

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

Form #5

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2004 NOV -3 P 3:27

OFFICE WEST VIRGINIA
SECRETARY OF STATE

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

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

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

RULE TYPE: PROCEDURAL INTERPRETIVE _____

EXEMPT LEGISLATIVE RULE _____

CITE STATUTE(S) GRANTING EXEMPTION FROM LEGISLATIVE REVIEW

AMENDMENT TO AN EXISTING RULE: YES NO _____

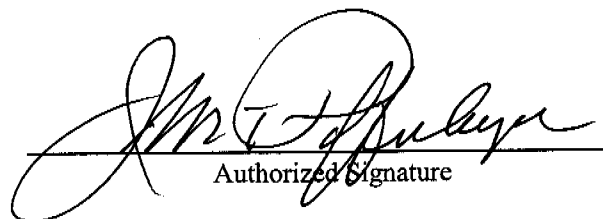
IF YES, SERIES NUMBER OF RULE BEING AMENDED: 156 CSR 1

TITLE OF RULE BEING AMENDED: Procedural Rules

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: _____

TITLE OF RULE BEING PROPOSED: _____

THE ABOVE RULE IS HEREBY ADOPTED AND FILED WITH THE SECRETARY OF STATE. THE
EFFECTIVE DATE OF THIS RULE IS December 4, 2004


Authorized Signature

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 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 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 - Grievance evaluators may issue subpoenas for witnesses and documents. Grievance evaluators at Level Three in state employee grievances may 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. Documents must not be privileged, and must be relevant to a claim or defense in the pending grievance. In addition, documents must be redacted of confidential information, 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.

§156-1-4. Level Four

4.1. Grievance Forms - Grievance forms that should be used at all levels in the procedure are attached.

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.

4.5. 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). 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. 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.

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.

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.

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

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 , 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 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

APPENDIX D

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 B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Procedural Rules 156 C S R 1

Type of Rule: Legislative Interpretive X Procedural

Agency: Education and State Employees Grievance Board

Address: 808 Greenbrier Street

Charleston, WV 25311

Phone Number: 558-3361 Email: wvgb@state.wv.us

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

No fiscal impact

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	2005 Increase/Decrease (use "-")	2006 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0	0	0
Personal Services	0	0	0
Current Expenses	0	0	0
Repairs & Alterations	0	0	0
Assets	0	0	0
Equipment	0	0	0
Other	0	0	0
2. Estimated Total Revenues	0	0	0

APPENDIX B

FISCAL NOTE FOR PROPOSED RULES

Rule Title: Procedural Rules 156 C S R 1

Type of Rule: Legislative Interpretive X Procedural

Agency: Education and State Employees Grievance Board

Address: 808 Greenbrier Street
Charleston, WV 25311

Phone Number: 558-3361 Email: wvgb@state.wv.us

Fiscal Note Summary

Summarize in a clear and concise manner what impact this measure will have on costs and revenues of state government.

No fiscal impact

Fiscal Note Detail

Show over-all effect in Item 1 and 2 and, in Item 3, give an explanation of Breakdown by fiscal year, including long-range effect.

FISCAL YEAR			
Effect of Proposal	2005 Increase/Decrease (use "-")	2006 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost	0	0	0
Personal Services	0	0	0
Current Expenses	0	0	0
Repairs & Alterations	0	0	0
Assets	0	0	0
Equipment	0	0	0
Other	0	0	0
2. Estimated Total Revenues	0	0	0

Rule Title: PROCEDURAL RULES 156 CSR 1

3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

The Board has no data upon which to base an estimate of the costs employers may incur under Rule 4.6.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule would not have a fiscal impact, and/or any special issues not captured elsewhere on this form.

Date: November 3, 2004

Signature of Agency Head or Authorized Representative

Ronald Wright, Director

Rule Title: Procedural Rules 156 C S R 1

3. **Explanation of above estimates (including long-range effect):**
Please include any increase or decrease in fees in your estimated total revenues.

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 judges to allocate costs to the subpoena of witnesses to Level Four hearings.

MEMORANDUM

Please identify any areas of vagueness, technical defects, reasons the proposed rule **would not** have a fiscal impact, and/or any special issues **not** captured elsewhere on this form.

Date: November 2, 2004

Signature of Agency Head or Authorized Representative

Ronald Wright, Director

Summary of Amendments to the Grievance Board's Procedural Rules

The Grievance Board amended its Procedural Rules in response to changes in the law and suggestions from customers. The amendments are intended to improve the grievance process and make West Virginia's two grievance procedure laws more uniform.

Rule 3.3 allows Level Three grievance evaluators in grievances by state employee to subpoena relevant documents, including documents in the possession of the West Virginia Division of Personnel. The rule also requires redactions of confidential information within the documents before disclosure.

Rule 3.5 allows state and higher education employees to intervene and become a party in a grievance proceeding, when their rights or property may be substantially adversely affected by a decision in a pending grievance, and their rights may not be adequately represented by the existing parties.

Rule 4.6 allows administrative law judges to issue subpoenas for level three hearings upon written request.

Rule 4.6.1 requires the exchange of a witness list. All parties must supply the Board, and the other parties, with a list of witnesses they intend to call for the Level Four hearing, at least six days before the hearing.

Rule 4.15 allows grievances to be consolidated at the lower levels of the procedure. This will permit grievances to be processed in a more efficient and expeditious manner.

Appendix C is a grievance form to be used in grievances by higher education employees. The Board created this form in 2001 shortly after the Legislature, by passing Senate Bill 703 [see W. Va. Code § 18B-2A-4(k)], 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.



West Virginia University

Administration, Finance and Human Resources

August 19, 2004

By Facsimile Transmission (304-558-1106)
and Regular Mail

Ronald Wright, Director
 West Virginia Education and State
 Employees Grievance Board
 80 Greenbrier Street
 Charleston, WV 25311-1527

RECEIVED

AUG 19 2004

WV Education & State
 Employees Grievance Board

Re: Proposed Changes to Grievance Board Procedural Rules

Dear Mr. Wright:

West Virginia University wishes to thank the Grievance Board for the opportunity to comment during this preliminary review and comment period on the proposed amendments to Title 156, Series 1 of the West Virginia Code of State Rules, "Procedural Rules, West Virginia Education and State Employees Grievance Board" ("the proposed amendments"). WVU remains supportive of most of the changes proposed in the new Rules.

We are concerned, however, about the following three proposed revisions as they affect Chapter 29, Article 6A of the West Virginia Code, for the reasons expressed below:

- § 156-1-3.3 – Grievance Evaluator Authority (new provision)
- § 156-1-3.5 – Intervention
- § 156-1-4.6 – Subpoenas and Subpoenas Duces Tecum

First, the University opposes the new §156-1-3.3, the amendment to §156-1-3.5 and that portion of the new language in §156-1-4-6 relating to Administrative Law Judge ("ALJ") subpoena authority, because these revisions are inconsistent with the applicable statute, Chapter 29, Article 6A of the West Virginia Code. As explained in footnotes accompanying the Proposed Amendments, the intent behind each of these changes is to apply to grievance procedures under Chapter 29, Article 6A of the West Virginia Code ("Chapter 29 Procedures") a particular provision which currently applies to grievance procedures under Chapter 18, Article 29 of the West Virginia Code ("Chapter 18 Procedures"). See footnotes 1 and 3 to the Proposed Amendments. In each instance, however, the applicable provision under the Chapter 18 Procedures is squarely based on specific statutory language contained in Chapter 18, Article 29 – language which is significantly absent from Chapter 29, Article 6A. Thus:

Office of Vice President

304-293-2545 104 Stewart Hall
 Fax: 304-293-3493 PO Box 6205
 www.wvu.edu/~adminfin/ Morgantown, WV 26506-6205

Ronald Wright
August 19, 2004
Page 2

W.V. Code §18-29-3(t) states that the chief administrator has a right of appeal from a level 2 or level 3 decision, clearly indicating that, under Chapter 18, Article 29, the chief administrator does not retain decision-making authority upon delegation to a grievance evaluator. While that removal of authority under the Chapter 18 Procedures is therefore supported by Chapter 18, Article 29, no such language exists in Chapter 29, Article 6A to justify the proposed amendment to § 156-1-3.3.

W.V. Code §18-29-3(u) extends to non-grievants a right of intervention which is nowhere present in Chapter 29, Article 6A. Thus, the proposed change to §156-1-3.5 would create a new substantive right that is not contained in Chapter 29, Article 6A.

W.V. Code §18-29-4(b) authorizes ALJs to issue subpoenas at lower level hearings, but Chapter 29, Article 6A contains no comparable subpoena power. The proposed new language references W.V. Code §29A-5-1, but that clause authorizes subpoena powers only to the extent that a covered state agency has independent statutory authority. See §29A-5-1(b). Since Chapter 29, Article 6A does not provide for subpoena powers, §29A-5-1 does not provide a statutory basis for the proposed amendment to §156-1-4.6

Standard rules of legislative interpretation establish that, if a provision is present in one statute and is absent from another similar statute, it is presumed that the Legislature intended for the statutes to be different. If the regulatory modifications identified above are finalized, therefore, they will change the meaning of Chapter 29, Article 6A as intended by the West Virginia Legislature. This will be especially harmful to the Legislature's intent as to public higher education, since higher education was removed from Chapter 18, Article 29 and placed under Chapter 29, Article 6A, precisely because the Legislature intended for higher education no longer to be subject to those provisions of Chapter 18, Article 29 which are absent from Chapter 29, Article 6A. Nor can authority to make these changes be read into the Board's general authority to issue procedures interpreting these two statutes. The Board's regulatory authority is limited by and must be consistent with the statutes under which it operates.

Second, WVU also opposes the new §156-1-3.3 because it inappropriately interferes with the authority of a chief administrator to delegate her or his authority in whole or in part. This standard administrative prerogative is necessary to allow chief administrators to efficiently oversee their agencies. Effectively, the new clause presents the chief administrator with a Hobson's choice of whether to waive his or her final decision-making authority – set out in the statute and appropriately recognized in more than one ALJ decision, as noted in footnote 1 to the Proposed Amendments – or directly assume burdens which, in the case of a large state agency such as West Virginia University, would be debilitating.

The University also opposes §156-1-4.6 to the extent that it would allow administrative law judges "to allocate costs under ... the provisions of ... W. Va. Code §29A-5-8 ... for costs incurred for service, witness and mileage fees for witnesses subpoenaed to Level Four hearings." First, it does not appear that there is direct support in §29A-5-8 for the

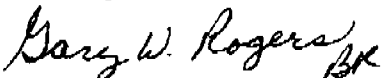
Ronald Wright
August 19, 2003
Page 3

proposition that administrative law judges may allocate costs: this provision merely addresses expenses as levels one through three of the grievance process. Second, this is directly contrary to the well-established principle of American jurisprudence under which each party is to bear its own costs of adjudication. While there are exceptions to this rule, generally they are set out in statute and require the losing party is required to bear certain costs of the prevailing party. Here, the Proposed Amendment would impose certain costs solely on one party without regard to the outcome of the case and without statutory basis. Indeed, this revision would directly conflict with W.V. Code §29-6A-5, which requires subpoenas to be issued pursuant to W.V. Code §29A-5-1. Section 29A-5-1, in turn, requires that costs arising from a subpoena "shall be paid by the party who asks that such subpoena ... be issued." To require the employer to bear costs arising from a subpoena sought by the grievant, therefore, would be contrary to law.

Finally, we would propose that all rule changes be applied only to grievances filed after the effective date, and not to pending grievances.

We appreciate, once again, the opportunity to comment on the Proposed Amendments, and hope that these comments are useful.

