

**WEST VIRGINIA
SECRETARY OF STATE
JOE MANCHIN III
ADMINISTRATIVE LAW DIVISION**

Form #2

Do Not Mark In This Box

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2004 JUL 20 A 11:35

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

WEST VIRGINIA
SECRETARY OF STATE

AGENCY: Education and State Employees Grievance Board TITLE NUMBER: 156 C.S.R.1

RULE TYPE: Procedural CITE AUTHORITY: W. Va. Code §§ 18-29-5(a) and 26-6A-5(a)

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: 156 C.S.R.1

TITLE OF RULE BEING AMENDED: Procedural Rules

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

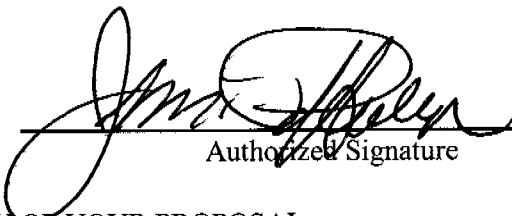
IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON August 19, 2004 AT 9:00 am ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS:

Education and State Employees Grievance Bd.

808 Greenbrier Street

Charleston, WV 25311

THE ISSUES TO BE HEARD SHALL BE LIMITED TO THIS PROPOSED RULE.


Authorized Signature

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL



STATE OF WEST VIRGINIA
DEPARTMENT OF ADMINISTRATION
OFFICE OF THE CABINET SECRETARY

BOB WISE
GOVERNOR

JOHN T. POFFENBARGER
ACTING CABINET SECRETARY

July 20, 2004

Via Hand-Delivery

The Honorable Joe Manchin, III
Secretary of State
Building 1, Suite 157K
1900 Kanawha Boulevard, East
Charleston, WV 25305

Re: Procedural Rules

Dear Secretary Manchin,


I am enclosing an original and one copy of the documents listed below for filing. The proposed rules are being filed on behalf of the Education and State Employees Grievance Board. I will provide a copy of the enclosed documents to the Legislative Rule Making Review Committee once they are marked filed by your office.

The documents enclosed consist of the following:

1. Notice of Comment Period on a Proposed Rule,
2. Statement of Circumstance and Brief Summary,
3. Proposed Rules, and
4. Fiscal Note for Proposed Rules.

Thank you very much for your assistance. If you have any questions, or need any additional information, please do not hesitate to give me a call.

Sincerely,


Donna M. Lipscomb
Executive Coordinator

Enclosures

Summary of Proposed Amendments to the Grievance Board's Procedural Rules

The Grievance Board is proposing amendments to its Procedural Rules in response to changes in the law and complaints concerning the procedures used by state agencies in hearing and deciding grievances. The Board's purpose in proposing these amendments is to improve the grievance process and make the two grievance procedures more uniform.

Rule 3.3 provides that Level Three grievance evaluators shall have final decision-making authority in grievances by state and higher education employees, and allows them to subpoena relevant documents from the West Virginia Division of Personnel in grievances by state employees.

Rule 3.5 allows state and higher education employees the same right to intervene as county board of education employees when their rights may be substantially adversely affected by a decision in a pending grievance.

Rule 4.1.1 requires grievants to designate a representative at Level Four in the grievance process on a standard form created by the Board.

Under Rule 4.6 makes clear that administrative law judges can allocate costs and expenses incurred by Grievants for witnesses subpoenaed to Level Four hearings. This rule change will also allow administrative law judges to issue subpoenas for lower level hearings.

Rule 4.6.1 provides each party must provide the Board, and the other parties, with a list of witnesses they intend to call for a Level Four hearing at least six days before the hearing.

Rule 4.15 is intended to allow grievances to be consolidated at the lower levels of the procedure.

Appendix C is a Grievance Form for Higher Education employees. This form was created in 200,1 shortly after the Legislature made grievances filed by higher education employees subject to the provisions of W. Va. Code §§ 29-6A-1 et seq., instead of W. Va. Code §§ 18-29-1 et seq.

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Procedural Rules 156 C.S.R. 1

Type of Rule: Legislative Interpretive Procedural

Agency: Education and State Employees Grievance Board

Address: 808 Greenbrier Street

Charleston, WV 25311

1. Effect of Proposed rule:

	ANNUAL FISCAL YEAR				
	INCREASE	DECREASE	CURRENT	NEXT	THEREAFTER
ESTIMATED TOTAL COST	0				
PERSONAL SERVICES	0				
CURRENT EXPENSE	0*				
REPAIRS & ALTERATIONS	0				
EQUIPMENT	0				
OTHER	0				

2. Explanation of Above Estimates:

*The Board has no data upon which to base an estimate of the costs employers may incur under Rule 4.6. This rule states that grievants may request the administrative law judge to allocate costs related to the subpoena of witnesses to Level Four hearings.

3. Objectives of These Rules:

See summary of Proposed Amendments.

