

**WEST VIRGINIA
SECRETARY OF STATE**

KEN HECHLER

ADMINISTRATIVE LAW DIVISION

Form #5

FILED

DEC 28 12 54 PM '95

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

**NOTICE OF AGENCY ADOPTION OF A PROCEDURAL OR INTERPRETIVE RULE
OR A LEGISLATIVE RULE EXEMPT FROM LEGISLATIVE REVIEW**

W. Va. Education and State
AGENCY: Employees Grievance Board TITLE NUMBER: 156CSR1

CITE AUTHORITY: W. Va. Code §§18-29-5(a) and 29-6A-5(a)

RULE TYPE: PROCEDURAL INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE None
CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

AMENDMENT TO AN EXISTING RULE: YES , NO _____

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 156CSR1

TITLE OF RULE BEING AMENDED: Procedural Rules, Education and State
Employees Grievance Board

IF NO, SERIES NUMBER OF NEW RULE BEING ADOPTED: _____

TITLE OF RULE BEING ADOPTED: _____

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS February 1, 1996



Authorized Signature

Amendments made to Proposed Rule

The Grievance Board has approved amendments to the proposed procedural rule in the following sections: 4.6, 4.6.1 and 4.5.

The amendment to Section 4.6 deletes from the rule a specified time period required for the submission of a motion to an Administrative Law Judge and, in its place, requires that all motions be made in a timely fashion. Also, it is stated that all motions must be provided to the non-moving party. Further, an Administrative Law Judge shall give all non-moving parties a reasonable time to response to any motion filed. Finally, Section 4.6.1 was amended to provide that an Administrative Law Judge may hold a motion hearing if, in his/her discretion, one is necessary.

Section 4.5.3 adds a new section to the rule allowing for the quashing of subpoenas issued by the Grievance Board. This amendment is presented, in part, in response to the comment received by the Division of Personnel during the formal comment period concerning the same subject. Pursuant to this section, an Administrative Law Judge may quash or modify a subpoena if it is unreasonable and oppressive, or the Administrative Law Judge may, in his/her discretion, condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things subpoenaed.

The substance of the amendments discussed are provided herein, along with the substance of the proposed rule which is being amended. The amendment to the language of the sections are highlighted by underlining while any language deleted is shown as being struck through. Each of these amendments are proposed to provide for a more fair, responsive and user-friendly atmosphere by which grievances are processed at level four of the grievance procedure. Further, these amendments set forth various standards for which action may be taken by an Administrative Law Judge, and notifies all interested parties of these standards of discretionary exercise of authority.

AMENDMENTS TO 156 C.S.R. 1

4.5.3. Upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, an administrative law judge may (1) quash or modify the subpoena if it is unreasonable and oppressive, or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

4.6. Motions - An application to an administrative law judge for an order must be by motion, in writing, unless made during a hearing, and must be filed and served upon all parties ~~not less than ten working days before the hearing, if any, is to be held either on the motion or on the merits of the case. promptly, as soon as the facts or grounds upon which the motion is based becomes known to the moving party.~~ All motions must be served by the movant upon the non-moving party at the same time it is presented to the administrative law judge. The non-moving party has seven working days from the date of service of the motion to file a written response. Upon receiving a written motion, the non-moving party shall be given a reasonable time with which to file a written response. A certificate of service must accompany all motions.

4.6.1. If any party desires a hearing on a motion, he shall make a request for a hearing at the time of the filing of his motion or response. An administrative law judge may, in his discretion, hold a hearing on a motion ~~A hearing on a motion will be directed by the administrative law judge only~~ if it is determined that a hearing is necessary to the development of a full and complete record on which a proper decision can be made.

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DEC 28 12 55 PM '95

OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

156 CSR 1

TITLE 156
PROCEDURAL RULES
WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

SERIES 1

§156-1-1. General

1.1. Scope - The following procedural rule sets forth the practice and procedure established by the West Virginia Education and State Employees Grievance Board for carrying out its responsibilities in the administration and enforcement of the West Virginia Education and State Employees Grievance Statutes, W. Va. Code §§ 18-29-1, et seq., and 29-6A-1, et seq., as amended.

