WEST VIRGINIA LEGISLATURE
SECOND REGULAR SESSION, 1992

ENROLLED

Com. Sub. C for
HOUSE BILL No. H602

(By Delegates S. Cook and Staton.)

Passed March 5, 1992
In Effect Ninety Days from Passage
AN ACT to amend and reenact sections one, two, three, four, six and eight, article twenty-nine, chapter eighteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended; and to further amend said article twenty-nine by adding thereto two new sections, designated sections ten and eleven, relating to grievance procedures for education employees; authorizing filing of grievance on behalf of others similarly situated; redefining employee and chief administrator; requiring assertion of untimeliness be made prior to level two; allowing grievant to prevail by default upon untimely response; authorizing appeal of remedy received by default; allowing grievance to be brought at higher level if evaluator at that level consents thereto; allowing presence of employee and others at certain meetings; affording protections to such employee; prohibiting certain communications between grievance evaluator and management representative; providing for appeal by adversely affected nongrievant; limiting application of doctrine of laches; amending certain deadlines; authorizing subpoena of witnesses and documents at levels two and three; allowing grievant to waive appeal to level three; requiring governing board to set forth reasons upon its waiver of level three hearing; making
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information and decisions of level four proceedings available at reasonable cost; requiring institution to pay for transcripts; setting forth provisions regarding self-incrimination, burden of proof and burden of going forward; authorizing court to set costs and reasonable attorneys fees to employees prevailing upon appeal to circuit or supreme court; requiring mediation attempts and report of same; requiring compilation and dissemination of level four data to governing boards; and updating references to higher education governing boards.

Be it enacted by the Legislature of West Virginia:

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

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 governing boards of higher education, 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
governing boards of higher education 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
policies, rules of the governing boards of higher
education regarding such employees. Any board deci-
sion 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 governing boards of higher
education, 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 compen-
sation, hours, terms and conditions of employment,
employment status or discrimination; any discrimina-
tory 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.

A grievance may be filed by one or more employees
on behalf of a class of similarly situated employees:
Provided, That any similarly situated employee shall
indicate in writing of his or her intent to join the class
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.

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 em-
ployees 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 as a tempo-
rary, probationary or permanent employee by an insti-
tution 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, misappli-
cation 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 governing boards of higher education,
any institution whose employees are hired by the state
board of education including the department of educa-
tion, 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 adminis-
trative authority and designated as such in the em-
ployee’s contract, if any.

(h) “Chief administrator” means, as may be applica-
ble, the president of a state institution of higher
education, the chancellor of a governing board of higher
education only as to those employees employed solely by
the chancellor and governing board and not assigned to
a state institution of higher education, the senior
administrator as to those employees hired pursuant to
section two, article four, chapter eighteen-b of this code,
the state superintendent of schools as to employees hired
by the state board of education, the county superintend-
ent, 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
governing boards of higher education, 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 voca-
tional center.

(j) "Grievance evaluator" means that individual or
governing 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 distur-
bance, irritation or annoyance of an employee which
would be contrary 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. Any assertion by the employer that the filing of the grievance at level one was untimely must be asserted by the employer on behalf of the employer at or before the level two hearing. If a grievance evaluator required to respond to a grievance at any level fails to make a required response in the time limits required in this article, unless prevented from doing so directly as a result of sickness or illness, the grievant shall prevail by default. Within five days of such default, the employer may request a hearing before a level four hearing examiner for the purpose of showing that the remedy received by the prevailing grievant is contrary to law or clearly wrong. In making a determination regarding the remedy, the hearing examiner shall
27 presume the employee prevailed on the merits of the
grievance and shall determine whether the remedy is
contrary to law or clearly wrong in light of that
presumption. If the examiner finds that the remedy is
contrary to law, or clearly wrong, the examiner may
modify the remedy to be granted so as to comply with
the law and to make the grievant whole.

(b) If the employer or agent intends to assert the
applicability 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 submission
thereof in accordance with the provisions of this
subsection.

(c) The grievant may file the grievance at the level
vested with the authority to grant the requested relief
if the grievance evaluator at that 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 em-
ployee 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, as well as at any investigative meeting or other meeting which is held with the employee for the purpose of discussing the possibility of disciplinary action. When a fellow employee is assisting a grievant, the employee shall do so without loss of pay and shall have protection from reprisal as that term is defined in section two of this article.