Sincerely,



Gary W. Rogers

Vice President for Administration, Finance
and Human Resources



West Virginia Division of Personnel

Willard M. Farley, Acting Director

STATE PERSONNEL BOARD
Eugene Stump, Chairman
Rev. Paul Gilmer ♦ Elizabeth Harter
Sharon Lynch

August 17, 2004

C. Ronald Wright, Director
West Virginia Education and State Employees Grievance Board
808 Greenbrier Street
Charleston, West Virginia 25311

RECEIVED

AUG 20 2004

WV Education & State
Employees Grievance Board

Dear Mr. Wright:

I have reviewed the Summary of Proposed Amendments to the Grievance Board's Procedural Rules and offer the following comments.

Proposed 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, as follows:

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. 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. In addition, the Division of Personnel must redact confidential information from the documents, such as social security numbers and personal health information, before disclosure.

In my March 30, 2004, letter on this subject, I opined that no agency head should be forced to comply with his or her designee's Level Three decision, as agency heads are vested by statute with certain rights and responsibilities which cannot be limited by the procedural rules of another agency. I believe that for the Education and State Employees Grievance Board to promulgate a procedural rule which forces an agency head to comply with a decision of his or her designee is contrary to the intent of the Legislature, as expressed in W. Va. Code § 29-6A-4(c). I suggested, in the alternative, that the Director of the Division of Personnel and agency head be permitted to appeal Level Three

decisions of designees. I continue to be of the opinion that a procedural rule prohibiting an agency head from overriding or reversing a decision is contrary to Code § 29-6A-4(c).

Additionally, I believe that a procedural rule permitting grievance evaluators at Level III to issue subpoenas duces tecum is contrary to W. Va. Code § 29-6A-6(c), which, when read in pari materia with Code § 29-6A-5(b), reflects the Legislature's intent that administrative law judges (which are attorneys) be empowered to subpoena documents, while prohibiting grievance evaluators (which may not be attorneys) from issuing subpoenas for documents. In my opinion, the Legislature was cognizant of the potential for a lay-person grievance evaluator to unintentionally facilitate the disclosure of personal or confidential information not normally subject to disclosure.

Proposed Rule 4.6 provides 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, as follows:

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. 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.

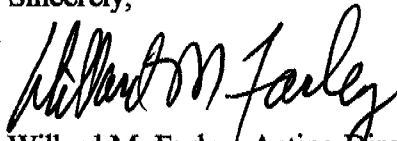
In my March 30, 2004, letter, I opined that no agency should be responsible for travel expenses of grievants' witnesses, and that this provision creates the potential for abuse and untold expense to the agencies. The current practice of all parties being held responsible for their respective expenses (absent a showing of bad faith) contributes to an environment in which expenses are minimized by the utilization of only those witnesses who are crucial to the case, and limits the attempted utilization

Mr. Wright
August 17, 2004
Page 3

of corroborative and/or non-probative witnesses. A procedural rule to permit the administrative law judge to allocate costs under the provisions of 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 is contrary to the above-cited statute. Code § 29-6A-7(e) permits the administrative law judge to allocate costs only at Level IV, and only in instances of "bad faith and in extreme instances," and "to the party found to be acting in bad faith." For the Education and state Employees Grievance Board to promulgate a procedural rule to permit administrative law judges to allocate cost only upon the grievant's request, and for service, witness, and mileage fees is, in my opinion contrary to Code § 29-6A-7(e).

Thank you for the opportunity to provide input. Please let me know if you have any questions.

Sincerely,



Willard M. Farley, Acting Director
West Virginia Division of Personnel

WMF:SF



WEST VIRGINIA
H I G H E R
E D U C A T I O N
P O L I C Y
C O M M I S S I O N

MARY CLARE EROS
CHAIR

J. MICHAEL MULLEN
CHANCELLOR

August 19, 2004

Ronald Wright, Director
West Virginia Education & State
Employees Grievance Board
808 Greenbrier Street
Charleston, West Virginia 25311-1527

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WV Education & State
Employees Grievance Board

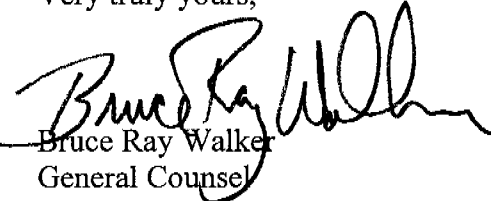
Re: Proposed Rule Comments

Dear Mr. Wright:

I would like to make the following comments regarding the proposed amendments to your procedural rule.

1. I oppose the language in Section 3.3 that would make the Level III decision of a designated hearing examiner final. A president should retain the authority to review recommended decisions. Hearing examiners at Level III are normally laypersons whom may not adequately understand the law or comprehend the larger picture.
2. I oppose any language that would make a state institution responsible for the expenses of grievants. Any attempt to accomplish this by rule is contrary to law.
3. Section 4.6.1 should be redrafted to provide that rebuttal witnesses can be called even if they were not listed six days before the hearing.

Very truly yours,


Bruce Ray Walker
General Counsel

BRW/bc



Executive Office
1356 Hansford Street
Charleston, WV 25301
Phone: (304) 558-5929
Fax: (304) 558-6576

West Virginia Department of Environmental Protection

Bob Wise
Governor

Stephanie R. Huffman
Cabinet Secretary

August 17, 2004


RECEIVED

AUG 20 2004

WV Education & State
Employees Grievance Board

MEMORANDUM

TO: WV State Grievance Board

FROM: Randy Huffman 
Assistant Cabinet Secretary

SUBJECT: **COMMENT ON PROPOSED AMENDMENTS
REGARDING PROCEDURAL RULES**

The Department of Environmental Protection (DEP) has carefully reviewed the proposed amendments to the Grievance Board's Procedural Rules and finds no reason to oppose the changes to the following Rules: 3.5, 4.1.1, 4.6, 4.6.1, 4.15.

We do oppose the change to Rule 3.3 for the following reasons. Customarily, third level evaluators are agency heads or someone in an executive capacity. It has been found that DEP employees at this level of management have frequent and last minute scheduling conflicts, causing delay and inconvenience for both the grievant and other participants in the hearing process. Thus, the agency employs, by contract, Level III Grievance Evaluators who serve as neutral participants in this process. The agency chose to use contract employees in the interest of conducting a fair and unbiased hearing for our employees.

This change in Rule 3.3 will penalize DEP by removing management's option for overturning a decision at Level 3, albeit, in those rare occasions when this may be necessary when a decision may not be in the agency's best interests. There must be equity in decisions and Rule 3.3, may jeopardize agency control in important matters. It is important to note that the evaluator serves as an impartial moderator, not an attorney chosen to represent the agency's interest. Further, government agencies should not be forced to hire attorney's to represent them at this level, this is an unnecessary expense and in the end, is detrimental to both the grievant and the Department.

Thank you for allowing me to participate in this proposal.

RH/gb



West Virginia Department
of Environmental Protection

"Promoting a healthy environment."



STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

Bob Wise
Governor

Office of the Secretary
State Capitol Complex, Building 3, Room 206
Charleston, West Virginia 25305
Telephone: (304) 558-0684 Fax: (304) 558-1130

Paul L. Nusbaum
Secretary

MEMORANDUM

RECEIVED

AUG 19 2004

WV Education & State
Employees Grievance Board

DATE: August 18, 2004
TO: The Honorable Joe Manchin III
Secretary of State
FROM: Paul L. Nusbaum, Secretary
Department of Health and Human Resources
RE: Comments to Proposed Rules

Attached are the Department of Health and Human Resources' comments to the West Virginia Education and State Employees Grievance Board's proposed procedural rules.

PLN/smb

Attachment

Department of Health and Human Resources

Comments

Rule 3.3

The proposed change prohibits the chief administrator from overriding the final decision of the designee. This section attempts to bring parity to the education side and state employee side of the grievance procedure. However, it has the opposite effect. The administrative hearing on the education side occurs at Level II, not Level III. In the case cited in the proposed rules, Triggs v. Berkeley County Bd. of Educ., 188 W. Va. 435, 425 S.E.2d 111 (1992), the Court points out that education employers have the ability to appeal a decision from the Level II hearing to the next level. That's why the decision of the Level II grievance evaluator is a final decision. On the public employee side of the grievance procedure the employer does not have that right. W. Va. Code § 29-6A-4 only gives the employee the right to appeal an adverse decision to the next level. To institute the rule as written would deny the state employer procedural due process by denying them any appellate right. Moreover, the recommended decision process the Department of Health and Human Resources (DHHR) utilizes with the grievance procedure is in harmony with DHHR's contested case hearing regulations. See, 64 C.S.R. 1, *et. seq.* In contested case hearings, DHHR utilizes an outside hearing examiner to conduct the hearing and make a recommended decision. This decision is presented to the Secretary of the Department who may either adopt the decision or issue a new decision based on the evidence presented.

It is unnecessary to point out that grievance evaluators may subpoena documents from the Division of Personnel (DOP). Grievance evaluators may already issue subpoenas for documents in the control of the DOP.

Rule 3.5

Allowing employees to intervene in a grievance in which they have an interest saves employers from having to consolidate multiple grievances later. However, it seems the grievance board is exceeding its authority by "encouraging" employers to give notice to employees who may have a property interest and encouraging employees to intervene. This type of language is not appropriate in an administrative rule.

Rule 4.1.1

The rule fails to identify the penalty for not completing the "Designate Your Representative Form." If the parties fail to designate the representative, they should be prohibited from participating in the proceeding until proper notice is given.

Rule 4.6

W. Va. Code § 29-6A-8 provides that "any expenses incurred relative to the grievance procedure **at levels one through three** shall be borne by the party incurring such expense." W. Va. Code § 29-6A-5(b) provides that ALJ's may allocate costs among the parties in accordance with section eight of this article. At most, this code section applies § 29-6A-8 to the Level IV hearing which would suggest at Level IV the party incurring the expense should be responsible. The proposed rule seems to imply that the grievant may now ask the ALJ to require the employer to bear the costs the grievant incurred for service, witnesses and mileage fees for their witnesses. I think this contradicts the clear language contained in the West Virginia Code.

Rule 4.6.1

The problem with this rule is that most grievants are not represented and are not legally sophisticated. It is unlikely that most grievants will provide witness lists prior to the hearing. If they do not, the rule does not address the remedy. Will unnamed witnesses be prohibited from testifying?

Rule 4.15

This is a needed change.



WEST VIRGINIA
H I G H E R
E D U C A T I O N
P O L I C Y
C O M M I S S I O N

MARY CLARE EROS
CHAIR

J. MICHAEL MULLEN
CHANCELLOR

August 19, 2004

Ronald Wright, Director
West Virginia Education & State
Employees Grievance Board
808 Greenbrier Street
Charleston, West Virginia 25311-1527

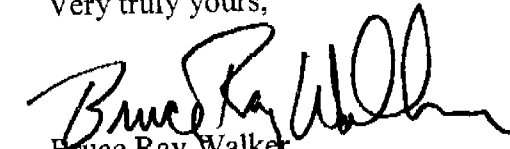
Re: Proposed Rule Comments

Dear Mr. Wright:

I would like to make the following comments regarding the proposed amendments to your procedural rule.

1. I oppose the language in Section 3.3 that would make the Level III decision of a designated hearing examiner final. A president should retain the authority to review recommended decisions. Hearing examiners at Level III are normally laypersons whom may not adequately understand the law or comprehend the larger picture.
2. I oppose any language that would make a state institution responsible for the expenses of grievants. Any attempt to accomplish this by rule is contrary to law.
3. Section 4.6.1 should be redrafted to provide that rebuttal witnesses can be called even if they were not listed six days before the hearing.