1.2. Authority - This rule is issued under authority of W. Va. Code §§ 18-29-1, et seq., and 29-6A-1, et seq.

1.3. Filing date - _____

1.4. Effective date - February 1, 1996. This rule applies to all grievances pending and those filed after this effective date.

1.5. This rule repeals and replaces the former Procedural Rule promulgated at 156 CSR 1.

1.6. Liberal construction - The provisions of this rule will be liberally construed to permit the Board to discharge its statutory functions and to secure just and expeditious determination of all matters before the Board; therefore, for good cause, the Board may, at any time, suspend the requirements of any of these regulations.

1.7. Severability - If any sections or subsections of this rule is determined to be invalid, it shall not be construed to invalidate any of the provisions not otherwise affected.

1.8. Availability of rule - This rule is on file in the Office of the Secretary of State and at each of the Grievance Board's offices.

1.9. Delegation of powers and duties - Except where contrary to law, the Board may delegate any of its powers and duties to the director, administrative law judges, or other employees or agents of the Board. Pursuant to W. Va. Code §§ 18-29-1, et seq., and 29-6A-1, et seq., the administrative law judges are authorized to take

any other action not inconsistent with the grievance procedure statutes and this rule.

§156-1-2. Definitions

2.1. All terms defined in W. Va. Code §§ 18-29-2 and 29-6A-2 shall have the meanings therein ascribed to them for the purposes of this rule. All other terms shall have the following meanings.

2.1.1. "File" or "filing" means to place an appropriate grievance form or letter evidencing an intent to appeal a lower level grievance decision in an official depository of the United States Postal Service, postage prepaid, and addressed to the Board's main offices at 808 Greenbrier Street, Charleston, West Virginia 25311, or by facsimile transmission to the Board's offices. A hard copy of any grievance filed by facsimile must be received by the Board office within a reasonable time following the facsimile transmission.

2.1.2. "Service" or "Serve" means personal delivery or delivery by first class United States Postal Service mail, postage prepaid and addressed to the person to be served at his or her last known address. A Certificate of Service by the person making the service is to be attached to every document requiring service under this rule, indicating that copies have been served on all parties to the grievance or their representatives.

2.1.3. "Certificate of Service" means a certification by a party that on the stated date, he has hand-delivered or placed in the United States mail, postage pre-paid, in a properly addressed envelope, a true copy of the document he is filing with the Board, for the other parties, or their representatives, at their last known address. See Appendix B, attached hereto.

2.1.4. "Subpoena" means an official document, issued by an Administrative Law Judge pursuant to the provisions of the West Virginia Administrative Procedures Act, West Virginia Code §§ 29A-5-1 et seq., requiring the appearance of an individual at a given time and place.

2.1.5. "Subpoena duces tecum" means an official document requiring that an individual named to appear at a given time and place must bring a specific document or documents.

2.1.6. "Motion" means an oral or written request or application for a ruling or order by an administrative law judge.

2.1.7. "Evidence" means substance of proof, presented in a hearing on the merits of a grievance, by testimony given under oath, records, documents or other concrete objects, for the purpose of meeting one's burden of proof.

§156-1-3. Levels One, Two and Three

3.1. Forms - Each governing board (education) and employer (state) should, within ninety days of the effective day of this rule, adopt one official form for the initiation of grievances at Levels One, Two and Three. This form is to be made available to an employee, upon request, by his immediate supervisor. A sample form is attached as Appendix A to this rule.

3.2. Written procedures - Each governing board (education) and employer (state) should establish written procedures relating to employee grievances at Levels One, Two and Three. These procedures should inform employees of the provisions of this rule and of W. Va. Code §§ 18-29-3, et seq., 18A-2-8, and 29-6A-3, et seq. Copies of these procedures should be made available to all existing employees and all newly-hired employees should be given a copy of these procedures upon commencement of their employment.