Rule Title: _____

4. Explanation of Overall Economic Impact of Proposed Rule:

A. Economic Impact on State Government:

0

B. Economic Impact on Political Subdivisions; Specific Industries; Specific Groups of Citizens:

0

C. Economic Impact on Citizens/Public at Large.

0

Date: 7/16/04

Signature of Agency Head or Authorized Representative:

Ronald Wright, Director

156 CSR 1
TITLE 156
PROCEDURAL RULES
WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

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SERIES 1

WEST VIRGINIA
SECRETARY OF STATE

§156-1-1. General

1.1. Scope - The following procedural rules set forth the practice and procedure established by the West Virginia Education and State Employees Grievance Board for carrying out its responsibilities to administer the grievance procedure for educational and state employees contained in W. Va. Code §§ 18-29-1, et seq., and W. Va. Code §§ 29-6A-1, et seq. The Board is responsible for administering the grievance procedure at Level Four and has jurisdiction regarding procedural matters at Levels Two and Three of both grievance procedures. These rules apply to all grievances pending and those filed after the effective date.

1.2. Authority - W. Va. Code §§ 18-29-5(a), and 29-6A-5(a).

1.3. Filing Date -

1.4. Effective Date -

1.5. Liberal Construction - The provisions of these rules 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 rules.

1.6. Severability - If any section or subsection of these rules is determined to be invalid, it shall not be construed to invalidate any of the provisions not otherwise affected.

1.7. Availability of Rules - These rules are on file in the Office of the Secretary of State, and are available at each of the Board's offices, and at the Board's web site: www.state.wv.us/admin/grievanc/grievanc.htm.

1.8. 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 these rules.

§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 purpose of these rules, except the term "administrative law judge" will be used, instead of the statutory term "hearing examiner". 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 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. A grievance may also be filed by hand-delivery to the Board's main office or by facsimile transmission to that office. A hard copy of any grievance filed by facsimile must be mailed to the main office within a reasonable time following the facsimile transmission, and should be identified as a duplicate.

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 these rules, 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. Appendix A is the Certificate of Service form.

2.1.4. "Subpoena" means an official document, issued by an administrative law judge or a grievance evaluator in accordance with ~~pursuant to the provisions of~~ the West Virginia Administrative Procedures Act, W. Va. 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 for a ruling or order by an administrative law judge.

2.1.7. "Evidence" is any of the means through which an alleged fact is either proven or disproven, and includes testimony given under oath and documents.

2.1.8. "Grievance evaluator" means that individual or governing board authorized to render a decision on a grievance at Levels One, Two or Three of the grievance procedure.

§156-1-3. Levels One, Two and Three

3.1. Forms - All governing boards (education) and employers (state) should use the applicable grievance form issued by the Grievance Board at all levels of the procedure, but they may elect to use their own forms instead. The immediate supervisor must provide a grievance form to an employee upon request. Appendix B is the Form for Education Employees. Appendix C is the Form for Higher Education Employees. Appendix D is the Form for State Employees. Copies of these forms can be obtained at the Grievance Board's web site.

3.2. Written procedures - All governing boards (education) and employers (state) should establish written procedures relating to employee grievances at Levels One, Two and Three. These procedures should inform employees of the provisions of these rules 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. All newly-hired employees should be given a copy of these procedures upon commencement of their employment.

3.3. Grievance Evaluator Authority - At Level Three of the procedure for state and higher education employees, i.e., W. Va. Code § 29-6A-4(3), grievance evaluators designated by the chief administrator shall issue the final decision, and the chief administrator shall have no authority to override or reverse the decision.¹ Grievance evaluators may issue subpoenas for witnesses. Grievance evaluators at Level Three in state employee grievances may also issue subpoenas for documents in the possession or control of the Division of Personnel in accordance with W. Va. Code §§ 29A-5-1 et seq. These documents must not be privileged, and must be relevant to a claim or defense in the pending grievance.² In addition, the Division of Personnel must redact confidential

¹ This change is intended to give Level Three grievance evaluators under W. Va. Code §§ 29-6A-1 et seq., the law that covers state and higher education employment, the same decision-making authority as grievance evaluators in public education grievances. In Syllabus Point 2 of Triggs v. Berkeley County Bd. of Educ., 188 W. Va. 435, 425 S.E.2d 111 (1992), states: "Under W. Va. Code, 18-29-3(t) 1985, a county board of education or its superintendent may appeal a grievance decision made by the superintendent's designee at level two or by an independent hearing examiner at level four." In at least three decisions, the Grievance Board's administrative law judges have recognized that the grievance procedure law for state and higher education employment does not prohibit a chief administrator from reserving the ultimate decision-making authority to himself, by delegating to grievance evaluators only the authority to make recommended decisions. Conclusion of Law 2, Franz v. Dept. of Health and Human Resources, Docket No. 98-HHR-228 (Nov. 30, 1998); Miller v. Division of Highways, Docket No. 98-DOH-037 (July 6, 1998) and Gains v. Division of Highways, Docket No. 97-DOH-203 (Dec. 12, 1997). The Board is of the opinion, however, that the plain language of the statute does not authorize this practice. Accordingly, it voted to propose this procedural rule.

