WEST VIRGINIA LEGISLATURE
REGULAR SESSION, 1988

ENROLLED

COMMITTEE SUBSTITUTE FOR
SENATE BILL NO. 289

(By Senator Towns, Mr. President, et al.)

PASSED March 12, 1988

In Effect July 1, 1988
AN ACT to amend chapter twenty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article six-a, relating to a grievance procedure for state employees; legislative purpose; definitions; procedural levels; expedited grievance process; education and state employees grievance board; employment of hearing examiners; submission of annual budget, evaluation and report; promulgation of rules and regulations; hearings; enforcement and reviewability; mandamus proceeding; attorney's fees and costs; and application of article.

Be it enacted by the Legislature of West Virginia:

That chapter twenty-nine of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article six-a, to read as follows:

ARTICLE 6A. GRIEVANCE PROCEDURE FOR STATE EMPLOYEES.

§29-6A-1. Purpose.

1 The purpose of this article is to provide a procedure for the equitable and consistent resolution of employment grievances raised by nonelected state employees who are
classified under the state civil service system, or employed
in any department, other governmental agencies, or by
independent boards or commissions created by the
Legislature, with the exception of employees of the board of
regents, state institutions of higher education, the
Legislature, any employees of any constitutional officer
unless they are covered under the civil service system, and
members of the department of public safety.


For the purpose of this article:

(a) "Board" means the education employees grievance
board created in section five, article twenty-nine, chapter
eighteen of this code and hereafter known as the education
and state employees grievance board.

(b) "Chief administrator" means the commissioner,
director or head of any state department, board,
commission or agency.

(c) "Days" means working days exclusive of Saturday,
Sunday or official holidays.

(d) "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.

(e) "Employee" means any person hired for permanent
employment, either full or part-time, by any department,
agency, commission or board of the state created by an act
of the Legislature, except those persons employed by the
board of regents or by any state institution of higher
education, members of the department of public safety, any
employees of any constitutional officer unless they are
covered under the civil service system and any employees of
the Legislature. The definition of "employee" shall not
include any patient or inmate employed in a state
institution.

(f) "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.

(g) "Employer" means that state department, board,
commission or agency utilizing the services of the employee
covered under this article.
(h) "Favoritism" means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.

(i) "Grievance" means any claim by one or more affected state employees 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 their employer; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the employees.

(j) "Grievance evaluator" means that individual authorized to render a decision on a grievance under procedural levels one, two and three as set out in section four.

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

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

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

(n) "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.

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

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


(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 shall be extended whenever a grievant is not working because of accident, sickness, death in the immediate family or other cause necessitating the grievant to take personal leave from his or her employment.

(b) If the employer or its agent intends to assert the application 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 named in the filed grievance. Anything 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 submission thereof in accordance with the provisions of this subsection.

(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. The grievance may not be reinstated by the grievant unless 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) A grievant may be represented by an employee organization representative, legal counsel or any other person, including a fellow employee, in the preparation or presentation of the grievance. At the request of the grievant, such person or persons may be present at any step of the procedure: Provided, That at level one of such grievance, as set forth in section four of this article, a grievant may have only one such representative.

(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) 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 to the grievant and any representative named in the grievance within the time prescribed. 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 limitation 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 employer'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 open to employees of the grievant's immediate office or work area or, at the request of the grievant, shall be public. Within the discretion of the hearing examiner, conferences and hearings may be public at level four.

(n) No person shall confer or correspond with a hearing examiner regarding the merits of the grievance unless all parties to the grievance are present.

(o) Grievances shall be processed during regular working hours. Attempts shall be made to process the grievance in a manner which does not interfere with the normal operation of the employer.

(p) The grievant or the employee selected by a grievant to represent him in the processing of a grievance through this procedure, or both, shall be granted necessary time off during working hours for the grievance procedure without loss of pay and without charge to annual or compensatory leave credits. In addition to actual time spent in grievance conferences and hearings, the grievant or the employee representative, or both, shall be granted time off during
working hours, not to exceed four hours per grievance, for
the preparation of such grievance without loss of pay and
without charge to annual or compensatory leave credits.
However, it shall be understood by all parties that the first
responsibility of any state employee is the work assigned by
the appointing authority to the employee. Grievance
preparation and representation activities by an employee
shall not seriously affect the overall productivity of the
employee.