§156-1-4. Level Four

4.1. Form - A sample form which may be used for filing a grievance at Level Four is attached as Appendix A.

4.2. Assignment of Administrative Law Judge - At Level IV; hearing examiners are known as an administrative law judges. Upon proper filing of a Level Four grievance, the Board shall assign the matter to an administrative law judge and all parties will be notified of this assignment. Thereafter, all documents or correspondence is to be delivered to the assigned administrative law judge as provided for in Rule 2.1.2.

4.3. Authority of Administrative Law Judge - Each Administrative Law Judge has the authority and discretion to control the processing of each grievance assigned to him and, to take any such action as is deemed appropriate consistent with the provisions of West Virginia Code §§18-29-5 and 29-6A-5.

4.4. Ex Parte Communication - No person shall confer or correspond with any member of the Board, its administrative law judges, staff or agents, concerning the merits or substance of a pending grievance, unless all parties to the grievance are present.

4.5. Subpoenas and subpoenas duces tecum - Subpoenas and subpoenas duces tecum will be issued by the Board to any party to a grievance upon written request, in the discretion of the administrative law judge, and in compliance with W. Va. Code § 29A-5-1(b). The written request shall include the full name and address of each person to be subpoenaed (and for subpoenas duces tecum, a complete description of the document or item to be produced), together with a statement accepting responsibility for

service and costs (including applicable witness and mileage fees) incurred relative thereto.

4.5.1. Any party requesting a subpoena or subpoenas must advise all other parties of the request at the time it is made.

4.5.2. No subpoena or subpoena duces tecum will be issued unless a written request has been received by the administrative law judge within six work days prior to the scheduled hearing.

4.5.3. Upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, an administrative law judge may (1) quash or modify the subpoena if it is unreasonable and oppressive, or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

4.6. Motions - An application to an administrative law judge for an order must be by motion, in writing, unless made during a hearing, and must be filed and served upon all parties promptly, as soon as the facts or grounds upon which the motion is based becomes known to the moving party. All motions must be served by the movant upon the non-moving party at the same time it is presented to the administrative law judge. Upon receiving a written motion, the non-moving party shall be given a reasonable time with which to file a written response. A certificate of service must accompany all motions.

4.6.1. If any party desires a hearing on a motion, he shall make a request for a hearing at the time of the filing of his motion or response. An administrative law judge may, in his discretion, hold a hearing on a motion if it is determined that a hearing is necessary to the development of a full and complete record on which a proper decision can be made.

4.6.2. If a situation necessitating a motion arises immediately before or during a hearing, an oral motion may be made at the hearing. The movant shall be prepared to state the reasons as to why the motion was not made in conformance with rule 4.6. Further, the movant is to be prepared to proceed with the hearing if the motion is denied and the granting of the motion would have operated to delay the hearing.

4.6.3. All motions are to be accompanied by a concise statement of its basis, both legal and factual. Motions not timely made in the determination of the administrative law judge may be denied on that basis alone.

4.7. Continuances - Any party may request a continuance of a hearing or other proceeding related to a grievance. Requests for

a continuance of a hearing will be granted upon a showing of good cause. Unless time does not permit, a request for a continuance is to be made in writing to the administrative law judge and served upon all parties of record. The administrative law judge may, upon his own motion, continue hearings or other proceedings.

4.7.1. Any party moving for a continuance is encouraged to first contact the other side and obtain an agreement to request a joint continuance. The parties are further encouraged to provide the administrative law judge with alternative dates for the scheduling of the case.

4.8. Remand - Any party may move to remand (return to a lower level of the grievance procedure) a grievance. Requests for remand of a grievance will be granted upon a showing of good cause. The administrative law judge may, upon his own motion, remand a grievance.