² This is to grant grievance evaluators at Level Three in state employee grievances clear authority to issue subpoenas for documents in the possession or control of the

information from the documents, such as social security numbers and personal health information, before disclosure.

3.4. Grievance Evaluator Decisions - Except for the informal attempt to resolve an educational employee grievance as provided for in W. Va. Code § 18-29-4(a), 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 therefore, 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.

3.5. Intervention - Upon timely request in a grievance filed by a state or higher education employee under W. Va. Code §§ 29-6A-1, et seq., an employee shall be allowed to intervene and become a party to a grievance at any level, when that employee claims the ruling in a grievance may substantially and adversely affect his or her rights or property and his or her interest is not adequately represented by the existing parties. Employers are encouraged to give notice to employees who could be substantially and adversely affected by the decision in a pending grievance that such employees may make a written request to intervene. Employees who may be directly affected by a ruling in a particular grievance are encouraged to intervene. An employee who intervenes in a grievance proceeding may make affirmative claims for relief in matters related to the grievance, as well as assert defensive claims, and may appeal to circuit court like any other party.³

§156-1-4. Level Four

4.1. Grievance Forms - Sample Grievance forms that which should be used for filing a grievance at all levels in the procedure are attached. as Appendix B, (Form for Education Employees), Appendix C (Form for State Employees).

4.1.1 Designate Your Representative Form at Level Four - Employees have the right to represent themselves at all levels in the grievance procedure. Employees may also be represented an employee organization, fellow employee, legal counsel or other person designated by the grievant as the representative. If an employee decides to have someone represent them at Level Four, the attached Designation of Representative Form,

Division of Personnel, similar to the authority of grievance evaluators granted by W. Va. Code § 18-29-4(b) in grievances by public education employees.

³ This change will allow for intervention in grievances filed by state and higher education employees, in the same manner and circumstances as allowed for public education employees under W. Va. Code § 18-29-3(u). This change is intended to make the law uniform on this issue.

Appendix E, must be completed and signed by the employee and the representative.⁴

4.2. Assignment of Administrative Law Judge - Upon proper filing of a Level Four grievance, the Board shall assign the grievance a docket number, and the employer will be directed to submit the complete record of the lower level proceedings, including the transcript and all exhibits, if any. If a Level Four hearing is requested, the parties will be directed to provide proposed hearing dates for the grievance hearing. Thereafter, the Board shall assign the matter to an administrative law judge and all parties will be notified of the assignment. Once the parties are notified of the assignment, all documents and correspondence are 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 or her and, to take any such action considered appropriate consistent with the provisions of W. Va. Code §§18-29-5 and 29-6A-5.

4.4. Prehearing Conferences - As soon as practical after the grievance is assigned, the administrative law judge may conduct a prehearing conference with the parties and/or their representatives, in person or by telephone, to explore and resolve matters to expedite the grievance proceedings. In the ALJ's discretion, such conferences will be recorded by mechanical means.

4.4.1. The specific matters that may be addressed include: explaining the Board's procedures, particularly to employees representing themselves; identifying the issues to be decided in the grievance; discussing whether the case can be submitted for decision based upon the record made in the lower levels of the procedure; setting the date, time, place and estimated duration of the hearing; resolving any outstanding discovery issues and establishing discovery limits; discussing the law, standards of proof, rules of evidence and burdens of proof that are to apply to the grievance; exchanging stipulations and declarations regarding facts, exhibits, witnesses and other issues; identifying the names of witnesses, the scope of witness testimony and witness exclusion; discussing whether the case can be settled or should be mediated; determining the value of separating the grievance into phases, such as a default phase and a remedy phase; determining whether the hearing should be open to the public and press; and discussing any other issues relating to the grievance or the conduct of the grievance hearing. The administrative law judge may issue oral or written orders reflecting his or her decisions on the above matters and may conduct additional conferences when the need arises.

⁴ The requirement that employees designate a representative at Level Four came about as the result of complaints to the Board by a union that state employees were incorrectly designating the union as the representative. A similar form is used by the Merit Systems Protection Board on the federal level.

4.5. 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.

4.5.1. Any ex parte communication made to an administrative law judge concerning the merits or substance of a grievance shall be promptly disclosed to the other parties and an opportunity for rebuttal allowed.