Very truly yours,


Bruce Ray Walker
General Counsel

BRW/bc

RECEIVED

AUG 19 2004

WV Education & State
Employees Grievance Board

Public Service Commission

Richard E. Hitt, General Counsel



201 Brooks Street, P.O. Box 812
Charleston, West Virginia 25323

Phone: (304) 340-0317
FAX: (304) 340-0372

August 18, 2004

Ronald Wright, Director
West Virginia Education and State
Employees' Grievance Board
808 Greenbrier Street
Charleston, WV 25311

RECEIVED

AUG 19 2004

WV Education & State
Employees Grievance Board

Re: Comments regarding Proposed Changes to Procedural Rules

Dear Mr. Wright:

This letter is to provide comment on the proposed revisions to the Procedural Rules of the Education and State Employees Grievance Board. The primary concern of the Public Service Commission is the provision that appears to bar the chief administrator of an agency from participating in the decision-making process at level three where a grievance evaluator has been designated to conduct the hearing.

Footnote #1 concludes by indicating the plain language of 29-6A-1 "does not authorize" the practice of chief administrators receiving a recommended decision from a designated evaluator and subsequently issuing a decision. That observation is correct, but it is equally correct to state that the statute does not prohibit the practice. In fact, the language of the statute is neutral with respect to whether a designated grievance evaluator can issue decisions without regard for the opinion of the chief administrator. For the reasons set forth below, the Public Service Commission takes the position that the outcome is far more reasonable when an agency's chief administrator is permitted to designate a third level grievance evaluator who issues a recommended decision only, while permitting the chief administrator to issue a final decision.

The Public Service Commission takes the position that the first three levels of the grievance procedure are meant for agency administrators to sort out the facts and make a decision. The chief administrator of any agency necessarily must rely on support staff to perform this function at level three, as hearings at level three can and often do extend over a period of several days. To establish a rule that requires the administrator to abdicate this right is contrary to the intent of the statute, and intrudes upon the chief administrator's obligation to effectively manage the agency.

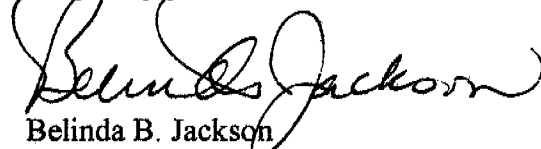
The statute was designed to provide review of an employee complaint at successively higher levels of the management chain, concluding with the chief administrator at level three. After that point, the hearing examiners of the Education and State Employees Grievance Board provide an outside and more impartial review over which the chief administrator rightfully has no influence. The proposed procedural rule, in effect, imposes the intended impartiality of level four on the level three proceedings by declaring that the chief administrator who designates a grievance evaluator has no input into the decision. This transfer of the characteristics of a level four proceeding to level three essentially eliminates an agency's ability to put a final decision forth on behalf of the agency itself, unless the chief administrator is willing to dedicate numerous hours to hearing grievances at level three.

In construing statutes, the West Virginia Supreme Court of Appeals has stated that "it is as well duty of court to disregard construction, though apparently warranted by literal sense of words in statute, when such construction would lead to injustice and absurdity." Pristavec v. Wesfield Ins. Co., 400 S.E. 2d 575 (1990). In considering the intent of the grievance statute alongside the realities of administering a public agency, the proposed rule would indeed result in an injustice to chief administrators by forcing them to choose between relinquishing authority that is rightfully theirs, or expending valuable management time hearing matters best left to those trained in receiving and hearing evidence. More importantly, this Hobson's choice would ultimately prevent the chief administrator from addressing an issue involving an employee under his or her own jurisdiction.

We understand the concern of the Board for grievance evaluators who may be offended by the manner in which some chief administrators have exercised their rightful discretion upon their review of a recommended decision, but the proposed rule goes too far to address what appears to be a problem that would be better solved within the agency itself. Moreover, the right of appeal to the Grievance Board protects the grievant from any abuses by the chief administrator.

Thank you for your consideration of these comments.

Very truly yours,

A handwritten signature in cursive script that reads "Belinda B. Jackson". The signature is written in black ink and is positioned above the printed name and title.

Belinda B. Jackson
Counsel for Human Resources



WEST VIRGINIA DEPARTMENT OF TRANSPORTATION

Division of Highways

1900 Kanawha Boulevard East • Building Five • Room 110
Charleston, West Virginia 25305-0430 • 304/558-3505

Bob Wise
Governor

Fred VanKirk, P. E.
Secretary/Commissioner

August 16, 2004

Ron Wright, Director
Education and State Employees
Grievance Board
808 Greenbrier Street
Charleston, WV 25311

RECEIVED

AUG 18 2004

WV Education & State
Employees Grievance Board

Dear Mr. Wright:

This is to provide comment on the proposed revisions to the Procedural Rules of the Education and State Employees Grievance Board. The primary concern of the Division of Highways is the provision that appears to bar the chief administrator of an agency from participating in the decision making process at level three where a grievance evaluator has been designated to conduct the hearing.

Footnote #1 concludes by indicating the plain language of 29-6A-1 "does not authorize" the practice of chief administrators receiving a recommended decision from a designated evaluator and subsequently issuing a decision. That observation is correct, but it is equally correct to state that the statute does not prohibit the practice. In fact, the language of the statute is neutral with respect to whether a designated grievance evaluator can issue decisions without regard for the opinion of the chief administrator.

The Division of Highways hereby reiterates its position that the first three levels of the grievance procedure are meant for agency administrators to sort out the facts and make a decision. The chief administrator of a large agency necessarily must rely on support staff to perform this function at level three. To establish a rule that requires the administrator to abdicate this right is, in our opinion, contrary to the intent of the statute.

The scheme of the statute is clearly for managerial review of an employee complaint at successively higher levels of the management chain, concluding with the chief administrator at level three. After that point, the hearing examiners of the Education and State Employees Grievance Board provide an outside and more impartial review over which the chief administrator rightfully has no influence. The proposed procedural rule, in effect, imposes the intended impartiality of level four on the level three proceedings by declaring that the chief administrator who designates a grievance evaluator has no input into the decision. This transfer of the characteristics of a level four proceeding to level three is particularly unfair to chief administrators of large agencies who could not possibly conduct the level three hearings.

Mr. Ron Wright
August 16, 2004
Page Two

In construing statutes, the West Virginia Supreme Court of Appeals has stated that "it is as well duty of court to disregard construction, though apparently warranted by literal sense of words in statute, when such construction would lead to injustice and absurdity." Pristavec v. Westfield Ins. Co., 184 W.Va. 331, 400 S.E. 2d 575 (1990). In considering the intent of the grievance statute alongside the realities of administering a large organization, the proposed rule would indeed result in an injustice to chief administrators by forcing them to relinquish authority that is rightfully theirs, and would also create the absurd result of a chief administrator being prevented from addressing an issue involving an employee under his or her jurisdiction. In that regard, the proposed rule is an interpretation of the statute that favors an inferior position – that it is better to eliminate the chief administrator from the process. While this result may be one desired by certain persons or entities involved in the process, the superior position that is clearly favored by the statute is inclusion of the chief administrator in the dispute resolution process.

In addition to contravening the grievance statute, the Division believes the proposed rule is contrary to W. Va. Code §17-2A-4 which authorizes the Commissioner of Highways to be "in charge of and responsible for the selection, employment and effective organization of all commission personnel." The proposed rule contravenes this statute by preventing the Commissioner from exercising his or her discretion in matters of employment of agency personnel, and limiting his or her discretion in level three grievances only to the designation of a grievance evaluator.

We understand the concern of the Board for grievance evaluators who may be offended by the manner in which some chief administrators have exercised their rightful discretion in processing and answering employee grievances, but the proposed rule seems to throw the baby out with the bath water, so to speak.

Thank you for your consideration of these comments.

Very truly yours,



Fred VanKirk, P.E.
Secretary/Highways Commissioner

FV:Br



**West Virginia
Northern
COMMUNITY COLLEGE**

For All Who Wish To Learn

August 3, 2004

**College
Administrative Offices**
1704 Market Street
Wheeling, WV 26003
(304) 233-5900

WV Education and State Employee Grievance Board
808 Greenbrier Street
Charleston, WV 25311

RECEIVED
AUG 5 2004

SUBJECT: Proposed Changes to the Board's Procedural Rules
WV Education & State
Employees Grievance Board

Regional Campuses

Weirton

150 Park Avenue
Weirton, WV 26062
(304) 723-2210

Wheeling

1704 Market Street
Wheeling, WV 26003
(304) 233-5900

New Martinsville

141 Main Street
New Martinsville, WV 26155
(304) 455-4684

Gentlemen:

The proposed changes appear to be contrary to the intent of any grievance process to resolve problems at the lowest level. In effect, the proposed changes work in the opposite direction and encourage higher, external levels of review. Further, the higher levels of procedure tend to be more formal, adversarial, costly and burdensome to the Grievance Board, institutions, and employee/grievants. Higher levels of the procedure are more likely to involve legal representatives, both for institutions and grievants.

1. The proposed change at Level 3 will move us from an internal process into a potential court situation. The President is the person held accountable for decisions made in his/her administration. If his/her authority is undermined by designation of a hearing officer who does not report back to the president, the situation will be problematic, first for the president who may be more reluctant to assign another employee as hearing officer, but also to any subordinate staff member assigned as well. In most instances the president will accept the conclusion and recommendation of the hearing officer. However, the president should not be forced into this before he can evaluate the report presented to him. The grievant has the opportunity to take the grievance to Level 4 if he/she feels the decision was not fair. The grievant's rights are well protected. If the president were to override a recommendation of a hearing officer that step would be more likely. Additionally, the president might find he has a much more difficult time at Level 4 if he makes a decision different from the recommendation of the hearing officer. Nevertheless, it is unreasonable to ask the president to accept a recommendation when he hasn't seen it--from anyone.

C/LKD/MyDocuments/Proposed Changes to Boards Procedural Rules

2. To require a hearing evaluator to identify the potential impact of a decision on other employees is an unreasonable burden. That could be a large administrative task in itself when there is a need to find more efficiency in the grievance process. This seems to put such a burden on the evaluator that it may limit options available to him as evaluator in advance. Additionally, this makes the grievance almost a public event, a situation which is not in the interest of the parties and should be avoided. It might have some advantage in letting other persons know the situation. (Having served as hearing officer many times, I can think of instances when I wished "that I could identify the impact on others and get them involved.") However, this negates the purpose of attempting to resolve issues internally and without public controversy. Again this is like turning Level 3 into a court situation, and even in court this is not required..
3. The employer should not have to pay travel expenses of grievant witnesses unless the findings end up in the grievant's favor. The employer already is paying these persons a salary for their involved time. A better procedure is to let these witnesses (or the grievant) pay their expenses; then, if the grievant "wins," costs could be reimbursed by the employer.

I offer these views from the perspective of a college administrator involved in grievance adjudication and collective bargaining for over 30 years in four different states. I have not seen this level of formal interference in grievance handling before.

Given our current economic situation in West Virginia and the financial hardship facing educational institutions, it is in the best interests of both the institution and its employees to settle grievances internally if at all possible. The proposed changes carry us further down a trail of expensive grievance adjudication with further injury to collegial process. Certainly, the rights of the employee must be protected. However, so should the interest of the institution and the State. The proposed changes make it more difficult to effect a reasonable balance of these values.