(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 confer-
ence 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 four.

(n) No person or governing board to which appeal has been made shall confer or correspond with a grievance evaluator at a previous level or a management representative who recommended or approved the grieved action 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 on work time in a manner which does not interfere with the normal operation of the institution. 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.

(u) Upon a timely request, any employee shall be allowed to intervene and become a party to a grievance at any level when that employee claims 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.

(v) The doctrine of laches shall not be applied to prevent a grievant or grievants from recovering back pay or other appropriate relief for a period of one year prior to the filing of a grievance based upon a continuing practice.

§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 ten 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
(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. Level four hearing examiners or the chief administrator shall have the authority to subpoena witnesses and documents for level two and level three hearings in accordance with the provision of section one, article five, chapter twenty-nine-a of this code, and may issue a subpoena upon the written request of any party to the grievance.

(c) Level three.

Within five days of receiving the decision of the chief administrator, the grievant may appeal the decision to the governing board of the institution or may proceed directly to level four. An appeal to the governing board shall set forth the reasons why the grievant is seeking a level three review of the decision of the chief administrator. 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, shall be in writing and shall set forth the reasons for such decision, including the decision to waive participation in the grievance. If a hearing is 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 chief administrator, or, if appealed to level three, 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, 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 shall be enforceable in circuit court.

All information and data generated by the board and in its custody relative to level four decisions and copies of such decisions shall be provided at reasonable cost to any individual requesting it.

§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 higher education governing boards, the president of any state institution of higher education, the senior administrator, 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 institution shall be responsible for all costs relating to preparation and duplication of the 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.

Formal rules of evidence shall not be applied, but parties shall be bound by the rules of privilege recognized by law. In any grievance involving disciplinary or discharge actions, no employee may be compelled to testify against himself or herself, the burden of proof is on the employer, and the employer shall present its case first.

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.

§18-29-8. 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 except as to the costs of transcriptions as provided for in section six of this article.

In the event an employee or employer appeals an adverse level four decision to the circuit court or an adverse circuit court decision to the supreme court, and the employee substantially prevails upon such appeal, the employee or the organization representing the employee is entitled to recover court costs and reasonable attorney fees, to be set by the court, from the employer.

§18-29-10. Mediation.

To such extent as may be feasible with existing
personnel and resources, the education employees

grievance board shall attempt mediation and other
alternative dispute resolution techniques to actively
assist the parties in identifying, clarifying and resolving
issues regarding the grievance at any time prior to the
level four hearing.

All of the information that is provided by the parties
during mediation shall remain confidential. Mediators
shall not be called as witnesses to provide testimony in
unresolved grievances that proceed to a grievance hearing, and any hearing examiner involved in a
mediation process shall not hear the grievance nor be consulted regarding the merits of the grievance.

The education employees grievance board shall
monitor the results of all mediation attempts and report
to the legislature prior to the first day of January, one
thousand nine hundred ninety-three, regarding the feasibility of the process, the cost effectiveness of the
process, the success of the process in resolving grievan-
ces, the resources which would be required to expand the process, and such other information or recommen-
dations as the grievance board may deem appropriate and helpful.

§18-29-11. Compilation and dissemination of data.

In addition to such other data as may be required under the provisions of this article, beginning with the quarter ending the first day of October, one thousand nine hundred ninety-two, the education employees grievance board shall provide each governing board and employee organization, within thirty days of the end of each quarter, a statewide quarterly report summarizing matters decided by the hearing examiners during the preceding quarter. Each report shall set forth any information deemed to be helpful in providing an overview of grievance-related issues: Provided, That nothing contained in the report shall breach the confidentiality of a grievant or other person, nor shall any matter be disclosed if the disclosure may violate any provision of law. The grievance board shall make an effort to provide information applicable to particular
17 counties, institutions or governing boards, as may be appropriate.

Each report shall then be distributed to each member of the governing board so that the governing board may monitor the significant personnel-related matters which came before the grievance board and thereby ascertain whether any personnel policies need to be reviewed, revised or enforced.

Each quarterly report shall be incorporated into the annual report required by section five of this article, which shall also be distributed to each governing board and employee organization.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originating in the House.

Takes effect ninety days from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker of the House of Delegates

The within ................ approved this the ..........

day of ................., 1992.

Governor
PRESENTED TO THE
GOVERNOR

Date = 3/13/92
Time 4:16 pm