4.6. Subpoenas and subpoenas duces tecum - Parties who wish to obtain subpoenas to require the attendance and testimony of witnesses, or subpoenas requiring the production of documents, must file a written motion or request for subpoenas with the administrative law judge assigned to the grievance. The written request should be submitted as soon as possible, so that the subpoena can be served at least five days before to the scheduled hearing, as required by W. Va. Code § 29A-5-1(b). Subpoenas and subpoenas duces tecum will be issued in the discretion of the administrative law judge. 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 for witness and mileage fees, if any. Witness and mileage fees shall be the same as are paid witnesses in the courts of this state. Subpoenas and subpoenas duces tecum may be enforced as provided in W. Va. Code § 29A-5-1(b). Grievants may request the administrative law judge to allocate costs under either the provisions of W. Va. Code § 18-29-8 or W. Va. Code § 29-6A-8, as applicable, to reimburse them for costs incurred for service, witness and mileage fees for witnesses subpoenaed to Level Four hearings.⁵ Administrative law judges shall have the authority to subpoena witnesses and documents for Level Three hearings in accordance with the provision of section one [§ 29A-5-1], article five, chapter twenty-nine-a of this code, upon the written request of any party to the grievance

4.6.1. ~~Any party requesting a subpoena or subpoena duces tecum must advise all other parties of the request at the time it is made. All parties shall provide the Board and all other parties with a list of the witnesses it intends to call at the Level Four hearing, whether subpoenaed or not, at least six days prior to the hearing.⁶ The parties are~~

⁵ Administrative law judges have been vested with the authority to allocate costs at Level Four by the provisions of W. Va. Code §§ 18-29-5(b) & 8 and W. Va. Code §§ 29-6A-5(b) & 8.

⁶ This language was added to address a complaint about existing procedure by public employee organizations. Under current procedure each side must notify the other parties when requesting subpoenas. Because employers ordinarily direct their employees to appear as witnesses without requesting subpoenas, the result is that employers are not required to disclose who their witnesses may be, but Grievants must do so if a subpoena is requested. The purpose of this change is place the same duty on all parties.

~~encouraged to exchange a list of witnesses prior to the Level Four hearing.~~

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

4.7. 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 are to be accompanied by a concise statement of their basis, both legal and factual. All motions must be served by the moving party upon all other parties at the same time it is presented to the administrative law judge. Upon receiving a written motion, all non-moving parties shall be given a reasonable time within which to file a written response. A certificate of service must accompany all motions.

4.7.1. 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. Such hearing may be conducted via telephone conference call, with all parties or their representatives participating.

4.7.2. If a situation necessitating a motion arises immediately before or during a hearing, an oral motion may be made at the hearing. The moving party 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.

4.8. Continuances - Any party may request a continuance of a hearing or other proceeding related to a grievance. Any party moving for a continuance must first attempt to contact the other parties to obtain an agreement to a continuance and to obtain five agreed upon dates for scheduling the hearing. 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 or her own motion, continue hearings or other proceedings.

4.9. 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 or her own motion, remand a grievance for good cause.

4.10. 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 4.7 and will be 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.

4.10.1. 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 4.7. 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.

4.11. 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.

4.12. 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.

4.13. 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.

4.13.1. The administrative law judge shall have authority to order such additional discovery, by way of deposition, interrogatory, document production, or otherwise, as considered necessary for a fair determination of the issues in dispute, consistent with the expedited nature of the grievance procedure. When a party serves another party with a discovery request, that request need not be filed with the Board.

4.13.2. 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.

4.14. Joinder - Any party may move to join (or add as a party to the grievance) a person or entity necessary to grant complete relief in the grievance by filing a motion in accordance with Rule 4.7. The administrative law judge may on his or her own motion, join a person or entity necessary to grant complete relief in the grievance. The Division of Personnel must be joined and made a party in any state employee grievance involving

classification matters.

4.15. Consolidation - Separate grievances filed by two or more employees may be consolidated for hearing and decision because the grievances contain identical or similar issues. Grievances may be consolidated by agreement of all parties, or by the administrative law judge or the grievance evaluator on his or her own motion. Any party may move to join two or more grievances filed by the same party for purposes of hearing and/or decision, or the grievance evaluator at Level Three or the administrative law judge may join such cases for united consideration on his or her own motion.⁷

4.16. Failure to pursue - Once no action by a party has been taken on a grievance for four 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 twenty 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. If neither the grievant nor the grievant's representative, if applicable, appears for a scheduled grievance hearing, the administrative law judge may issue a show cause order, requiring the grievant to show good cause for his or her absence, and advising that the failure to respond with a set time limit will result in the dismissal of the grievance for failure to prosecute.

4.17. 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.

4.18. Location - All Level Four hearings will be conducted in the Board's offices; provided that, upon written motion in accordance with Rule 4.7 and for good cause shown, the administrative law judge may, in his or her discretion, conduct the hearing in another location agreeable to the parties. 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. However, the administrative law judge has the discretion to use the Board's recording equipment to record the testimony, at no cost to the parties.

⁷ These changes are intended to give grievance evaluators the same authority as administrative law judges to process grievance in a fair and efficient manner.

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

4.19.1. 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 and are transmitted monthly to the Office of the Secretary of State, Capitol Complex, Charleston, West Virginia 25305. Decisions on the merits are appealable to the Kanawha County Circuit Court or the circuit court of the county in which the grievance arose.

4.19.2. Nonappealable dismissal orders may be based upon grievances dismissed for the following: settlement, withdrawal and, in accordance with Rule 4.15, a party's failure to pursue.

