-a of
this code, provide such relief as is deemed fair and equitable
in accordance with the provisions of this article, and such
other powers as will provide for the effective resolution of
grievances not inconsistent with any rules or regulations of the
board or the provisions of this article.
§18-29-6. Hearings generally.

The chief administrator or his or her designee, the governing board or the hearing examiner shall conduct all hearings in an impartial manner and shall ensure that all parties are accorded procedural and substantive due process. All parties shall have an opportunity to present evidence and argument with respect to the matters and issues involved, to cross examine and to rebut evidence. Notice of a hearing shall be sent to all parties and their named representative and shall include the date, time and place of the hearing.

The institution that is party to the grievance shall produce prior to such hearing any documents, not privileged, and which are relevant to the subject matter involved in the pending grievance, that has been requested by the grievant, in writing.

The superintendent, the president of the state or county board of education or the state or county board member designated by such president, the executive director of the regional educational service agency, the director of the multi-county vocational center, the chancellor of the board of regents, the president of any state institution of higher education, the chief administrator or his or her designee, each member of the governing board or the hearing examiner shall have the power to (1) administer oaths and affirmations, (2) regulate the course of the hearing, (3) hold conferences for the settlement or simplification of the issues by consent of the parties, (4) exclude immaterial, irrelevant or repetitious evidence, (5) sequester witnesses, (6) restrict the number of advocates, and take any other action not inconsistent with the rules and regulations of the board or the provisions of this article.

All the testimony and evidence at any hearing shall be recorded by mechanical means, and all recorded testimony and evidence at such hearing shall be transcribed and certified at the request of any party to the institution or board. The institution shall be responsible for promptly transcribing the testimony and evidence and for providing a copy of the certified transcription to the party requesting same. The hearing examiner may also request and be provided a transcript upon appeal to level four and allocate the costs
therefor as prescribed in section eight of this article.

Formal rules of evidence shall not be applied, but parties shall be bound by the rules of privilege recognized by law.

All materials submitted in accordance with section three of this article; the mechanical recording of all testimony and evidence or the transcription thereof, if any; the decision; and any other materials considered in reaching the decision shall be made a part and shall constitute the record of a grievance. Such record shall be submitted to any level at which appeal has been made, and such record shall be considered, but the development of such record shall not be limited thereby.

Every decision pursuant to a hearing shall be in writing and shall be accompanied by findings of fact and conclusions of law.

Prior to such decision any party may propose findings of fact and conclusions of law.

§18-29-7. Enforcement and reviewability.

The decision of the hearing examiner shall be final upon the parties and shall be enforceable in circuit court: Provided, That either party may appeal to the circuit court of the county in which the grievance occurred on the grounds that the hearing examiner's decision (1) was contrary to law or lawfully adopted rule, regulation or written policy of the chief administrator or governing board, (2) exceeded the hearing examiner's statutory authority, (3) was the result of fraud or deceit, (4) was clearly wrong in view of the reliable, probative and substantial evidence on the whole record, or (5) was arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Such appeal shall be filed in the circuit court of Kanawha County or in the circuit court of the county in which the grievance occurred within thirty days of receipt of the hearing examiner's decision. The decision of the hearing examiner shall not be stayed, automatically, upon the filing of an appeal, but a stay may be granted by the circuit court upon separate motion therefor.

The court's ruling shall be upon the entire record made before the hearing examiner, and the court may hear oral arguments and require written briefs. The court may reverse, vacate or modify the decision of the hearing examiner or may
remand the grievance to the chief administrator of the institution for further proceedings.

§18-29-8. Allocation of costs.

Any expenses incurred relative to the grievance procedure at levels one through three shall be borne by the party incurring such expenses.


Any institution failing to comply with the provisions of this article may be compelled to do so by mandamus proceeding and shall be liable to any party prevailing against the institution for court costs and attorney fees, as determined and established by the court.

CHAPTER 18A. SCHOOL PERSONNEL.

ARTICLE 2. SCHOOL PERSONNEL.

§18A-2-8. Suspension and dismissal of school personnel by board; appeal.

Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance or willful neglect of duty, but the charges shall be stated in writing served upon the employee within two days of presentation of said charges to the board. The employee so affected shall be given an opportunity, within five days of receiving such written notice, to request, in writing, a level four hearing and appeals pursuant to provisions of article twenty-nine, chapter eighteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended.

§18A-2-11. Employee's right to attorney's fees and costs.

If an employee shall appeal to a circuit court an adverse decision of either a county board of education or of a hearing examiner rendered in a grievance or other proceeding pursuant to provisions of chapters eighteen and eighteen-a of this code and such person shall substantially prevail, the adverse party or parties shall be liable to such employee, upon final judgment or order, for court costs, and for reasonable attorney's fees, to be set by the court, for representing such employee in all administrative hearings and before the circuit
court and the supreme court of appeals, and shall be further liable to such employee for any court reporter's costs incurred during any such administrative hearings or court proceedings: Provided, That in no event shall such attorney's fees be awarded in excess of a total of one thousand dollars for the administrative hearings and circuit court proceedings nor an additional one thousand dollars for supreme court proceedings: Provided, however, That the requirements of this section shall not be construed to limit the school employee's right to recover reasonable attorney's fees in a mandamus proceeding brought under section eight, article four, chapter eighteen-a of this code.
The Joint Committee on Enrolled Bills hereby certifies that the foregone bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originating in the House.

Takes effect July 1, 1985.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker of the House of Delegates

The within ... the 2nd day of ... 1985.

Governor
PRESENTED TO THE
GOVERNOR
Date  6/10/85
Time  7:43 p.m.