In West Virginia the costs for grievance adjudication have already escalated beyond the average of settlement cost in states such as New York, Illinois or Pennsylvania. If the grievant has nothing to lose, costs to

WV Education and State Employee Grievance Board
August 3, 2004
Page 3

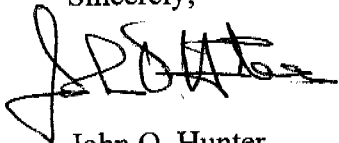
the employer easily become obligatory without strengthening fair process. This is especially true when the time of the grievance is greatly extended.

Recently we had one which was finally settled here in its fourth year (no cost to the grievant), and while the institution "won," there were inordinate costs to the college, not only financial but in administrative time and energy to dispose of what was essentially a frivolous matter. Just a few of these going on simultaneously in a poor institution could bring it to its knees with detriment to both the grievant and other employees.

Normally, grievances will be settled by internal process in a three to four month period with the final authority at the level of the Institutional Board of Trustees. Then, of course, if the grievant feels that he/she has not received justice civil action may be taken. Rather than further destruction of our collegial process, steps taken to reform the grievance administration would foster the best interests of both the educational institutions and their employees.

Thank you for the opportunity to comment.

Sincerely,

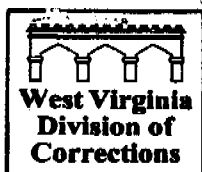


John O. Hunter
President

JOH/lkd

COMMENTS ON PROPOSED RULE CHANGES

Division of Corrections	Jim Rubenstein, Commissioner
Division of Highways	Jerry Bird, Asst. Comm Jeff Black (attachments)
Division of Personnel	Edison Casto, Director
WV University	Scott Kelley, Admn. and Finance
Marshall University	Jim Stephens, Human Resources
WVNCC	John Hunter, President
Eastern WVCC	Michele Wetherald, Exec. Dean
Higher Ed. Policy Comm	Bruce Walker, General Counsel
BEP	Quetta Muzzle, Acting Commissioner
DNR	Kelly Goes, Asst. Atty. General
CWA	Elaine Harris, Representative
AFSCME	Ed Hartman



STATE OF WEST VIRGINIA
DEPARTMENT OF MILITARY AFFAIRS & PUBLIC SAFETY
DIVISION OF CORRECTIONS



BOB WISE
GOVERNOR

JIM RUBENSTEIN
COMMISSIONER

JOE MARTIN
SECRETARY

OFFICE OF THE COMMISSIONER
112 CALIFORNIA AVENUE-STATE CAPITOL COMPLEX
BUILDING 4, ROOM 300
CHARLESTON, WV 25305-0280
(304) 558-2036 Telephone - (304) 558-5934 Fax

March 5, 2004

Ron Wright and Members of the Board
WV Education & State Employees Grievance Board
808 Greenbrier Street
Charleston, WV 25301

RECEIVED

MAR 12 2004

RE: Proposed Changes to Procedural Rules of the
WV Education & State Employees Grievance Board

WV Education & State
Employees Grievance Board

Dear Mr. Wright and Members of the Board:

Please accept this as comment by the Division of Corrections on the proposed rule changes.

Rule 3.X Grievance Evaluator Authority: The Division of Corrections respectfully believes that this proposed rule change is improper and contrary to present statutory authority as it takes the decision making process away from the chief administrator of the agency. It is also believed that if enacted this rule would put an undue amount of pressure upon Level III grievance evaluators to ensure a decision, which wholly conforms with the position of the chief administrator. Under the present system, a Level III grievance evaluator is free to express what is believed to be appropriate, and the chief administrator is free to make any corrections to the decision. Further, the proposed implementation of Rule 3.X does not contemplate situations where both the employer and employee disagree with the Level III decision. Therefore the Division of Corrections would urge the Grievance Board not to adopt this proposed rule change.

Rule 3.XX Level III Hearings: The Division of Corrections approves of this new rule and would urge its adoption.

Rule 4.1.1 Designate Your Representative Form: The Division of Corrections agrees with this rule provided that in numerous consolidated grievances a single spokesman or representative should only be allowed and this rule should be rigidly enforced in those situations.

Rule 4.6: It should be noted that this proposed rule change, of all the proposed changes, is the most objected to by the Division of Corrections. As the Grievance Board should be fully aware the Division of Corrections is the subject of numerous grievances which are not granted and often border on being completely frivolous. In many of these grievances employees take advantage of an opportunity to miss work and subpoena their fellow officers and numerous staff members to the hearings. This has detrimental effects upon the institutions merely from absences let alone forcing the agency to bear the travel costs through ordinary travel rules. This rule is also inconsistent with ordinary civil litigation in that a party demanding the attendance of a witness at a proceeding is required to pay the subpoenaed witness in advance the costs of one day's attendance and their mileage. Clearly the Division of

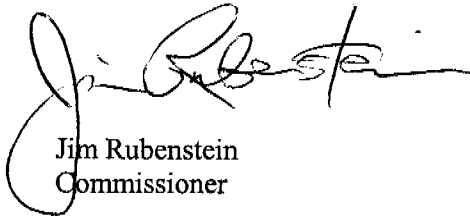
Corrections is of the opinion that it is improper to require an agency to pay witnesses who are subpoenaed by the opposing party their costs in attending the hearing. If the agency requires an employee to attend, the agency should and does pay for such costs. Moreover, the Division of Corrections has no problem in reimbursing costs when it is not the prevailing party in a grievance. However, the proposed rule is totally one sided and places an undue burden upon an agency that is already saddled with numerous frivolous grievances. The Division of Corrections would also urge that when considering allocation of costs that the Board also consider adopting rules, which allow the Division of Corrections to recoup its costs against the nonprevailing parties.

Rule 4.6.1: The Division of Corrections would discourage the adoption of this rule.

While the rule appears to be logical on its face the reality faced by many state agencies with ever shrinking budgets is that priorities must be assigned given to all cases their attorneys are forced to defend. The Division of Corrections is limited to employing only two attorneys despite the fact that there are nearly 500 pending cases. Of these 500 cases nearly 200 involve fairly complex issues of litigation, which absorb huge amounts of time. As such, extensive advance preparation for grievance hearings is simply not possible. Further, many of the employees who appear against the Division of Corrections are *pro se* and as such will not likely comply with this rule either. Therefore, one of two things will happen. Either the Division of Corrections will be defending against a lopsided enforcement of a rule wherein it is enforced against this agency but not the *pro se* parties, or the rule will simply be ignored. As such, the Board is simply urged not to adopt this rule but to consider the use of pre-trial conferences or pre-hearing conferences when an issue as to the number of witnesses is of a significant importance.

In conclusion, the Division of Corrections, like most state agencies, has budget concerns. As such, it is believed that the proposed rules particularly Rule 4.6 will have an extremely adverse financial effect upon this agency. Therefore on the behalf of the Division of Corrections your attention to this matter is greatly appreciated. The Division of Corrections would welcome the opportunity to appear and speak to this issue at any point in the future.

Sincerely,



Jim Rubenstein
Commissioner

JR/smh

CC: Warden and Administrators
Charles Houdyschell, Jr.
Wayne Armstrong, Director of Human Resources



WEST VIRGINIA DEPARTMENT OF TRANSPORTATION

Division of Highways

1900 Kanawha Boulevard East • Building Five • Room 110
Charleston, West Virginia 25305-0430 • 304/558-3505

Bob Wise
Governor

Fred VanKirk, P. E.
Secretary/Commissioner

Jerry Bird
Assistant Commissioner

March 31, 2004

Ron Wright, Director
Education and State Employees
Grievance Board
808 Greenbrier Street
Charleston, WV 25311

RECEIVED

MAR 31 2004

WV Education & State
Employees Grievance Board

Dear Mr. Wright:

The Division of Highways is in receipt of the Proposed Changes to the Board's Procedural Rules. We offer comments below regarding the changes to grievance evaluator authority and employer reimbursement of grievant's witnesses travel expenses that are critical to this agency's interest.

Grievance Evaluator Authority
Proposed Rule 3.X.

The Division of Highways does not agree that the chief administrator should not have the authority to override or reverse the decision of the grievance evaluator at Level III. This proposed rule language contravenes the statutory scheme developed by the Legislature for Level III of the grievance procedure. The intent of the grievance statute at Level III is to permit the "chief administrator" to make the Level III ruling on the grievance. It is obvious that agency heads, particularly in large agencies, cannot personally conduct grievance hearings and render decisions. In fact, most responsibilities of executives at that level require the substantial assistance of staff; but the executive retains the final authority. The Grievance Board's proposal would take advantage of the fact that the agency head cannot possibly conduct the Level III hearings, and would force him or her to abdicate his/her authority.

Because the Grievance Board does not have the authority to establish a Level III appeal for chief administrators, it would not only violate the statutory scheme for the state employees grievance procedure, it would be a mistake to propose that a chief administrator has no authority to override or reverse a designee's decision at Level III. This rule language would change the meaning of "designee" as intended by the statute and as commonly practiced in the grievance procedure. To the knowledge of this drafter, since the state employee grievance procedure allowed the chief administrator to appoint a designee, chief administrators have been appointing designees to hear the facts and provide a decision to the chief administrator, not to replace the chief administrator. The Grievance Board should recognize that the intent of the grievance statute at Level III is to permit the chief administrator to make a ruling on the grievance. If the

purpose of this statutory provision is to replace the chief administrator with another level of independent hearing evaluator, it would be the role of the Legislature to make this drastic change. It is within the power of the Grievance Board to interpret the statutes by establishing administrative rules. It is not within the power of the Grievance Board to use administrative rules to rewrite statutes and completely change the statutory scheme.

The Grievance Board does not have the authority to establish, by rule, that a chief administrator can appeal a Level III decision, whether that decision has been made by the chief administrator or "recommended" by the grievance evaluator. The Division of Highways believes that because rule language permitting appeal by a chief administrator (respondent) of a Level III decision is contrary to the Code, it will be struck down and agencies will be left with a rule that does not allow the chief administrator to make the Level III decision and also does not allow him/her to appeal the decision to Level IV.

The Legislature gave the chief administrator the right to appeal a Level IV decision W.Va. Code, §29-6A-3(x) and §29-6A-7(b). It did not, however, specify that the chief administrator could appeal a Level III decision W.Va. Code, 29-6A-4(d). Therefore, it cannot be argued that the Legislature "intended" to give the chief administrator the right to appeal a Level III decision. The Legislature did not give the chief administrator that right. It is apparent that the Board is attempting to grant an appeal right to chief administrators that was not intended by the Legislature.

Reliance by the Grievance Board on the case of Triggs v. Berkeley County Bd. of Educ., 188 W.Va. 435, 425 S.E.2d 111 (1992) to support this change is also misplaced. The Triggs case is an interpretation by the Supreme Court of the statutory language governing the grievance process for education employees W.Va. Code, §18-29-3(t). The Supreme Court did not base its finding in Triggs on the language of the state employees grievance statute, which this proposed rule language would violate. In fact, the Supreme Court in Parsons v. W.Va. Bureau of Employment, 428 S.E.2d 528 (1993) found that these differences in the statutory language "prevent us from using the rationale in Triggs" to extend the right to appeal. In Parsons, the Court wrote that the language of W.Va. Code 29-6A-3 makes it clear that unlike the education administrator in Triggs, the chief administrator in state employee grievances can appeal only at Level IV. Id.

Travel Expenses for Employee Witnesses
Proposed addition to Rule 4.6

The Division of Highways does not agree that state taxpayers should be responsible for the travel expenses incurred by witnesses for the grievant at Level IV as proposed by this language. While it seems the fair thing to do, it is inadvisable based on the experience of the Division with the grievance process. Grievants have the unfettered right to subpoena any witness, including any employee they deem appropriate. Often, they subpoena numerous Division of Highways' employees to testify to the same facts, to testify to irrelevant facts, or to testify to facts that could be stipulated. Unfortunately, this does not become apparent until the hearing actually occurs.