(q) The aggrieved employee, employing agency and
representatives of both shall have the right to call, examine
and cross-examine witnesses who are employees of the
agency against which the grievance is lodged and who have
knowledge of the facts at issue.

(r) Both parties may produce witnesses other than
employees of the agency against which the grievance is
lodged, and such witnesses shall be subject to examination
and cross-examination.

(s) 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.

(t) 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.

(u) 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 grievant's identity
from any file kept by the employer.

(v) 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.

(w) 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.
Any chief administrator with whom a grievance was filed may appeal a level four decision on the grounds that the decision (1) was contrary to law or lawfully adopted rule, regulation or written policy of the employer, (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.

§29-6A-4. Procedural levels and procedure at each level.

(a) Level one.
Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

(b) Level two.
Within five days of receiving the decision of the immediate supervisor, the grievant may file a written appeal to the administrator of the grievant's work location, facility, area office, or other appropriate subdivision of the department, board, commission or agency. The administrator or his designee shall hold a conference within five days of the receipt of the appeal and issue a written decision upon the appeal within five days of the conference.

(c) Level three.
Within five days of receiving the decision of the administrator of the grievant's work location, facility, area office, or other appropriate subdivision of the department, board, commission or agency, the grievant may file a written appeal of the decision with the chief administrator.
of the grievant’s employing department, board, commission
or agency. A copy of the appeal and the level two decision
shall be served upon the personnel director of the state civil
service commission by the grievant.

The chief administrator or his designee shall hold a
hearing in accordance with section six of this article within
seven days of receiving the appeal. The personnel director
of the state civil service commission or his designee may
appear at such hearing and submit oral or written evidence
upon the matters in the hearing.

The chief administrator or his designee shall issue a
written decision affirming, modifying or reversing the level
two decision within five days of such hearing.

(d) Level four.

(1) If the grievant is not satisfied with the action taken
by the chief administrator or his designee, 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 fifteen
days following the request therefor: Provided, 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. A copy of the
appeal shall be served by the grievant upon the director of
personnel of the state civil service commission. The director
of personnel of the state civil service commission, or his
designee, may appear at such hearing and submit oral or
written evidence upon the matters in the hearing.

(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 shall be enforceable in circuit court.

(e) Expedited grievance process.

An employee may grieve a final action of the employer
involving a dismissal, demotion or suspension exceeding
twenty days directly to the hearing examiner. The
expedited grievance shall be in writing and must be filed
71 within ten days of the date of the final action with the chief
72 administrator and the director of personnel of the state civil
73 service commission.

§29-6A-5. Education and state employees grievance board;
hearing examiners.

1 (a) The education employees grievance board, created
2 by virtue of the provisions of section five, article twenty-
3 nine, chapter eighteen of this code, shall be hereafter known
4 and referred to as the education and state employees
5 grievance board and, in addition to those duties set forth in
6 said chapter eighteen, is hereby authorized and required to
7 administer the grievance procedure at level four as
8 provided for in section four of this article. The board shall
9 employ, in addition to those persons employed as hearing
10 examiners for educational employee grievances, at least
11 two full-time hearing examiners for the purpose of
12 conducting hearings at level four as provided in section four
13 of this article. Such hearing examiners shall be employed on
14 an annual basis along with such clerical help as is necessary
15 to implement the legislative intent expressed in section one
16 of this article.