4.9. Recusal - Any party may move to recuse (disqualify) the administrative law judge assigned to their grievance. Motions for recusal will be considered only in accordance with Rule 4.6 and granted only for good cause shown, in the discretion of the administrative law judge. A motion for recusal will not operate to automatically continue a hearing or other action on the grievance; provided, that any party may make a separate motion for a continuance until such time as a decision is made on the motion for recusal.

4.9.1. The administrative law judge's decision on a motion to recuse may be appealed to the Board or its Chairman by any party to the grievance, in accordance with Rule 4.6. An appeal shall operate to automatically continue any hearing or other action on the grievance. The decision of the Board or its Chairman is final and not subject to further appeal or review prior to the disposition of the grievance.

4.10. Errata Notice - After the administrative law judge issues a final decision in a grievance, the Board retains jurisdiction to amend the decision to correct clerical errors by errata notice during the appeal period.

4.11. Failure to state a claim - A grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.

4.12. Discovery - W. Va. Code §§ 18-29-6 and 29-6A-6 of the grievance procedure statutes encourage parties to participate in informal discovery prior to hearing. All employers must produce, prior to any hearing on the merits, any documents requested in writing by the grievant that are relevant and are not privileged. Further, if an employer 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 is to be forwarded to the grievant and/or any representative of the grievant named in the grievance.

4.12.1. Additional discovery may be allowed in the discretion of the administrative law judge, including evidentiary depositions which may be taken and read as in civil actions in the circuit courts of this state. When a party serves another party with a discovery request, that request need not be filed with the Board.

4.12.2. Parties shall attempt to resolve any discovery disputes among themselves before making a motion requesting an order compelling discovery. Any such motion must state that the parties have attempted to resolve the dispute, as well as the reason why the discovery is needed.

4.13. Joinder - Any party may move to join (or add as a party to the grievance) a person or entity necessary to the final disposition of the grievance, in accordance with Rule 4.6. The administrative law judge may on his own motion, join a person or entity necessary to the final disposition of the grievance.

4.14. Failure to pursue - Once no action by a party has been taken on a grievance for six months, the Board will send all parties a letter, by certified mail, advising that the case will be dismissed from the docket of the Board thirty calendar days from the date of the letter, unless any party objects and can demonstrate why the case should not be dismissed. If no timely written objection is received by the Board, an order of dismissal will be entered. If timely written objection is received by the Board, the grievance will be promptly scheduled for hearing or other action will be taken consistent with the orderly disposition of the grievance.

4.15. Hearings in general - Administrative law judges have full and complete authority to preside over and control all aspects of a hearing. If, in the determination of the administrative law judge, an individual present at a hearing is engaging in disruptive conduct, the administrative law judge may, in his discretion, admonish the individual to cease such conduct; exclude the individual from the remainder of the hearing; adjourn the hearing; or take other action consistent with the orderly and timely disposition of the grievance.

4.16. Location - All Level Four hearings will be conducted in the Board's offices; provided that, upon written motion in accordance with Rule 4.6 and for good cause shown, the administrative law judge may, in his discretion, conduct the hearing in another neutral location. In such cases, the party requesting the change in hearing site shall be responsible, at no

expense to the Board, for providing the following: a suitable hearing room; a separate area for witnesses; such other facilities, equipment or personnel as necessary; and a certified copy of the transcript of the hearing and delivery of the same to the administrative law judge within a specific number of days after the hearing.

4.17. Final disposition - Grievances may be disposed of in three ways: by decision on the merits; nonappealable dismissal order; or appealable dismissal order.

4.17.1. Decisions on the merits will result in the granting or denying of a grievance, in whole or in part. All decisions are maintained by the Board staff and transmitted monthly to the Office of the Secretary of State, Capitol Complex, Charleston, West Virginia 25305. Copies may be obtained from that office, at cost. Decisions on the merits in education cases are appealable to the Kanawha County Circuit Court or the circuit court of the county in which the grievance arose. Decisions on the merits in state cases are appealable only to the circuit court of the county in which the grievance arose.

4.17.2. Nonappealable dismissal orders may be based upon grievances dismissed for the following: settlement, withdrawal and, in accordance with Rule 4.14, a party's failure to pursue.