4.19.3. 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.

4.20. Appeals to circuit court - In every matter appealed to circuit court, the appealing party shall serve a copy of the appeal petition upon the Board as required by W. Va. Code § 29A-5-4(b), and will provide the Board with the civil action number so that the certified record can be properly filed with the circuit court. 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.

4.21. 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.

4.22. 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.

4.23. Registration of employee organizations - All labor unions or other organizations representing West Virginia education and/or state employees before the Board should register at the Board's main office in Charleston in accordance with W. Va. Code § 18-29-2(q) and W. Va. Code § 29-6A-2(f).

4.24. Interpreter Appointment - In accordance with the requirements of W. Va. Code § 5-14A-5, if a hearing impaired person makes a request for an interpreter, the Board, at its own expense, shall appoint an interpreter to interpret the proceeding to the hearing impaired person and/or to interpret his or her testimony.

§156-1-5. Claims for Relief by Default

5.1. A grievant seeking to prevail by default must file a written claim seeking relief by default with his or her employer and may, at the same time, file the claim with the Board. After the employer receives the written claim for default, it may file a request for a hearing with the Board within five working days. Upon receipt of a claim for relief by default, the Board will place the claim for default on its docket, assign a docket number, and set the claim for hearing. The issues to be decided may include whether a default has occurred at Levels One, Two or Three, whether the employer has a statutory excuse for not responding within the time required by law and/or whether the relief sought is contrary to law or clearly wrong. Once a grievant files a written claim for relief by default with the Board at Level Four, all proceedings at the lower levels are automatically stayed until all default matters have been ruled upon at Level Four, unless all parties agree in writing that lower level proceedings can go forward. Mediation services shall continue to be available while default matters are pending.

§156-1-6. Mediation

6.1. When available - The Grievance Board can provide mediation services to assist the parties in identifying, clarifying and resolving issues in a grievance at any stage of the grievance. Mediation can be requested at Levels Two or Three of the procedure, even before an evidentiary hearing is held. Mediation is an option available to the parties. If the parties cannot resolve their dispute through mediation, the grievance will proceed as if no mediation session had been held.

6.2. Request for mediation - Any party to a grievance may request mediation by contacting the Board's main office in Charleston, orally or in writing. The Board's staff will contact the other parties in an effort to obtain an agreement to mediate and to schedule a mediation session. If any party objects to mediation, the Board will not ordinarily provide mediation services, although the Board does possess the authority to compel mediation upon the request of any party in grievances by state employees.

6.3. Assignment of mediator - In the event of mediation, an administrative law judge, or any other person agreeable to the parties, will be assigned to serve as the mediator. The mediator has no authority to impose a settlement on the parties but will try to help them reach a satisfactory resolution to their dispute. The mediator has full authority to conduct the mediation session, to determine its length, and to terminate the mediation when, in the judgment of the mediator, further efforts at mediation will not contribute to a resolution of the dispute between the parties.

6.3.1. All information 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. Mediation sessions are private. Persons other than the parties and their

representatives may attend only with the permission of the parties and with the consent of the mediator.

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

6.5. Time - The mediation session will be scheduled by agreement of the parties and the mediator. If possible and the parties agree, the mediation session will be scheduled on the same day as the Level Four hearing, in which event the parties must be prepared to go forward with the hearing should they be unable to resolve their dispute that day.

6.6. Mediation not to delay other proceedings - The mediation session shall not cause a delay in the hearing of the grievance, except by order of the administrative law judge, or by agreement of the parties.

6.7. Attendance - All parties and their representatives shall attend the mediation session. If the authority to settle a grievance is vested in a person not present at the mediation conference, that individual or individuals must be readily available by telephone.

6.8. Finalizing the record - Upon reaching an agreement, the parties and their representatives will put the agreement in writing and sign it, or the agreement will be recorded by mechanical means.

APPENDICES

Appendix A - Certificate of Service form

Appendix B - Form for Education Employees

Appendix C - Form for Higher Education Employees

Appendix D - Form for State Employees

Appendix E - Form for Designation of Grievant's Representative

CERTIFICATE OF SERVICE

I, _____, do hereby certify that I have this _____ day of _____, 20____, served true copies of the foregoing **[NAME OF DOCUMENT]** upon the following by United States Mail in properly addressed and stamped envelopes to their addresses as follows:

[NAMES AND ADDRESSES OF PARTIES]

[NAME]

APPENDIX A

**EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD
FORM FOR EDUCATION EMPLOYEES**

808 Greenbrier Street, Charleston, WV 25311 (304) 558-3361 Fax (304) 558-1106 Toll-Free (866) 747-6743

For Levels I, II, III, IV

PART A: Grievant's Information:

Grievant's Name	Agency/Board of Education/Institution	Grievant's Representative (if applicable)
_____	_____	_____
Grievant's Home Address	Grievant's Work Address	Representative's Address
_____	_____	_____
City, State and Zip Code	City, State and Zip Code	City, State and Zip Code
_____	_____	_____
Grievant's Home Telephone No.	Grievant's Work Telephone No.	Representative's Telephone No.
_____	_____	_____

STATEMENT OF GRIEVANCE: (Please state the event causing this grievance and list the specific statutes, policies, rules, regulations or agreements you claim have been violated, misapplied or misinterpreted.) This field will expand if more room is needed.

