ENROLLED

House Bill No. 4314

(By Mr. Speaker, Mr. Kiss, and Delegates Martin, Stator, Manuel, Fleischauer and Givens)

Passed March 13, 1998

In Effect July 1, 1998
AN ACT to amend and reenact section five, article twenty-nine, chapter eighteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended; to amend and reenact sections three, four, five, six, seven and ten, article six-a, chapter twenty-nine of said code; and to further amend said article by adding thereto a new section, designated section twelve, all relating to the education and public employees grievance process; providing for expedited grievance processes; expanding the jurisdiction of the board; changing the default provisions; giving board procedural jurisdiction at levels two and three; allowing mediation at the request of any party; allowing appeals to be filed in the circuit court of Kanawha County; and increasing the cap on attorney's fees for prevailing grievants.

Be it enacted by the Legislature of West Virginia:

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

CHAPTER 18. EDUCATION.

ARTICLE 29. GRIEVANCE PROCEDURE.

§18-29-5. Education and state employees grievance board; hearing examiners.

(a) The education and state employees grievance board shall consist of three members who are citizens of the state appointed by the governor by and with the advice and consent of the Senate for overlapping terms of three years. No two members may be from the same congressional district, and no more than two of the appointed members may be from the same political party. No person may 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 are 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 the state elected officers.

The board shall hold at least two meetings yearly at times and places as it may prescribe and may meet at other times as may be necessary, the other meetings to be agreed to in writing by at least two of the members. The compensation for members of the board is 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 for reimbursement upon a sworn itemized statement.

The board shall administer the grievance procedure at levels two, three and four, as provided in section five, article six-a, chapter twenty-nine of this code, and as provided for in section four of this article and shall employ at least two full-time hearing examiners on an annual basis and clerical help as is necessary to implement the legislative intent expressed in section one of this article.

In addition to the authorization granted by this section over education employees, the board has jurisdiction over the procedures to be followed in processing grievances filed under article six-a, chapter twenty-nine of this code.

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 the areas, at which time two hearing examiners may be from the same area. If a grievant previously before a hearing examiner again brings a grievance, a different hearing examiner is required to hear the grievance upon written request therefor by any party to the grievance. These hearing examiners 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 other information as the board determines appropriate. The board shall further evaluate on an annual basis the level four grievance process and the performance of all hearing examiners and include the evaluation in the annual report to the governor and Legislature. In making the 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 or the hearing of testimony regarding the grievance process, or both. 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 consistent with the provisions of this article; the rules shall be adopted in accordance with chapter twenty-nine-a of this code.

(b) Hearing examiners may 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 relief found fair and equitable in accordance with the provisions of this article, and exercise other powers as provides for the effective resolution of grievances not inconsistent with any rules of the board or the provisions of this article.

CHAPTER 29. MISCELLANEOUS BOARDS AND OFFICERS.

ARTICLE 6A. GRIEVANCE PROCEDURE FOR STATE EMPLOYEES.


(a) (1) A grievance shall 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 is 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.

(2) Any assertion by the employer that the filing of the grievance at level one was untimely shall be asserted by the employer on behalf of the employer at or before the level two hearing. The grievant prevails by default 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, injury, excusable neglect, unavoidable cause or fraud. Within five days of the receipt of a written notice of the 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 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 to comply with the law and to make the grievant whole.

(b) If the employer or its agent intends to assert the application of any statute, policy, rule or written agreement or submits any written response to the filed grievance at any level, a copy of the materials shall be forwarded to the grievant and any representative of the grievant named in the filed grievance. Anything submitted and the grievant's response to the submitted materials, if any, becomes part of the record. Failure to assert the statute, policy, rule or written agreement at any level does not prevent the subsequent submission of the materials 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 to filing the grievance at a higher level. 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 where 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 does 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, the 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, that person or persons may be present at any step of the procedure: Provided, That at level one of the grievance, as set forth in section four of this article, a grievant may have only one 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 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 may 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 the participation. A reprisal constitutes a grievance, and any person held responsible for reprisal action is subject to disciplinary action for insubordination.

(i) Decisions rendered at all levels of the grievance procedure shall be dated, in writing setting forth the decision or decisions and the reasons for the decision, and transmitted to the 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 where 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 it, the parties may consent to the 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 is measured from the date of the 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. The forms shall include information 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 the 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 may 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 or her 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 the grievance without loss of pay and without charge to annual or compensatory leave credits. However, the first responsibility of any state employee is the work assigned by the appointing authority to the employee. An employee may not allow grievance preparation and representation activities to seriously affect the overall productivity of the employee.

(q) The aggrieved employee, employing agency and representatives of both 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 the witnesses are subject to examination and cross-examination.

(s) If an employer or the employer's agent causes a conference or hearing to be postponed without adequate notice to employees who are scheduled to appear during their normal work day, the employees may not suffer any loss in pay for work time lost.

(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 if this occurs the grievance evaluator at
the next higher level shall designate an alternative
grievance evaluator if it is 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
may not become a part of the 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 is not, per se, an
indication of the employer's or agent's or the employee's
job performance.
(x) Any chief administrator with whom a grievance is
filed may appeal a level four decision on the grounds that
the decision:
(1) Is contrary to law or a lawfully adopted rule or
written policy of the employer;
(2) Exceeds the hearing examiner's statutory
authority;
(3) Is the result of fraud or deceit;
(4) Is clearly wrong in view of the reliable, probative
and substantial evidence on the whole record; or
(5) Is arbitrary or capricious or characterized by abuse
of discretion.
The 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. If a grievance alleges discrimination or retaliation by the immediate supervisor of the grievant, the level one filing may be waived by the grievant and the grievance may be initiated at level two with the administrator or his or her designee, within the time limits set forth in this subsection for filing a grievance at level one. A meeting may be held to discuss the issues in dispute, but the meeting is not required.