4.17.3. Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits.

4.18. Appeals to circuit court - In every matter appealed from this Board to circuit court, the appealing party shall furnish the Board with a copy of the notice of appeal and the circuit court docket number. The party prevailing on the appeal shall furnish the Board with a copy of the final decision of the circuit court and any accompanying order within twenty days of its receipt.

4.19. Burden of proof - The grievant bears the burden of proving his case by a preponderance of the evidence, except in disciplinary matters, where the burden is on the employer to prove that the action taken was justified. Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence.

4.20. Advisory opinions - The Board will, under no circumstances, issue an advisory opinion, i.e., an opinion on an issue not directly raised before the Board in a grievance.

4.21. Registration of employee organizations - All labor unions or other organizations representing West Virginia education and/or state employees and desiring to appear before the Board must register at the Board's main office in Charleston.

§156-1-5. Mediation

5.1. Parties to a grievance are encouraged to meet and attempt to negotiate and settle the grievance, as soon as possible after the grievance has been filed, prior to a hearing. The Board may provide mediation services, and information concerning such services will accompany the Notice of Hearing.

5.2. Motion for Mediated Settlement Conference - Any party to a grievance may request a mediated settlement conference prior to hearing. If any party objects to mediation, those services will not be rendered.

5.3. Independent administrative law judge - If the parties agree to mediation, an independent administrative law judge (other than the one assigned to hear the grievance), may be assigned to act as the mediator and actively assist the parties in identifying, clarifying and resolving issues regarding the grievance at any time prior to the level four hearing.

5.3.1. 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 administrative law judge involved in a mediation process shall not hear the grievance nor be consulted regarding the merits of the grievance.

5.4. Location - Mediation conferences will take place in the Board's offices, unless all parties and the mediator otherwise agree.

5.5. Time - The mediation conference will be scheduled sometime prior to the scheduled hearing of the grievance. In some instances, the mediation conference will be scheduled on the same day as the hearing, and the parties must be prepared to go forward with the hearing should the attempt at mediation fail.

5.6. Mediation not to delay other proceedings - The mediation conference shall not be cause for the delay of other proceedings in the grievance, including the completion of discovery, filing or hearing of motions, or the hearing of the grievance, except by order of the administrative law judge.

5.7. Attendance - All parties to the grievance and their representatives shall attend the mediation conference. If the authority to settle a grievance is vested in another individual not

present at the mediation conference, that individual or individuals must be available be telephone.

5.8. Finalizing the record - Upon reaching an agreement, the parties and their representatives will be asked to reduce the agreement to writing and sign it. A written, voluntary dismissal or withdrawal of a grievance must be filed with the Board by such persons as the parties shall designate.

APPENDICES

Appendix A - Sample grievance form

Appendix B - Certificate of Service form

**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE FORM**

PART A - MUST be completed by Grievant

If there is more than one grievant, put remaining names, addresses, telephone numbers and representatives, for each, on separate pages.

Grievant's Name	v. Department/Agency/Institution	Grievant's Representative or Pro Se
Grievant's Home Address	Department/Agency/Institution Address	Representative's Address
City, State & Zip Code	City, State & Zip Code	City, State & Zip Code
Grievant's Telephone No. Home & Work		Representative's Telephone No.

STATEMENT OF GRIEVANCE: Include a brief but COMPLETE description of the grievable event (attach additional pages if necessary). **Suspensions exceeding 20 days, demotions for discipline and dismissals may be grieved directly to Level IV.**

RELIEF SOUGHT: Include a brief but COMPLETE description of the relief sought. _____

CHECK if appropriate: _____ A Level I Informal Conference is requested.