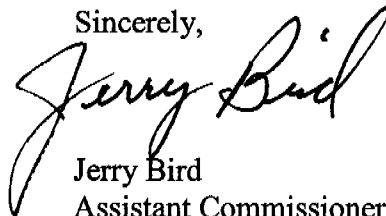
Agencies already pay the salaries of all employees appearing as witnesses whether or not they appear for the grievant or for the agency. If the Division of Highways is required to pay

travel expenses for grievant's witnesses, it could prompt a level of pre-hearing activity that would approach formal litigation because the employer might need to question grievant's witnesses, move to quash grievant's subpoenas, request hearings on the relevance of grievant's evidence, etc. to try to determine whether all of the witnesses subpoenaed by the grievant are really necessary. This type of advanced procedural work would be almost always confusing for grievants and expensive for grievants and agencies. It would create additional work and expense for grievance evaluators and hearing examiners. Another problem arising from placement of travel expense on the agency rather than the grievant is the practice by some grievants of "emptying" out the workplace by insisting that the subpoenaing of many employees is necessary to the grievant's case. This, in effect, shuts down a Division workplace. The requirement that witnesses, or the person by whom they were subpoenaed, be responsible for travel expenses to Level IV hearings serves as an effective yet not unreasonable check on the unnecessary calling of witnesses.

In the event the Board chooses to adopt this rule, it is recommended that language be added to indicate that the agency by which the witness is employed be required to provide transportation or reimburse in the alternative. Travel for Division of Highways follows this pattern. Employees are required to use agency vehicles and are eligible for reimbursement for personal vehicle use only after specific authorization. As written, the proposed rule language could produce administrative difficulties and inefficiencies by causing the Division of Highways to process numerous individual reimbursement checks for small amounts of money. This is contrary to the overall efforts of state government to control costs by limiting the number of checks it must write. (e.g. the purchasing card program, direct payroll deposit, etc.).

Thank you for the opportunity to comment on these proposed rules.

Sincerely,

A handwritten signature in cursive script that reads "Jerry Bird". The signature is written in black ink and is positioned above the printed name and title.

Jerry Bird
Assistant Commissioner

JB:Br

1-100 117104

WEST VIRGINIA DEPARTMENT OF TRANSPORTATION
DIVISION OF HIGHWAYS
HUMAN RESOURCES DIVISION
1900 Kanawha Boulevard, East
Building 5, Room A-949A
Charleston, WV 25305

RECEIVED

APR 2 2004

WV Education & State
Employees Grievance Board

TO: *Ron Wright*

FROM: *Jeff Black*

SPECIAL INSTRUCTIONS:

*Here is the memo from DOP regarding
Grievance Evaluator's Authority that I
mentioned yesterday. Also, here are a couple
of examples of how we used the 3 member
panel when the Commissioner did not agree
with the evaluators recommendation. If you
have any questions, please call.*

Number of pages _____ and cover page being transmitted.

If there are any problems please contact _____.

Phone Number: (304) 558-3111



West Virginia Division of Personnel

Edison L. Casto, Director

STATE PERSONNEL BOARD

Roger Morgan, Chairman

Rev. Paul J. Gilmer + Elizabeth D. Harter

Sharon Lynch + Eugene Stump

MEMORANDUM

TO: All Cabinet Secretaries/Bureau Chiefs/Agency Heads

FROM: Edison L. Casto, Director
WV Division of Personnel

RE: Grievance Evaluators' Authority

DATE: January 22, 1999

The Division of Personnel is occasionally approached by agencies inquiring as to their agency heads' discretion to modify his/her designee's decision in a Level III grievance. Accordingly, we would like to share with you a recent decision of the Education and State Employees Grievance Board which reflects their position on this question in a Level II grievance. I believe it is safe to conclude that the Board's position on a Level III grievance should be consistent with its position on a Level II grievance.

In a November 30, 1998, decision, the Board addressed the matter of recommended grievance decisions and the authority of Level II grievance evaluators to grant certain relief. The Board found, in pertinent part, in *Pat Franz, et al v. West Virginia Department of Health and Human Resources/Huntington State Hospital and Division of Personnel*, Docket No. 98-HHR-228 (Nov. 30, 1998) that;

Nothing in the grievance procedure prevents an agency from making the decisions rendered at the lower levels from being recommended decisions prior to their approval by a designated authority. Grievance Evaluators are only vested with the authority granted them by *W Va. Code § 29-6A-1 et seq.*, and the appointing agency. (Syl. Pt. 2)

A draft decision may be recalled and changed if it did not receive the necessary approval prior to its issuance. (Syl. Pt. 4)

HHR did not over step its authority by recalling a draft decision issued to Grievants when this decision had not received the necessary prior approval. (Syl. Pt. 5)

January 22, 1999

Grievants, all Registered Nurses at the Department of Health and Human Resources' (DHHR) Huntington (State) Hospital (HSH), alleged DHHR exceeded its legal authority and interfered with the grievance process when it directed the Level II grievance evaluator to amend the decision on an earlier pay equity grievance, because the decision was clearly erroneous. Grievants sought reinstatement of the first Level II decision granting the requested relief.

Grievants had filed a pay equity grievance on November 3, 1997, stating they had been discriminated against when they had not received a salary increase in 1993. Grievants requested back pay, plus interest, from 1993. This grievance was denied at Level I, and, on December 11, 1997, it was granted at Level II by the grievance evaluator. After granting this grievance, the evaluator forwarded the written decision, on approximately January 5, 1998, to DHHR's Office of Personnel Services (OPS), and requested a settlement agreement be drafted. On January 30, 1998, the grievance evaluator was directed to amend the decision because it was "based on completely erroneous representations" and untimely. The evaluator revised the Level II decision and, on February 9, 1998, denied the grievance as untimely. After receiving the amended decision, the grievants then filed the second grievance alleging unlawful interference in the grievance process.

Grievants argued this grievance is exactly like the case of *Miller v. Division of Highways*, Docket No. 98-DOH-037 (July 6, 1998), in which the Grievance Board would not allow an agency to change a final Level III decision once the recommended decision had been approved by the proper agency authority. Grievants' reliance on *Miller* is misplaced, as that case dealt with a recommended agency decision approved by the Assistant Commissioner, the individual delegated the authority to sign off on recommended decisions. Here, neither the grievance evaluator or the Hospital Administrator had the required authority to bind DHHR to a monetary award dating back to 1993, which ran into "tens of thousands of dollars," without the proper settlement agreement.

Settlement agreements are required on all grievances that are granted at Level III and below that involve a monetary award. These settlement agreements must be approved by individuals from the agency, the West Virginia Division of Personnel (DOP), local agency officials, the Attorney General's Office, Grievant, and the Director of Finance. These grievance decisions are considered draft decisions and not valid until these settlement agreements are signed and received.

All authority to grant back wages was removed from lower level evaluators (I through III) on November 16, 1990, but evaluators are still permitted to make recommended decisions granting back pay, and these decisions are reviewed by the "appropriate authorities" for final approval. The removal of this authority is supported by a November 16, 1990, memo from then Director of DOP, Michael Smith, which discussed in detail the problems multiple agencies were having with monetary awards being granted at the lower levels. Although this memo speaks mainly to the granting of monetary awards in misclassification grievances, it also refers to problems with settlement agreements, reallocations, promotions, and awards paid from current fiscal years general revenue

All Cabinet Secretaries/Bureau Chiefs/Agency Heads

Page 3

January 22, 1999

accounts for expenses incurred in previous fiscal years. Mr. Smith noted the Auditor "will not approve any payroll for back wages unless ordered to do so by a body of proper authority or pursuant to a signed settlement agreement approved by the Attorney General."

For additional information on this or any other Level IV decision, contact the Division of Personnel's Employee Relations Section, at 558-3950, ext. 251.

ELC:SF

cc: Joseph F. Markus
Assistant Directors



WEST VIRGINIA
DEPARTMENT OF TRANSPORTATION
1900 Kanawha Boulevard East • Building Five • Room 109
Charleston, West Virginia 25305-0440 • 304/558-0444

Cecil H. Underwood
Governor

Samuel H. Beverage, P. E.
Acting Secretary

April 26, 2000

David A. McGee
Rt. 1, Box 134
Burlington, WV 26710

RE: David A. McGee, Grievant
Case No. 99-0579-D-088 (12/17/99 LIII)

Dear Mr. McGee:

I have reviewed and do not agree with the Third Level Hearing Examiner's Recommended Decision on your grievance. I have reviewed the Recommendation made by the Grievance Review Panel and I concur with their findings.

If you desire to proceed to the fourth level, in accordance with the West Virginia Code, Chapter §29-6A-4, you have five days upon receipt of this written decision to do so. To have your grievance heard at the fourth level, contact the West Virginia Education and State Employees Grievance Board, 808 Greenbrier Street, Charleston, West Virginia 25311.

Very truly yours,

Samuel H. Beverage, P.E.
Commissioner

By:

A handwritten signature in black ink, appearing to read "T. Badgett".

Thomas Badgett
Assistant Commissioner

TFB:Ecd
Attachment

cc: Anthony G. Halkias, Director/Nedra Koval, Esquire, WV DOT/DOH Legal Division
Lewis McGee, Grievant's Representative
William Hartman, District Five Administrator



WEST VIRGINIA DEPARTMENT OF TRANSPORTATION

Division of Highways

1900 Kanawha Boulevard East • Building Five • Room 110
Charleston, West Virginia 25305-0430 • 304/558-3505

Cecil H. Underwood
Governor

Samuel H. Beverage, P. E.
Acting Secretary
Commissioner of Highways

Thomas F. Badgett
Assistant Commissioner

April 14, 2000

MEMORANDUM

TO: Tom Badgett
Assistant Commissioner

FROM: Grievance Review Panel

SUBJECT: David A. McGee v. West
Virginia Division of Highways

The undersigned grievance review panel has reviewed the case record of David A. McGee v. West Virginia Division of Highways, Case No. 99-0579-D-088.

We unanimously recommend that the proposed Third Level Decision submitted by the Hearing Examiner not be adopted and that the disciplinary suspension of Mr. McGee stand as issued.

We generally concur with the Findings of Fact in the recommended decision, although we feel that some do not completely reflect, or are not completely substantiated by the record. In addition we find that:

1. Ms. Cole had no reason to file a false report regarding Mr. McGee's statements.
2. Mr. McGee's statements to Gary Long served to substantiate Ms. Cole's testimony.



WEST VIRGINIA DEPARTMENT OF TRANSPORTATION
Division of Highways

1900 Kanawha Boulevard East • Building Five • Room 110
Charleston, West Virginia 25305-0430 • 304/558-3505

Cecil H. Underwood
Governor

Samuel G. Bonasso, P.E.
Secretary

Samuel H. Beverage, P.E.
Commissioner of Highways

Thomas F. Badgett
Assistant Commissioner

July 29, 1999

Donald Miller
1265 Dog Fork Rd.
Kenna, WV 25248

RE: Donald Miller
Case No.: 98-0085-C-103 (08/20/98 LIII)

Dear Mr. Miller:

I have reviewed, and do not agree with the Third Level Hearing Examiner's Recommended Decision on your grievance. I have reviewed the Recommendation made by the Grievance Review Panel and I concur with their Recommendation.

If you desire to proceed to the fourth level, in accordance with the West Virginia Code, Chapter §29-6A-4, you have five days upon receipt of this written decision to do so. To have your grievance heard at the fourth level, contact the West Virginia Education and State Employees Grievance Board, 808 Greenbrier Street, Charleston, West Virginia 25311.