(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 or her 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 director of the division of personnel by the grievant.
The chief administrator or his or her designee shall hold a hearing in accordance with section six of this article within seven days of receiving the appeal. The director of the division of personnel or his or her designee may appear at the hearing and submit oral or written evidence upon the matters in the hearing.

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

(d) Level four.

(1) If the grievant is not satisfied with the action taken by the chief administrator or his or her 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. The hearing shall be conducted in accordance with section six of this article within fifteen days following the request for the hearing: Provided, That the hearing may be held within thirty days following the request, or within a time that is mutually agreed upon by the parties, if the hearing examiner gives reasonable cause, in writing, as to the necessity for the delay. A copy of the appeal shall be served by the grievant upon the director of the division of personnel. The director of the division of personnel, or his or her designee, may appear at the 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 is final upon the parties and is enforceable in circuit court.

(e) Expedited grievance process.

(1) A grievance involving suspension without pay, demotion or dismissal or loss of wages may be initiated at level two with the administrator of the grievant's work location, facility, area office, or other appropriate
subdivision of the department, board, commission or agency.

(2) 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 shall be filed within ten days of the date of the final action with the chief administrator and the director of the division of personnel.

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

(a) The education employees grievance board, created by virtue of the provisions of section five, article twenty-nine, chapter eighteen of this code, is renamed the education and state employees grievance board and, in addition to those duties set forth in chapter eighteen, shall administer the grievance procedure at level four as provided for in section four of this article. The board has jurisdiction regarding procedural matters at levels two and three of the grievance procedure. The board shall employ, in addition to those persons employed as hearing examiners for educational employee grievances, at least two full-time hearing examiners for the purpose of conducting hearings at level four, as provided in section four of this article. The hearing examiners are employed on an annual basis along with the clerical help necessary to implement the legislative intent expressed in section one of this article.

In addition to the budget required for submission to the Legislature by virtue of the provisions of section five, article twenty-nine, chapter eighteen of this code, the board shall submit a yearly budget and shall report annually to the governor and the Legislature regarding proceedings conducted under this article, including receipts and expenditures, the number of level four hearings conducted, synopses of hearing outcomes and other information as the board determines appropriate. The board shall further evaluate on an annual basis the level four grievance process and the performance of all hearing examiners and include the evaluation in the
annual report to the governor and the Legislature. In making the evaluation the board shall notify all employers, employee organizations, the director of the division of personnel 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 or the hearing of testimony regarding the grievance process, or both.

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 other documents as the board determines necessary for any stage of a grievance under this article.

The board is authorized to propose rules for promulgation consistent with the provisions of this article, and in accordance with article three, chapter twenty-nine-a of this code.

(b) Hearing examiners may 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 relief as is determined fair and equitable in accordance with the provisions of this article, and take any other action to provide for the effective resolution of grievances not inconsistent with any rules of the board or the provisions of this article: Provided, That in all cases the hearing examiner has the authority to provide appropriate remedies including, but not limited to, making the employee whole.

§29-6A-6. Hearings generally.

(a) The chief administrator or his or her 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 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 hearing might continue beyond normal working
hours. Level four hearings shall be at a place to be
designated by the hearing examiner.

(b) The employer that is party to the grievance shall
produce prior to the 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.

c) The chief administrator or his or her designee or
the hearing examiner has 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; (5)
exclude immaterial, irrelevant or repetitious evidence; (6)
sequester witnesses; (7) restrict the number of advocates;
and (8) take any other action not inconsistent with the
rules of the board or the provisions of this article.

d) 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 the
hearing shall be transcribed and certified by affidavit.
The chief administrator is responsible for promptly
providing a copy of the certified transcript of a level three
hearing to any party to that hearing who requests the
transcript. The hearing examiner may also request and be
provided a transcript upon appeal to level four and
allocate the costs for the transcript as prescribed in section
eight of this article. The board is responsible for
promptly providing a copy of the certified transcript of a
15  [Enr. Com. Sub. for H. B. 4314

level four hearing to any party to that hearing who requests the transcript.

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

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

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

(h) Prior to the decision any party may propose findings of fact and conclusions of law.

§29-6A-7. Enforcement and reviewability; costs; good faith.

(a) The decision of the hearing examiner is final upon the parties and is enforceable in circuit court.

(b) Either party or the director of the division of personnel may appeal to the circuit court of Kanawha County or to the circuit court of the county in which the grievance occurred on the grounds that the hearing examiner's decision:

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

(2) Exceeds the hearing examiner's statutory authority;

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

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

(c) The appeal shall be filed within thirty days of receipt of the hearing examiner's decision. The decision of the hearing examiner is not automatically stayed upon the filing of an appeal, but a stay may be granted by the circuit court upon separate motion for a stay.

(d) 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.

(e) 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. The allocation of costs shall be based on the relative ability of the party to pay the costs.

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

If an employee appeals 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 the person substantially prevails, the adverse party or parties is liable to the employee, upon final judgment or order, for court costs, and for reasonable attorney's fees, to be set by the court, for representing the employee in all administrative hearings and before the circuit court and the supreme court of appeals, and is further liable to the employee for any court reporter's costs incurred during any 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 five hundred 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-12. Mediation required at request of either party.

Upon the request of either party, the board may require mediation or other alternative dispute resolution technique to assist the parties in identifying, clarifying and resolving issues regarding the grievance. Mediation may be requested at any time prior to the level four hearing. All of the information that is provided by parties during mediation is and shall remain confidential. Mediators may 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 may not hear the grievance or be consulted regarding the merits of the grievance.
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 July 1, 1998.

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 8th day of , 1998.

Governor