Grievant's Signature: _____	Date Signed: _____
Supervisor's Signature: _____	Date Signed: _____

PART B - MUST be completed and signed by Evaluators and Grievant

PROCEDURAL SUMMARY

Level I decision issued by:	Signature: _____	Date: _____
	Immediate Supervisor	
Level I decision (attached) appealed to Level II:	Signature: _____	Date: _____
	Grievant	
Level II decision issued by:	Signature: _____	Date: _____
	Administrator or Designee	
Level II decision (attached) appealed to Level III:	Signature: _____	Date: _____
	Grievant	

UPON APPEAL TO LEVEL III, THE GRIEVANT MUST FORWARD A COPY OF THE GRIEVANCE TO BOTH THE DIVISION OF PERSONNEL (ADDRESS BELOW) AND THE AGENCY HEAD.

Level III decision issued by:	Signature: _____	Date: _____
	Chief Administrator/Designee	
Level III decision (attached) appealed to Level IV:	Signature: _____	Date: _____
	Grievant	

CHECK ONE: _____ A Level IV Hearing is requested. _____ A decision may be made on the lower level record.

THE GRIEVANT MUST SUBMIT THE GRIEVANCE FORM AND ALL LOWER LEVEL DECISIONS TO:

West Virginia Education and State Employees Grievance Board, 808 Greenbrier Street, Charleston, West Virginia 25311
and

Division of Personnel, Building 6, Room B-645, State Capitol Complex, Charleston, West Virginia 25305.

WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE FORM

GRIEVANCE FORM
Levels I, II, III, IV
(Circle One)

PART A - MUST be completed by Grievant

If there is more than one grievant, put remaining names, addresses, telephone numbers and representatives, for each, on separate pages.

_____	v.	_____	_____
Grievant's Name		Agency/Board of Education/Institution	Grievant's Representative or Pro Se
_____		_____	_____
Grievant's Home Address			Representative's Address
_____		_____	_____
City, State & Zip Code			City, State & Zip Code
_____		_____	_____
Grievant's Telephone No. Home & Work			Representative's Telephone No.

STATEMENT OF GRIEVANCE: Include a brief but **COMPLETE** description of the grievable event (attach additional pages if necessary).

RELIEF SOUGHT: Include a brief but **COMPLETE** description of the relief sought. _____

PART B - MUST be completed and signed by Evaluators and Grievant

PROCEDURAL SUMMARY

Level I decision issued by:	Signature: _____	Date: _____
	Immediate Supervisor	
Level I decision (attached) appealed to Level II:	Signature: _____	Date: _____
	Grievant	
Level II decision issued by:	Signature: _____	Date: _____
	Chief Administrator/Superintendent	
Level II decision (attached) appealed to Level III:	Signature: _____	Date: _____
	Grievant	
Level III decision issued by:	Signature: _____	Date: _____
	Governing Board/Agency	
Level III decision (attached) appealed to Level IV:	Signature: _____	Date: _____
	Grievant	

CHECK ONE: _____ A Level IV Hearing is requested. _____ A decision may be made on the lower level record.

THE GRIEVANT MUST SUBMIT THE GRIEVANCE FORM AND ALL LOWER LEVEL DECISIONS TO:

West Virginia Education and State Employees Grievance Board, 808 Greenbrier Street, Charleston, West Virginia 25311
and

The Chief Administrator of the agency, board of education or institution.

**APPENDIX A
(EDUCATION)**

CERTIFICATE OF SERVICE

I, _____, do hereby certify that a true copy of the foregoing [NAME OF DOCUMENT] was mailed to the parties by depositing copies thereof in the United States Mail, postage prepaid, this ___ day of _____, 19__.