Very truly yours,

Samuel H. Beverage, P.E.
Commissioner

By: 

Thomas Badgett
Assistant Commissioner

TFB:Eew
Attachment

cc: Anthony G. Halkias, Director/Nedra Koval, Esquire, WVDOT-DOH Legal Division
Barry Warhoftig, Director Traffic Engineering Division



WEST VIRGINIA DEPARTMENT OF TRANSPORTATION
Division of Highways

1900 Kanawha Boulevard East • Building Five • Room 110
Charleston, West Virginia 25305-0430 • 304/558-3505

Cecil H. Underwood
Governor

July 29, 1999

Samuel G. Bonasso, P.E.
Secretary

Samuel H. Beverage, P.E.
Commissioner of Highways

Thomas F. Badgett
Assistant Commissioner

MEMORANDUM

TO: Thomas F. Badgett
Assistant to the Secretary for Administration

FROM: Joseph Deneault, State Highway Engineer *JD*
Carl Thompson, Deputy State Highway Engineer – Operations *CT*
William Feazelle, Director of Finance Division *WF*

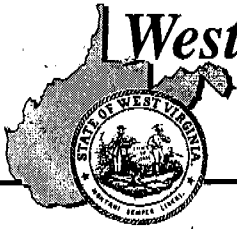
SUBJECT: THIRD LEVEL GRIEVANCE DECISION – DONALD MILLER

As members of the Greivance Review Panel, we have reviewed a decision of the Third Level Hearing Examiner. The Grievant, Donald Miller, filed a grievance on August 18, 1998, alleging he had been unjustly denied a promotion and pay increase by the State Division of Personnel. He requested that he be promoted to Transportation Services Manager I with a ten percent increase in pay.

After a review of the grievance file including the position description, transcript and grievance decision, we have several concerns. The question appears to be whether the grievant is responsible for an administrative support unit or manages a program or service organizational unit. We are not convinced that the grievant's duties are no longer restricted to the administrative section of the Division as stated in the decision. It appears that the grievant does not manage a program but acts as a coordinator for already established programs managed by others within the Division of Highways. We also believe that it would be fair to say, with the introduction of computers and other technology, that every organization and almost every position within the Division of Highways has changed substantially over 27 years.

We are therefore not in concurrence with this decision and it is the consensus of this panel that the grievance be denied. We are not however opposed to a job audit being performed on the "position."

JD:Sj



West Virginia Division of Personnel

Willard M. Farley, Acting Director

STATE PERSONNEL BOARD
Eugene Stump, Chairman
Rev. Paul Gilmer ♦ Elizabeth Harter
Sharon Lynch

March 30, 2004

RECEIVED

APR 2 2004

WV Education & State
Employers Grievance Board

Ronald Wright, Director
Education and State Employees Grievance Board
808 Greenbrier Street
Charleston, West Virginia 25301

Dear Mr. Wright:

The Division of Personnel has reviewed the proposed revisions to the Grievance Board's Procedural Rules (156 CSR 1) and would like to respond to some of the proposed revisions. We appreciate the opportunity to review the proposed revisions and provide input.

When the Legislature enacted the grievance statute in 1988, they mandated that "[b]oth employer and employee shall at all times act in good faith and make every possible effort to resolve disputes at the lowest level of the grievance procedure" (W. Va. Code § 29-6A-7(e)). We are of the opinion that the Legislature's intent has been thwarted by over-complication of the lower levels. Though the statute rightfully permits grievant representation at all levels of the procedure, the proliferation of employee organization representatives and attorneys at informal conferences at Level One and conferences at Level Two has had a chilling effect on the intended atmosphere of good faith. As you know, "... the grievance process is intended to be a fair, expeditious, and simple procedure, and not a 'procedural quagmire.'" *Spahr v. Preston County Bd. of Educ.*, 182 W. Va. 726, 393 S.E.2d 739 (1990).

Additionally, we are concerned that some of the proposed rule changes exceed the purpose and intent of West Virginia Code § 29A-3-1 *et seq.*, *Administrative Procedures Act*, which is to promulgate rules for the conduct of agency business. Some of the Board's proposed revisions appear to be to the grievance procedure itself and not to the conduct of business, and are misplaced in the procedural rule and might be more correctly proposed as legislative rule revisions, under provisions of W. Va. Code § 29-6A-1 *et seq.*

Our concerns relating to specific proposed revisions are as follows:

Section 2.1.4 - Subpoena: Revise "subpoena" to "subpoena ad testificandum" to distinguish that both administrative law judges and grievance evaluators have statutory authority to issue both subpoenas ad testificandum and subpoenas duces tecum.

Section 2.1.5 - Subpoena duces tecum: Insert "administrative law judge" to clarify that only they have statutory authority to issue subpoenas duces tecum. We know that the Legislature was cognizant of the fact that Administrative Law Judges are attorneys, and sensitive to the issue of privileged documents when they empowered them in W. Va. Code § 29-6A-5(b) to "subpoena witnesses and documents." Additionally, they were aware that many grievance evaluators would not be attorneys, and, therefore less familiar with the issue of privilege, and vested them in W. Va. Code § 29-6A-6(c)(2) with authority to only "subpoena witnesses." *Expressio unius est exclusio alterius*: the expression of one thing is the exclusion of another.

Section 3.1 - Forms: Insert term "shall" to make use of the Board-issued grievance form mandatory.

Section 3.X - Grievance Evaluator Authority: Delete. No agency head should be forced to comply with or appeal his or her designee's Level Three decision. Agency heads are vested by statute with certain rights and responsibilities which cannot be limited by the procedural rules of another agency. For any agency to promulgate a procedural rule which forces an agency head to comply with or appeal a decision of his or her designee is contrary to the intent of the Legislature, as expressed in W. Va. Code § 29-6A-4(c). In the alternative, authorize the Director of the Division of Personnel (in addition to the agency head) to appeal Level Three decisions.

Section 3.XX - Level Three Hearings: Agree with provision for telephonic hearings at Level Three.

Section 3.4. - Intervention: Agree only when intervening employee stands to lose property interest (e.g., already-awarded position and/or pay).

Section 4.1.1 - Designate Your Representative Form: Agree.

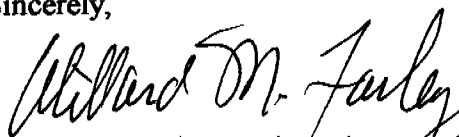
Section 4.6 - Subpoenas and subpoenas duces tecum: No agency should be responsible for travel expenses of grievants' witnesses, and this provision creates the potential for abuse and untold expense to the agencies. The current practice of all parties being held responsible for their respective expenses contributes to an environment in which expenses are minimized by the utilization of only those witnesses who are crucial to the case, and limits the attempted utilization of corroborative and/or non-probative witnesses.

Section 4.6.1 - List of Witnesses: Agree

Section 4.15 - Consolidation: Revise term "join" to "consolidate" as consolidate and join are not synonymous in this context.

Again, thank you for the opportunity to provide input. Please let me know if you have any questions.

Sincerely,


Willard M. Farley, Acting Director of Personnel
West Virginia Division of Personnel



West Virginia University

Administration, Finance and Human Resources

*To Bd / Jacques /
Elaine & Jeff*

4/19/04

March 31, 2004

RECEIVED

APR 5 2004

WV Education & State
Employees Grievance Board

**By Facsimile Transmission (304-558-1106)
and Regular Mail**

Ronald Wright, Director
West Virginia Education and State
Employees Grievance Board
80 Greenbrier Street
Charleston, WV 25311-1527

Re: Proposed Changes to Grievance Board Procedural Rules

Dear Mr. Wright:

West Virginia University wishes to thank the Grievance Board for the opportunity to comment during this preliminary review and comment period on the proposed amendments to Title 156, Series 1 of the West Virginia Code of State Rules, "Procedural Rules, West Virginia Education and State Employees Grievance Board" ("the proposed amendments"). WVU is supportive of most of the changes proposed in the new Rules. After careful consideration, however, we are concerned about the following three proposed revisions as they affect Chapter 29, Article 6A of the West Virginia Code, for the reasons expressed below:

- § 156-1-3.X - Grievance Evaluator Authority (new provision)
- § 156-1-3.4 - Intervention
- § 156-1-4.6 - Subpoenas and Subpoenas Duces Tecum

First, the University opposes the new §156-1-3.X, the amendment to §156-1-3.4 and that portion of the new language in §156-1-4-6 relating to Administrative Law Judge ("ALJ") subpoena authority, because these revisions are inconsistent with the applicable statute, Chapter 29, Article 6A of the West Virginia Code. As explained in the footnotes accompanying the Proposed Amendments, the intent behind each of these changes is to apply to grievance procedures under Chapter 29, Article 6A of the West Virginia Code ("Chapter 29 Procedures") a particular provision which currently applies to grievance procedures under Chapter 18, Article 29 of the West Virginia Code ("Chapter 18 Procedures"). See footnotes 1, 3 and 6 to the Proposed Amendments. In each instance, however, the applicable provision under the Chapter 18 Procedures is squarely based on specific statutory language contained in Chapter 18, Article 29 - language which is significantly absent from Chapter 29, Article 6A. Thus:

- W.V. Code §18-29-3(t) states that the chief administrator has a right of appeal from a level 2 or level 3 decision, clearly indicating that, under Chapter 18, Article 29, the chief administrator does not retain decision-making authority upon delegation to a grievance evaluator. While that removal of authority under the Chapter 18 Procedures is therefore supported by Chapter 18, Article 29, no such language exists in Chapter 29, Article 6A.
- W.V. Code §18-29-3(u) extends to non-grievants a right of intervention which is nowhere present in Chapter 29, Article 6A. Thus, the proposed change to §156-1-3.4 would create a new substantive right that is not contained in Chapter 29, Article 6A.
- W.V. Code §18-29-4(b) authorizes ALJs to issue subpoenas at lower level hearings, but Chapter 29, Article 6A contains no comparable subpoena power.

Office of Vice President

304-293-2545
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104 Stewart Hall
PO Box 6205
Morgantown, WV 26506-6205

Equal Opportunity/Affirmative Action Institution

March 31, 2004

Page 2

Standard rules of legislative interpretation establish that, if a provision is present in one statute and is absent from another similar statute, it is presumed that the Legislature intended for the statutes to be different. If the regulatory modifications identified above are finalized, therefore, they will change the meaning of Chapter 29, Article 6A as intended by the West Virginia Legislature. This will be especially harmful to the Legislature's intent as to public higher education, since higher education was removed from Chapter 18, Article 29 and placed under Chapter 29, Article 6A, precisely because the Legislature intended for higher education to no longer be subject to those provisions of Chapter 18, Article 29 which are absent from Chapter 29, Article 6A. Nor can authority to make these changes be read into the Board's general authority to issue procedures interpreting these two statutes. The Board's regulatory authority is limited by and must be consistent with the statutes under which it operates.

Second, WVU also opposes the new §156-1-3.X because it inappropriately interferes with the authority of a chief administrator to delegate her or his authority in whole or in part. This standard administrative prerogative is necessary to allow chief administrators to efficiently oversee their agencies. Effectively, the new clause presents the chief administrator with a Hobson's choice of whether to waive his or her final decision-making authority - set out in the statute and appropriately recognized in more than one ALJ decision, as noted in footnote 1 to the Proposed Amendments - or directly assume burdens which, in the case of a large state agency such as West Virginia University, would be debilitating.