RELIEF SOUGHT: This field will expand if more room is needed.

PART B: Procedural Summary (if applicable)

Level I:

Grievant's Signature:	Date Filed:	Date of Decision:
_____	_____	_____

Level II:

Grievant's Signature:	Date Filed:	Date of Decision:
_____	_____	_____

Level III:

Grievant's Signature:	Date Filed:	Date of Decision:
_____	_____	_____

Level IV: Check One:

- A Level IV hearing is requested.
- A decision may be made on the lower level record.

Grievant's Signature:	Date Filed:
_____	_____

Internet Site: www.state.wv.us/admin/grievanc/grievanc.htm

APPENDIX B

This form is designed to be used at all levels in the procedure.

FILING GRIEVANCES: County board of education employees who have been suspended or dismissed from employment can file directly at Level IV with the Grievance Board. W. Va. Code § 18A-2-8.

“Days,” for purposes of filing or responding to grievances, does not include Saturdays, Sundays, official holidays or school closings. W. Va. Code § 18-29-2(b).

Level I - W. Va. Code § 18-29-4(a)

- o Grievant or representative shall schedule a conference with immediate supervisor within fifteen (15) days of grievable event.
- o Immediate supervisor must hold a conference within ten (10) days of request.
- o Immediate supervisor shall respond within ten (10) days of conference.
- o A written grievance must be filed with immediate supervisor within ten (10) days of response. In higher education cases, the grievance must be filed with the immediate supervisor and the office of personnel.
- o Immediate supervisor must state a response within ten (10) days.

Level II - W. Va. Code § 18-29-4(b)

- o Grievant may appeal to the chief administrator within five (5) days of receiving Level I decision.
- o Chief administrator or designee must conduct hearing within five (5) days of receiving appeal.
- o Chief administrator or designee must issue written decision within five (5) days of the hearing.

Level III - W. Va. Code § 18-29-4(c)

- o Grievant may appeal, within five (5) days of receipt of Level II decision, to the governing board of the institution, or appeal directly to Level IV, the Grievance Board.
- o Governing board, within five (5) days of receipt of appeal, may either conduct hearing, review record from chief administrator and issue a decision, or waive participation and notify grievant. If a hearing is held, the governing board shall issue decision within five (5) days.

Level IV - W. Va. Code § 18-29-4(d)

- o Grievant may appeal to Grievance Board within five (5) days of receipt of the Level II decision or the action taken by the governing board at Level III.
- o **Upon appeal, the Grievant must submit the grievance form and all lower level decisions to the West Virginia Education and State Employees Grievance Board, 808 Greenbrier Street, Charleston, West Virginia 25311.**
- o A Level IV hearing, if requested, must be held within ten (10) days following the request. **Note: In practice, Level IV hearings are usually held on a date agreed upon by the parties.**
- o The Administrative Law Judge must issue a written decision within thirty (30) days of the hearing. **Note: If the parties elect to file proposed findings of fact and conclusions of law, the Board considers the 30-day deadline to be automatically extended until the agreed date.**

IMPORTANT

Grievant **MUST** fill out ALL pertinent parts of the grievance form. If some parts are not completed, this will delay processing this grievance. If there is more than one grievant, attach all grievant's names, home addresses, telephone numbers and representatives. Addresses and telephone numbers are very important. For confidentiality purposes, we prefer to send all correspondence to grievant's home address only.

Statement of Grievance and Relief Sought: Include a brief but **COMPLETE** description of the grievable event and the relief sought.

You have the right to request the Board to provide a mediator at any step in the grievance procedure to attempt to settle the dispute.

**EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD
FORM FOR HIGHER EDUCATION EMPLOYEES**

808 Greenbrier Street, Charleston, WV 25311 (304) 558-3361 Fax (304) 558-1106 Toll-Free (866) 747-6743

For Levels I, II, III, IV

PART A: Grievant's Information:

Grievant's Name	State Institution of Higher Education	Grievant's Representative (if applicable)
Grievant's Home Address	Grievant's Work Address	Representative's Address
City, State and Zip Code	City, State and Zip Code	City, State and Zip Code
Grievant's Home Telephone No.	Grievant's Work Telephone No.	Representative's Telephone No.

STATEMENT OF GRIEVANCE: (Please state the event causing this grievance and list the specific statutes, policies, rules, regulations or agreements you claim have been violated, misapplied or misinterpreted.) This field will expand if more room is needed.

RELIEF SOUGHT: This field will expand if more room is needed.