[NAMES AND ADDRESSES OF PARTIES]

[NAME]



Gaston Caperton
Governor

Robert L. Stephens, Jr.
Director

STATE OF WEST VIRGINIA
DEPARTMENT OF ADMINISTRATION
DIVISION OF PERSONNEL

STATE
PERSONNEL BOARD
John A. Canfield, Chairman
Rev. Paul J. Gilmer, Member
Sharon H. Lynch, Member
Roger Morgan, Member
Eugene Stump, Member

September 29, 1995

RECEIVED
OCT 4 1995

Mr. James Paul Geary, Chairman
WV Education and State Employees
Grievance Board
808 Greenbrier Street
Charleston, West Virginia 25311

W.Va. Education & State
Emp. Grievance Board

Dear Chairman Geary:

The Division of Personnel has reviewed the Grievance Board's proposed Procedural Rules, filed with the Secretary of State on August 22, 1995. As you know, the Division communicated with the Board on January 23, 1995 concerning recommendations the Division proposed you consider in your revised regulations. There were three, specifically, that were of particular interest and concern to us; e. g., a mechanism for the Administrative Law Judge (ALJ) to render summary decisions, a limitation on the ALJ's authority to reverse duly promulgated rules and regulations of the Division of Personnel, and the adoption of an internal adjustment procedure whereby an ALJ's decision could be reviewed for error and reconsideration by the Board.

While we were disappointed that none of these recommendations were addressed in the proposed Rule filed in August, nevertheless, we would like to offer these additional recommendations to the proposed Rule.

Subpoenas and Motions (Sections 4.5 and 4.6)

We suggest that a mechanism to provide for the "quashing of a subpoena" be provided with the proposed Administrative Rule. Since subpoenas are permitted by state law to be issued within six (6) days of the hearing, we are perplexed

as to how a motion can be filed within ten (10) days. Rather than forcing a review by the Circuit Court, I assert that providing some type of mechanism before the Grievance Board or ALJ reinforces the informal resolution of employee/employer disputes. Further, the currently drafted proposed rule and time frames require an employer to "be prepared to proceed with the hearing if the motion is denied." [4.6.2] In situations where a request for a subpoena is overly broad, the employer would have to appear at the hearing "prepared to proceed". Therefore, if requested, a "truck-load" of material would have to be prepared in any case even if a motion to quash is granted.

4.12 Discovery

The added language in this section broadens the requirements of the employer and does not present a shared burden between the grievant and employer. It is recommended that the last sentence be changed to read: "Further, if either party ~~an employer~~ 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 is to be forwarded to all parties ~~the grievant~~ and/or any representative of the parties ~~grievant~~ named in the grievance." Additionally, we are fearful that the proposed rule, as drafted, could be construed to mean that if employers fail to provide such prior to a hearing, they would be prohibited from asserting and relying on such at the hearing.

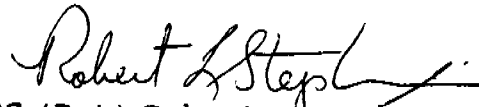
4.12.1 While we believe that additional discovery would at times be in the best interest of both parties by providing for

James Paul Geary, Chairman
Page 3
September 29, 1995

evidentiary depositions, the requirement for producing depositions, however, should be by mutual agreement of all parties and not left to the discretion of the ALJ.

I am inclined to ask, what has happened to the informal grievance procedure? I trust our recommendations will be considered when the proposed Rule is presented for final approval by the Legislative Rule-Making Committee. Should you wish to discuss our comments further, please do not hesitate to contact me.

Sincerely,



BG (Ret) Robert L. Stephens, Jr.
Director
WV Division of Personnel

BG(Ret)RLSjr

cc: Legislative Rule-Making Committee

DNR

West Virginia
Division of
Natural Resources

CHARLES B. FELTON, JR.
Director

Director
State Capitol Complex
Building 3, Room 669
1900 Kanawha Boulevard, E.
Charleston, West Virginia 25305-0660

Telephone
(304) 558-2754
FAX (304) 558-2768
TDD 558-1439
TDD 1-800-354-6087



GASTON CAPERTON
Governor

Equal Opportunity Employer

Administration
(304) 558-3315
FAX (304) 558-2768

Law Enforcement
(304) 558-2783
FAX (304) 558-1170

Parks and Recreation
(304) 558-2764
FAX (304) 558-0077

Wildlife Resources
(304) 558-2771
FAX (304) 558-3147

Conservation Education and Litter Control
(304) 558-3370
FAX (304) 558-2768

Public Information
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MEMORANDUM

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OCT 2 1995

W.Va. Education & State
Emp. Grievance Board

TO: W.Va. Education and State Employees
Grievance Board

FROM: Harry F. Price, Executive Secretary *HFP*

DATE: September 29, 1995

SUB: Comments on Rules - Title No. 156CSR1

This agency wishes to offer the following comment regarding Procedural Rule Title No. 156CSR1:

- (1) Page 6, paragraph 4.13, "legal notice of joinder must be given the party or entity joined thirty days prior to being joined."