Finally, the University opposes §156-1-4.6 to the extent that it would require employers to pay for the travel expenses of employee witnesses subpoenaed by a grievant at a level 4 hearing. This is directly contrary to the well-established principle of American jurisprudence under which each party is to bear its own costs of adjudication. While there are exceptions to this rule, generally they are set out in statute and require the losing party is required to bear certain costs of the prevailing party. Here, the Proposed Amendment would impose certain costs solely on one party without regard to the outcome of the case and without statutory basis. Indeed, this revision would directly conflict with W.V. Code §29-6A-5, which requires subpoenas to be issued pursuant to W.V. Code §29A-5-1. Section 29A-5-1, in turn, requires that costs arising from a subpoena "shall be paid by the party who asks that such subpoena ... be issued." To require the employer to bear costs arising from a subpoena sought by the grievant, therefore, would be contrary to law.

We appreciate, once again, the opportunity to comment on the Proposed Amendments, and hope that these comments are useful.

Very truly yours,



Scott C. Kelley

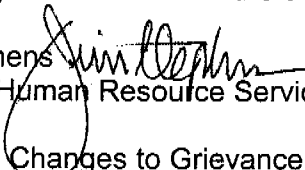
Vice President for Administration, Finance
and Human Resources

Human Resource Services

RECEIVED
MAR 30 2004

MEMORANDUM

TO: West Virginia Education and State Employees Grievance Board

FROM: Jim Stephens 
Director, Human Resource Services

SUBJECT: Proposed Changes to Grievance Board Procedural Rules

DATE: March 25, 2004

WV Education & State
Employees Grievance Board

I am replying in behalf of the administration of Marshall University to the proposed changes in the Grievance Board's procedural rules.

§ 156-1-3. Levels One, Two and Three

3.X. We oppose the adoption of this change. At Marshall, the president has overturned the recommendation of the grievance evaluator only once in the past six years, which suggests the system is presently effective and without need of change. It is a widely followed model for the president to seek input and recommendations from others for a variety of decisions but to make the actual decision himself. To provide a uniform decision making environment, this same protocol should be applied to Level III recommendations.

§ 156-1-4. Level Four

4.6. We oppose the adoption of this change. If adopted, this provision encourages the subpoena of witnesses who are not needed or who have no pertinent information to provide. The potential of the grievant to bear the responsibility of reimbursing his/her witnesses affords some balance in the process and limits the calling of witnesses to those who are necessary. If the institution bears the responsibility, the grievant is allowed to expand the witness list for the purpose of creating inordinate expense for the employer.

All other proposed changes are acceptable to Marshall University. Thank you.

C: F. Layton Cottrill, Jr.
Bruce Walker
David Harris

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**West Virginia
Northern
COMMUNITY COLLEGE**

For All Who Wish To Learn

March 25, 2004

**College
Administrative Offices**
1704 Market Street
Wheeling, WV 26003
(304) 233-5900

Mr. Ronald Wright
WV Education and State Employee Grievance Board
808 Greenbrier Street
Charleston, WV 25311

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MAR 29 2004

**WV Education & State
Employees Grievance Board**

Regional Campuses

Weirton

150 Park Avenue
Weirton, WV 26062
(304) 723-2210

Wheeling

1704 Market Street
Wheeling, WV 26003
(304) 233-5900

New Martinsville

141 Main Street
New Martinsville, WV 26155
(304) 455-4684

SUBJECT: Proposed Changes to the Board's Procedural Rules

Dear Mr. Wright:

Thank you for the opportunity to respond to the proposed changes attached to your memorandum of March 4, 2004.

The proposed changes appear to be contrary to the intent of any grievance process to resolve problems at the lowest level. In effect, the proposed changes work in the opposite direction and encourage higher, external levels of review. Further, the higher levels of procedure tend to be more formal, adversarial, costly and burdensome to the Grievance Board, institutions, and employee/grievants. Higher levels of the procedure are more likely to involve legal representatives, both for institutions and grievants.

1. The proposed change at Level 3 will move us from an internal process into a potential court situation. The President is the person held accountable for decisions made in his/her administration. If his/her authority is undermined by designation of a hearing officer who does not report back to the president, the situation will be problematic, first for the president who may be more reluctant to assign another employee as hearing officer, but also to any subordinate staff member assigned as well. In most instances the president will accept the conclusion and recommendation of the hearing officer. However, the president should not be forced into this before he can evaluate the report presented to him. The grievant has the opportunity to take the grievance to Level 4 if he/she feels the decision was not fair. The grievant's rights are well protected. If the president were to override a recommendation of a hearing officer that step would be more likely. Additionally, the president might

Misc#51/Wright Board's Procedural Rules

Mr. Ronald Wright
March 25, 2004
Page 2

find he has a much more difficult time at Level 4 if he makes a decision different from the recommendation of the hearing officer. Nevertheless, it is unreasonable to ask the president to accept a recommendation when he hasn't seen it--from anyone.

2. To require a hearing evaluator to identify the potential impact of a decision on other employees is an unreasonable burden. That could be a large administrative task in itself when there is a need to find more efficiency in the grievance process. This seems to put such a burden on the evaluator that it may limit options available to him as evaluator in advance. Additionally, this makes the grievance almost a public event, a situation which is not in the interest of the parties and should be avoided. It might have some advantage in letting other persons know the situation. (Having served as hearing officer many times, I can think of instances when I wished "that I could identify the impact on others and get them involved.") However, this negates the purpose of attempting to resolve issues internally and without public controversy. Again this is like turning Level 3 into a court situation, and even in court this is not required..
3. The possibility of telephonic hearings is also loaded with potentially negative complications. It could set a stage for agreement to manipulate the situation by having other persons available listening in and participating, which is not appropriate, and avoiding face to face confrontation which is often valuable in getting to the truth.
4. The employer should not have to pay travel expenses of grievant witnesses unless the findings end up in the grievant's favor. The employer already is paying these persons a salary for their involved time. A better procedure is to let these witnesses (or the grievant) pay their expenses; then, if the grievant "wins," costs could be reimbursed by the employer.
5. I agree that the form for assigning a representative should be adopted to clarify the meaning of "representative."

I offer these views from the perspective of a college administrator involved in grievance adjudication and collective bargaining for over 30 years. Given our current economic situation in West Virginia and the extreme financial hardship facing educational institutions, it is in the best

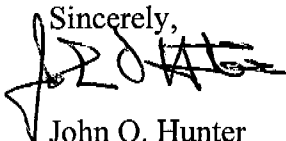
Mr. Ronald Wright
March 25, 2004
Page 3

interests of both the institution and its employees to settle grievances internally if at all possible. The proposed changes, in my judgment, carry us further down a trail of expensive grievance adjudication with further injury to collegial process. Certainly, the rights of the employee must be protected. However, so should the interest of the institution and the State. The proposed changes make it more difficult to effect a reasonable balance of these values.

In West Virginia the costs for grievance adjudication have already escalated beyond the average of settlement cost in states such as New York, Illinois or Pennsylvania. If the grievant has nothing to lose, costs to the employer easily become obligatory without strengthening fair process. This is especially true when the time of the grievance is greatly extended. Recently we had one which was finally settled here in its fourth year (no cost to the grievant), and while the institution "won," there were inordinate costs to the college, not only financial but in administrative time and energy to dispose of what was essentially a frivolous matter. Just a few of these going on simultaneously in a poor institution could bring it to its knees with detriment to both the grievant and other employees. Normally, grievances will be settled by internal process in a three to four month period with the final authority at the level of the Institutional Board of Trustees. Then, of course, if the grievant feels that he/she has not received justice civil action may be taken. Rather than further destruction of our collegial process, steps taken to reform the grievance administration would foster the best interests of both the educational institutions and their employees.

Thank you again for the opportunity to comment.

Sincerely,



John O. Hunter
President

c: Chancellor Michael Mullen
Chancellor James Skidmore



WEST VIRGINIA SCHOOL OF OSTEOPATHIC MEDICINE



30 March 2004

West Virginia Education & State
Employees Grievance Board
Attn: Ronald Wright
808 Greenbrier Street
Charleston, West Virginia 25311

RECEIVED
MAR 31 2004
WV Education & State
Employees Grievance Board

Re: Proposed Procedural Rule Changes

Dear Board Members:

I have reviewed the proposed changes and agree that the proposed changes in most cases would be beneficial; however, I must voice objection to two of the proposed changes.

First is the proposal in Section 3.X to make the Level III president's designee the final decision-maker after the hearing. I believe this holds some mischief at smaller institutions like WVSOM where the presidents know exactly why a policy or practice is being applied or pursued in a certain way which may have led to a grievance, and they know the persons involved in the dispute. To put the authority in a subordinate to overrule the president's policy or practice is awkward and can be very troublesome, both to the institution and the subordinate. It is ridiculous to put the president in the position of having to appeal his "own decision". I believe this proposed change should be dropped.

Second is the proposal in Section 4.6 to require employers to pay the costs of travel for all persons subpoenaed to a Level IV hearings, whether for the grievant or the respondent. This seems inappropriate in that it forces an employer to bankroll travel costs of witnesses who come to testify against the institution and thus encourages litigious individuals to "sue the company". The witnesses already get to keep their pay for the full day's work even though they might have been at a grievance hearing for the entire day, but the institution should not have to pay adverse witnesses' travel costs as well.

I am authorized to say that Dr. Jones, President of WVSOM, agrees with these remarks to the proposed rule changes.

Respectfully yours,

A handwritten signature in black ink that reads "Brentz H. Thompson".

Brentz H. Thompson
Legal Counsel

cc: Dr. Olen E. Jones, Jr.



Eastern West Virginia
Community & Technical College

Sent via facsimile and regular mail

MEMORANDUM

RECEIVED

MAR 31 2004

DATE: March 30, 2004

TO: Ronald Wright, Director
West Virginia Education and State Employees Grievance Board

FROM: 
Michele Warholic Wetherald
Executive Dean

SUBJECT: PROPOSED CHANGES to the BOARD'S PROCEDURAL RULES

The following comments are being submitted concerning the proposed changes to the Board's Procedural Rules.

1. The proposed change to eliminate the Chief Administrator's (President in higher education) opportunity to override or reverse a decision of the appointed grievance evaluator at Level III, in effect, may thwart the purpose legislative purpose for the grievance procedure. Specifically, the procedure was created to "*provide a simple, expeditious and fair process for resolving problems at the lowest possible administrative level.....*" (WV Code Section 18-29-1). Requiring the President to appeal the decision of a designee evaluator to the Grievance Board eliminates the potential to override or reverse the decision at the institutional level. Additionally, due to potential for liability and conflict of interest, Presidents may be discouraged from appointing designated evaluators.
2. The proposed change to permit telephonic hearings in order to meet deadlines, while it may provide a more efficient method of substantive compliance with the rules, tends to overlook the legislative intent to create a "*simple....and fair process for resolving problems.*" Further, an important communications tool to resolve conflicts will be encouraged for compliance and efficiency purposes, rather than substantive results. In this regard, problem solving

**Eastern West Virginia Community & Technical College
Comments to Proposed Changes to Grievance Board Procedural Rules
March 30, 2004**

between individuals is more likely to occur in face-to-face direct communications, rather than indirect conditions, such as telephonic meetings. Moreover, telephone meetings will preclude an essential element for evaluating the credibility of potential witnesses, that is, non-verbal communications, in matters which involve disputed facts.