17 In addition to the budget required for submission to the
18 Legislature by virtue of the provisions of section five, arti-
19 cle twenty-nine, chapter eighteen of this code, the board
20 shall submit a yearly budget and shall report annually to
21 the governor and the Legislature regarding proceedings
22 conducted under this article, including receipts and
23 expenditures, number of level four hearings conducted,
24 synopses of hearing outcomes and such other information
25 as the board may deem appropriate. The board shall further
26 evaluate on an annual basis the level four grievance process
27 and the performance of all hearing examiners and include
28 such evaluation in the annual report to the governor and the
29 Legislature. In making such evaluation the board shall
30 notify all employers, employee organizations, the director
31 of personnel of the state civil service commission and all
32 grievants participating in level four grievances in the year
33 for which evaluation is being made and shall provide for the
34 submission of written comment and/or the hearing of
35 testimony regarding the grievance process.
36 The board shall provide suitable office space for all
hearing examiners in space other than that utilized by any
employer as defined in section two of this article and shall
ensure that reference materials are generally available. The
board shall provide forms for filing grievances, giving
notice, taking appeals, making reports and
recommendations and such other documents as the board
deems necessary for any stage of a grievance under this
article.

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-nine-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 and regulations of the board or the provisions of this
article: Provided, That in all cases the hearing examiner
shall have the authority to provide appropriate remedies
including, but not limited to, making the employee whole.

§29-6A-6. Hearings generally.

The chief administrator or his designee acting as a
grievance evaluator 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.
Reasonable notice of a hearing shall be sent prior to the
hearing to all parties and their named representative and
shall include the date, time and place of the hearing. Level
one, level two and level three hearings shall be at a
convenient place accessible to the aggrieved employee. All
such hearings shall be held on the employer's premises or on
other premises mutually agreeable to the parties and within
regular working hours: Provided, That any such hearing
might continue beyond normal working hours. Level four
hearings shall be at a place to be designated by the hearing examiner.

The employer 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 have been requested by the grievant, in writing.

The chief administrator or his designee or the hearing examiner shall have the power to (1) administer oaths and affirmations, (2) subpoena witnesses, (3) regulate the course of the hearing, (4) hold conferences for the settlement or simplification of the issues by consent of the parties, (5) exclude immaterial, irrelevant or repetitious evidence, (6) sequester witnesses, (7) 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 level three or level four hearing shall be recorded by mechanical means, and all recorded testimony and evidence at such hearing shall be transcribed and certified by affidavit. The chief administrator shall be responsible for promptly providing a copy of the certified transcript of a level three hearing to any party to that hearing who requests such transcript. 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. The board shall be responsible for promptly providing a copy of the certified transcript of a level four hearing to any party to that hearing who requests such transcript.

Formal rules of evidence shall not be applied, but parties shall be bound by the rules of privilege recognized by law. No employee shall be compelled to testify against himself or herself in a grievance involving disciplinary action. The burden of proof shall rest with the employer in disciplinary matters.

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.
§29-6A-7. Enforcement and reviewability; costs; good faith.
The decision of the hearing examiner shall be final upon
the parties and shall be enforceable in circuit court:
Provided, That either party or the state civil service
commission 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 a
lawfully adopted rule, regulation or written policy of the
employer, (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 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 appropriate
chief administrator for further proceedings.
Both employer and 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 hearing
examiner 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. Such allocation of
costs shall be based on the relative ability of the party to pay
such costs.
§29-6A-8. **Allocation of costs.**

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

§29-6A-9. **Mandamus proceeding.**

1 Any employer 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 employer for court costs and attorney fees, as determined and established by the court.

§29-6A-10. **Employee's right to attorney's fees and costs.**

1 If an employee shall appeal to a circuit court an adverse decision of a hearing examiner rendered in a grievance proceeding pursuant to provisions of this article or is required to defend an appeal 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 employee's right to recover reasonable attorney's fees in a mandamus proceeding brought under section nine of this article.

§29-6A-11. **Application of Article.**

1 This article applies to all grievances arising on or after the effective date of this article. This article supersedes and replaces the civil service grievance and appeals procedure currently authorized under the rules and regulations of the Civil Service Commission upon the resolution of all grievances and appeals pending in the civil service grievance system on the effective date of this article.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originated in the Senate.

To take effect July 1, 1988.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker House of Delegates

The within is approved this the 31st day of , 1988.

Governor