PART B: Procedural Summary (if applicable)

Level I: Check <input checked="" type="checkbox"/> , if appropriate:	_____	A Level I Informal Conference is requested.
Grievant's Signature:	Date Filed:	Date of Decision:
Level II:		
Grievant's Signature:	Date Filed:	Date of Decision:
Level III:		
Grievant's Signature:	Date Filed:	Date of Decision:
Level IV: Check <input checked="" type="checkbox"/> One:	_____	A Level IV hearing is requested.
	_____	A decision may be made on the lower level record.
Grievant's Signature:		Date Filed:

Internet Site - www.state.wv.us/admin/grievanc/grievanc.htm

This form is designed to be used at all levels in the procedure.

FILING GRIEVANCES: Claims that a supervisor has engaged in discrimination or retaliation, and grievances contesting a suspension, demotion, dismissal, or loss of pay may be filed either at **Level I** or **Level II**. Claims concerning suspensions exceeding twenty (20) days, demotions and dismissals may be filed directly at **Level IV**.

“Days,” for purposes of filing or responding to grievances, means working days.

Level I - W. Va. Code § 29-6A-4(a)

- o File grievance form with immediate supervisor within ten (10) days of grievable event.
- o At request of grievant or immediate supervisor, an informal conference shall be held within three (3) days of receipt of written grievance.
- o Supervisor must issue written decision within six (6) days of receipt of written grievance.

Level II - W. Va. Code § 29-6A-4(b)

- o Grievant may appeal to administrator of grievant’s work location within five (5) days of receiving Level I decision.
- o Administrator or designee must hold conference within five (5) days of receipt of appeal.
- o Administrator or designee must issue written decision within five (5) days of conference.

Level III - W. Va. Code § 29-6A-4(c)

- o Grievant may appeal to chief administrator within five (5) days of receipt of Level II decision. The chief administrator is the president of a state institution of higher education for employees of the institution, or the chancellor for employees of the higher education policy commission.
- o Chief administrator or designee shall hold hearing within seven (7) days of receipt of appeal.
- o Chief administrator or designee must issue a written decision within five (5) days of the hearing.

Level IV - W. Va. Code § 29-6A-4(d)

- o Grievant may appeal to Grievance Board within (5) days of the Level III decision.
- o **Upon appeal, the Grievant must submit the grievance form and all lower level decisions to the West Virginia Education and State Employees Grievance Board, 808 Greenbrier Street, Charleston, West Virginia 25311.**
- o A Level IV hearing, if requested, must be held within fifteen (15) days following the request. **Note: In practice, hearings are usually held on a date agreed upon by the parties.**
- o The Administrative Law Judge must issue a written decision within thirty (30) days of the hearing. **Note: If the parties agree to file proposed findings of fact and conclusions of law, the Board considers the 30-day deadline to be automatically extended until the agreed date.**

IMPORTANT

Grievant **MUST** fill out ALL pertinent parts of the grievance form. If some parts are not completed, this will delay processing this grievance. If there is more than one grievant, attach all grievant’s names, home addresses, telephone numbers and representatives. Addresses and telephone numbers are very important. For confidentiality purposes, we prefer to send all correspondence to grievant’s home address only.

Statement of Grievance and Relief Sought: Include a brief but **COMPLETE** description of the grievable event and the relief sought.

You have the right to request the Board to provide a mediator at any step in the grievance procedure to attempt to settle the dispute.

**EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD
FORM FOR STATE EMPLOYEES**

808 Greenbrier Street, Charleston, WV 25311 (304) 558-3361 Fax (304) 558-1106 Toll-Free (866) 747-6743

For Levels I, II, III, IV

PART A: Grievant's Information:

Grievant's Name	State Agency	Grievant's Representative (if applicable)
_____	_____	_____
Grievant's Home Address	Grievant's Work Address	Representative's Address
_____	_____	_____
City, State and Zip Code	City, State and Zip Code	City, State and Zip Code
_____	_____	_____
Grievant's Home Telephone No.	Grievant's Work Telephone No.	Representative's Telephone No.
_____	_____	_____

STATEMENT OF GRIEVANCE: (Please state the event causing this grievance and list the specific statutes, policies, rules, regulations or agreements you claim have been violated, misapplied or misinterpreted.) This field will expand if more room is needed.

RELIEF SOUGHT: This field will expand if more room is needed.

PART B: Procedural Summary (if applicable)

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

Grievant's Signature:	Date Filed:	Date of Decision:
_____	_____	_____

Level II:

Grievant's Signature:	Date Filed:	Date of Decision:
_____	_____	_____

Level III:

Grievant's Signature:	Date Filed:	Date of Decision:
_____	_____	_____

Level IV: Check One: _____ A Level IV hearing is requested.

_____ A decision may be made on the lower level record.

Grievant's Signature:	Date Filed:
_____	_____

Internet Site: www.state.wv.us/admin/grievanc/grievanc.htm

This form is designed to be used at all levels in the procedure.