Thank you for the opportunity to comment.

HFP/mb

cc: Bond

 **West Virginia
Make It Shine**

**Comments Received Through Public Comment Period
Proposed Procedural Rule 156 C.S.R 1**

Upon the Grievance Board's submission of this rule, 156 CSR 1, to the Office of the Secretary of State, as a proposed rule, it established a comment period in lieu of a public hearing for the receipt of written comments. Only two written comments were received in a timely fashion. Copies of these responses are included.

The Division of Personnel, through correspondence by Director BG (Ret) Robert L. Stevens, Jr., submitted a written comment on September 29, 1995, to the Board, recommending that changes be made to Sections 4.5, 4.6, 4.12 and 4.12.1 of the rule. Also, Harry F. Price, Executive Secretary of the West Virginia Division of Natural Resources submitted a written comment concerning Section 4.12 of the Rule.

No formal, written responses were provided to either the Division of Personnel or the Division of Natural Resources. The written comments were considered by the Grievance Board at its meeting held on December 15, 1995. The only change made to the Rule as a result of public comment was the addition of Section which authorizes Administrative Law Judges to entertain motions to quash subpoenas which they have issued.

KEN HECHLER
Secretary of State

MARY P. RATLIFF
Deputy Secretary of State

STEPHEN N. REED
Deputy Secretary of State

CATHERINE FREROTTE
Executive Assistant

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Director, Administrative Law

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Supervisor, Corporations

STATE OF WEST VIRGINIA
SECRETARY OF STATE
Building 1, Suite 157-K
1900 Kanawha Blvd., East
Charleston, WV 25305-0770

RECEIVED (Plus all the volunteer help we can get)

MAR 15 1996

TO: Valerie D. Rist

AGENCY: State Employee Grievance Board

FROM: JUDY COOPER, DIRECTOR, ADMINISTRATIVE LAW DIVISION

DATE: March 11, 1996

W.Va. Education & State
Emp. Grievance Board

THE ATTACHED RULE FILED BY YOUR AGENCY HAS BEEN ENTERED INTO OUR COMPUTER SYSTEM. PLEASE REVIEW, PROOF AND RETURN IT WITH ANY CORRECTIONS. IF THERE ARE NO CORRECTIONS, PLEASE SIGN THIS MEMO AND RETURN IT TO THIS OFFICE. YOU WILL BE SENT A FINAL VERSION OF THE RULE FOR YOUR RECORDS.

PLEASE RETURN EITHER THE CORRECTED RULE OR THIS FORM WITHIN TEN (10) WORKING DAYS OF THE DATE YOU RECEIVED THIS REQUEST. CALL IF YOU HAVE ANY QUESTIONS.

SERIES: 1 TITLE: 159 State Employee Grievance Board

* THE ATTACHED RULE HAS BEEN REVIEWED AND IS CORRECT.

SIGNED: _____

TITLE OF PERSON SIGNING: _____

DATE: _____

* THE ATTACHED RULE HAS BEEN REVIEWED AND NEEDS CORRECTING. THE CORRECTIONS HAVE BEEN MARKED.

SIGNED: Valerie D. Rist

TITLE OF PERSON SIGNING: Adm. Asst

DATE: 3-18-96

NOTE: IF YOU ARE NOT THE PERSON WHO HANDLES THIS RULE, PLEASE FORWARD TO THE CORRECT PERSON.

pg 1 and pg 6 as noted