FILING GRIEVANCES: Claims that a supervisor has engaged in discrimination or retaliation, and grievances contesting a suspension, demotion, dismissal, or loss of pay may be filed either at **Level I or Level II**. Claims concerning suspensions exceeding twenty (20) days, demotions and dismissals may be filed directly at **Level IV**.

“Days,” for purposes of filing or responding to grievances, means working days.

Level I - W. Va. Code § 29-6A-4(a)

- o File grievance form with immediate supervisor within ten (10) days of grievable event.
- o At request of grievant or immediate supervisor, an informal conference shall be held within three (3) days of receipt of written grievance.
- o Supervisor must issue written decision within six (6) days of receipt of written grievance.

Level II - W. Va. Code § 29-6A-4(b)

- o Grievant may appeal to administrator of grievant’s work location within five (5) days of receiving Level I decision.
- o Administrator or designee must hold conference within five (5) days of receipt of appeal.
- o Administrator or designee must issue written decision within five (5) days of conference.

Level III - W. Va. Code § 29-6A-4(c)

- o Grievant may appeal to chief administrator of department or board within five (5) days of receipt of Level II decision.
- o **Upon appeal, a copy of grievance form and the Level II decision must also be sent to the Director of the Division of Personnel, Building 6, Room 416, State Capitol Complex, Charleston, West Virginia 25305.**
- o Chief administrator or designee shall hold hearing within seven (7) days of receipt of appeal.
- o Chief administrator or designee must issue a written decision within five (5) days of the hearing.

Level IV - W. Va. Code § 29-6A-4(d)

- o Grievant may appeal to Grievance Board within (5) days of the Level III decision.
- o **Upon appeal, the Grievant must submit the grievance form and all lower level decisions to the West Virginia Education and State Employees Grievance Board, 808 Greenbrier Street, Charleston, West Virginia 25311.**
- o **Grievant must also send a copy of the appeal to the Director of the Division of Personnel, Building 6, Room 416, State Capitol Complex, Charleston, West Virginia 25305 and to the chief administrator.**
- o A Level IV hearing, if requested, must be held within fifteen (15) days following the request. **Note: In practice, hearings are usually held on a date agreed upon by the parties.**
- o The Administrative Law Judge must issue a written decision within thirty (30) days of the hearing. **Note: If the parties agree to file proposed findings of fact and conclusions of law, the Board considers the 30-day deadline to be automatically extended until the agreed date.**

IMPORTANT

Grievant **MUST** fill out ALL pertinent parts of the grievance form. If some parts are not completed, this will delay processing this grievance. If there is more than one grievant, attach all grievant’s names, home addresses, telephone numbers and representatives. Addresses and telephone numbers are very important. For confidentiality purposes, we prefer to send all correspondence to grievant’s home address only.

Statement of Grievance and Relief Sought: Include a brief but COMPLETE description of the grievable event and the relief sought.

You have the right to request the Board to provide a mediator at any step in the grievance procedure to attempt to settle the dispute.

APPENDIX E
EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD
FORM FOR DESIGNATION OF GRIEVANT'S REPRESENTATIVE
FOR USE AT LEVEL FOUR ONLY

A representative helps and counsels a party in the preparation, presentation, or defense of the case. The representative appears with, or for, the party at hearings, settlement discussions, teleconferences, or other proceedings before the Board. Although employees have the right to represent themselves at all levels in the grievance procedure, employees can also be represented by an employee organization, fellow employee, legal counsel or other person designated by the grievant as the representative.

If you decide to have someone represent you at **Level Four**, you must fill out this Designation of Representative form to designate an organization or a person who has agreed to represent you in your case before the Grievance Board. If you are representing yourself, you do not need to fill out this form. By designating a representative, you agree to allow the Board to give your representative all information concerning the case.

You are responsible for arranging in a timely manner for your own representation. Any representative designated must indicate agreement to such designation by signing below. **If you intend to seek, but have not yet arranged for a representative, you must still obey any filing or orders set by the Administrative Law Judge or by Board regulations.** The Board will not recommend, designate, or arrange for a representative for you. Your representative must be able to proceed with the case without delay. Even once you have named a representative, you are still personally responsible for making sure that all papers are filed on time and that you or your representative participate in all conferences set by the administrative law judge.

The address and telephone number of the representative must be correct so that all communications are received on time by the representative. **Any changes** of this designation **must be sent in writing** to the office handling the case and to the other party(ies). **You MUST send a copy of this Designation and all other communications concerning this case to the other parties.**

Grievance Board Docket No: _____

Grievant's Name: _____

I hereby designate _____ as my representative during the course of this grievance. I understand that my representative is authorized to act on my behalf.

Address: _____

City: _____

State: Zip Code: _____

Telephone Nos.: Office: () _____ FAX: () _____

E-mail: _____

Signature of Grievant: _____ Date: _____

Representative's Signature: _____ Date: _____

RETURN THIS FORM TO THE GRIEVANCE BOARD'S CHARLESTON OFFICE
Education and State Employees Grievance Board
808 Greenbrier Street
Charleston, West Virginia 25311