- 3. The proposed rule to require the employer to bear the expenses of persons subpoenaed by the grievant is unreasonable and further increases the excessive cost burden borne by employers under the current grievance procedure. Specifically, this rule change would encourage potential abuse and misuse of witness participation on behalf of grievants, since no financial expense would be at risk. Current rules which require each party to bear their own witness expenses do not impose an undue burden or hardship upon grievant employees to "reach solutions to problems" in the workplace.**

c: President Linda S. Dunn

**Bruce Ray Walker, General Counsel
West Virginia Higher Education Policy Commission**



WEST VIRGINIA
H I G H E R
E D U C A T I O N
P O L I C Y
C O M M I S S I O N

J. THOMAS JONES
CHAIR

J. MICHAEL MULLEN
CHANCELLOR

March 31, 2004

Ronald Wright, Director
West Virginia Education & State
Employees Grievance Board
808 Greenbrier Street
Charleston, West Virginia 25311-1527

RECEIVED

APR 2 2004

WV Education & State
Employees Grievance Board

Re: Proposed Changes to the Board's Procedural Rules

Dear Mr. Wright:

Thank you, for the opportunity to comment on the proposed changes to the Grievance Boards procedural rules. After reviewing the proposed changes we have the following comments:

1. We are opposed to any change that would make the decision of one of our Presidents' designated grievance evaluators binding upon the President and institution. The practice of using designees to make recommended decisions to our Presidents has worked well for years. The practice has allowed hearings to be held expeditiously and without needlessly interfering with a President's other responsibilities and hectic schedule. By allowing a President to review and then adopt or modify a designee's recommended decision, potential errors by a designee can be avoided. We must remember that these designees are almost always laypersons and not necessarily aware of all provisions of law or institutional policy. Under current practice, a President may cure any errors in a recommended decision but would not be able to do so under the proposed change.

Furthermore, the proposed change only allows a President to appeal a designee's decision under a "clearly wrong" standard. However, a grievant appealing the designee's decision would have their grievance heard de novo. If any change regarding the finality of a designee's decision is made, fairness requires that either party's appeal be heard de novo.

2. We support the right to intervention by other employees when they have a substantial interest in the grievance. This is particularly helpful in situations where the remedy one employee seeks, if granted, would affect the rights of another employee, such as when an employee asserts he should be placed in a position that another employee presently fills.

3. We support the use of telephonic hearings. These have been used in the past when all parties agree, but a grievance evaluator needs unilateral authority to hold such when needed to avoid a default.

4. A form to designate a grievant's representative seems appropriate.

5. We are opposed to any change that would require the employer to pay the travel expenses of employees subpoenaed by a grievant. First, such a change is contrary to law. Hearing examiners of the Grievance Board may only subpoena witnesses ". . . in accordance with the provisions of . . . [§29A-5-1]." W. Va. Code § 29-6A-5. W. Va. Code § 29A-5-1 states that "All such fees [for attendance and travel] related to any subpoena or subpoena duces tecum issued at the instance of an interested party shall be paid by the party who asks that such subpoena or subpoena duces tecum be issued." (Emphasis added). Thus the very code provision that allows such subpoenas precludes the change proposed. The person seeking the subpoena is responsible for the witness' expenses, not the employer.

Second, the change is contrary to good public policy. Under the present statutory scheme, both parties bear the expenses associated with their own subpoenaed witnesses. This ensures that both parties are judicious in determining their actual need for witnesses. I am aware of cases where grievants have asked for literally dozens of witnesses. Once those grievants realized they would be responsible for all those persons' expenses they quickly determined they did not actually need so many witnesses.

The proposed change would remove any judiciousness in the grievant's decision on how many witnesses to subpoena when it would be the employer bearing all the cost. An unscrupulous grievant could use this proposed change to "punish" their employer by subpoenaing the whole workplace and causing undue expense to the employer. Another grievant might use the proposed change to reward all his co-workers with a day or two off, expenses paid, and then not even actually call them as witnesses. For these reasons, the proposed change is contrary to good public policy.

Finally, the inclusion of such a provision would require this rule be promulgated as a legislative rule instead of a procedural one, in that this provision would provide a new benefit to employees at the expense of their employer. W. Va. Code § 29A-1-2(d) provides that any rule that "grants or denies a specific benefit" is a legislative rule.

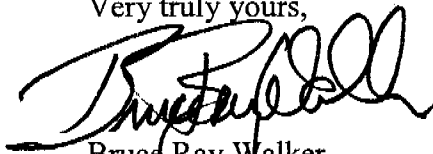
6. We are supportive of the change that would require parties to exchange witness lists at least six days prior to hearing. However, there must be exceptions to that provision to allow rebuttal witnesses to be called even if they are not listed.

Ronald Wright, Director
March 31, 2004
Page 3

7. We are also supportive of the power of a Level III evaluator to consolidate grievances since this will allow a more expeditious hearing of related matters.

Again, thank you for the opportunity to make these comments.

Very truly yours,

A handwritten signature in black ink, appearing to read "Bruce Ray Walker", written in a cursive style.

Bruce Ray Walker
General Counsel

BRW/bc

Bob Wise
Governor

Quetta T. Muzzle
Acting Commissioner



West Virginia Bureau of Employment Programs

• Job Service • Labor Market Information •
• Unemployment Compensation •
an equal opportunity/affirmative action employer

MEMORANDUM

TO: Ronald Wright, Director
WV Education and State Employees Grievance Board

FROM: *Quetta T. Muzzle*
Quetta T. Muzzle, Acting Commissioner
Bureau of Employment Programs

DATE: March 26, 2004

SUBJECT: Response to Proposed Changes to the Board's Procedural Rules

RECEIVED

MAR 29 2004

WV Education & State
Employees Grievance Board

In response to your proposed changes to the Grievance Board's procedural rules, I take exception to **Sections 3.X. and 4.6.**

Section **3.X.** gives the grievance evaluator the authority to make decisions independent of the chief administrator. The chief administrator would have no authority to override that decision.

In regard to the authority of the commissioner of the Bureau of Employment Programs, the **West Virginia Code §21A-2-6 Powers and duties generally** states:

"The commissioner is the executive and administrative head of the bureau and has the power and duty to:

(2) Prescribe uniform rules pertaining to investigations, departmental hearings and propose rules for promulgation;

(14) Exercise any other power necessary to standardized administration, expedite bureau business, assure the establishment of fair rules and promote the efficiency of the service. . . ."

Presently, an evaluator will recommend a decision to the commissioner for action. I recommend no change.

By the WV Code, the party serving a subpoena is responsible for the expenses of the witness. In regard to **4.6**, I recommend no change.

I submit for consideration a request that all costs incurred for a **frivolous** grievance be charged to the grievant. These costs would include any costs incurred by the agency or any other state entity that required action in the **frivolous** grievance.

Additionally, I request that there be developed a clear definition of the term **frivolous** for inclusion in WV State Code **§29-6A**.

Should you wish additional or more in depth comments, please contact me.

cc: Mark Miller, Deputy Commissioner of Administration, BEP
Thomas K. Rardin, Assistant Director, FAM Human Resources, BEP



DIVISION OF NATURAL RESOURCES

Capitol Complex, Building 3, Room 669
1900 Kanawha Boulevard East
Charleston WV 25305-0660
TDD (304) 558-1439
TDD (304) 1-800-354-6087
Fax (304) 558-2768
Telephone (304) 558-2754

Bob Wise
Governor

Ed Hamrick
Director

Wednesday, March 31, 2004

VIA U.S. MAIL and FACSIMILE 304-558-1106

Ronald Wright
Director
West Virginia Education and
State Employees Grievance Board
808 Greenbrier Street
Charleston, WV 25311

RECEIVED

APR 1 2004

WV Education & State
Employees Grievance Board

Re: Comments to proposed changes to procedural rules

The West Virginia Division of Tourism and the West Virginia Division of Natural Resources (collectively the "Divisions") wishes to comment on the proposed changes to the Procedural Rules for the grievances proceedings. I write on behalf of the Divisions as its assigned counsel after consultation with the staff. Overall, the Divisions feel that these proposed rule changes create more expense and time consuming procedures instead of simplifying the process for both the agency and the state employees. Moreover, these changes place the governance and policy of state agencies in the hands of Grievance Evaluators, which is an improper shift of authority.

3.X The Grievance Evaluator should not issue the final decision. Because of the tight time frames in the rules, state agencies are forced to find Grievance Evaluators who are available to schedule hearings on short notice. These Grievance Evaluators may or may not be familiar with the agency or with the issues presented. Moreover, the Grievance Evaluators are required to issue opinions in a short time frame. The reality of this scenario is that a Grievance Evaluator can set policy for a state agency through the grievance procedure, and the director of the agency would be forced to go through an appeals process in order to maintain the policy of that agency. Further, there may be occasions in which the Grievance Evaluator rules in favor of the agency, but the director of the agency has decided to make an allowance based on special circumstances. This rule would prevent such remediation.

3.xx. Telephonic hearings are often confusing and are a poor method of communication. The Divisions fully recognize the dilemma presented by the tight

Ronald Wright
Director
Page 2 of 3

deadlines in the grievance statute and rules, but does not feel that a telephonic hearing will provide information necessary for the evaluator or a proper environment for the grievant, who may well not be represented at the Level III proceeding.

4.1.1 While the Divisions feel that designating a representative at Level IV is helpful, this has never been a problem. The Divisions are more troubled by the tone of the rule, which seems to encourage representation at all grievance levels. Representation at the informal conference level is frequently, if not always, counterproductive. The first two levels of a grievance are designed for communication between an employee and the employee's supervisors. This is often helpful in resolving situations easily and with a minimum of ill will. The interjection of advocacy in these early proceedings practically guarantees that easy resolution will be impossible. If the grievant appears at Level I with counsel, a supervisor is likely to feel intimidated and may not be willing to make a decision. Alternatively, the supervisor may seek the agency's counsel to be present, at which point the lawyers are likely to take over, completely obliterating the purpose of an informal meeting. Employees have been known to show up with spouses as their "representatives." This often generates an emotional confrontation. While understandable at some level, again, this does not promote the resolution of an employment situation.

The grievance proceedings have mechanism by which the grievant may progress rapidly through the process, if the grievant so chooses. If the grievance involves discrimination or retaliation by an immediate supervisor, or if the grievance involves suspension without pay, demotion, dismissal, or loss of wages, the grievance may be initiated at Level II, requiring only one informal consultation prior to the interjection of representation. After Level II, the mediation process is available to the parties, providing another avenue for resolution with representation. The Divisions feel that the current rules and policies are more than adequate and that this alteration would actually result in fewer resolutions at a lower level, thus driving up the cost of the grievance proceeding for all parties.

4.6.1 The Divisions feel that requiring the parties to identify potential witnesses six days prior to a Level IV hearing actually puts a burden on the grievant. The Divisions feel that if the proceeding appears to be complicated from the Level III transcript and decision that the ALJ would be within his or her power to request such a witness disclosure from the parties in those instances. This would eliminate a potential pitfall from the process for an employee who may not think to review the procedural reviews for such a filing requirement.

Ronald Wright
Director
Page 3 of 3

The Divisions appreciate your time and attention to its thoughts on the proposed changes.

Best regards,

A handwritten signature in cursive script that reads "Kelley M. Goes".

Kelley Goes
Assistant Attorney General
West Virginia Division of Natural Resources
West Virginia Division of Tourism



STATE OF WEST VIRGINIA
DEPARTMENT OF HEALTH AND HUMAN RESOURCES

Office of the Secretary

State Capitol Complex, Building 3, Room 206
Charleston, West Virginia 25305
Telephone: (304) 558-0684 Fax: (304) 558-1130

Paul L. Nusbaum
Secretary

Bob Wise
Governor

March 31, 2004

RECEIVED

MAR 31 2004

WV Education & State
Employees Grievance Board

Mr. Ronald Wright, Director
West Virginia Education and State
Employees Grievance Board
808 Greenbrier Street
Charleston, West Virginia 25311

Dear Mr. Wright:

As requested, outlined below are my comments concerning the proposed changes to the Board's Procedural Rules. I hope the comments are helpful.

- § 156-1-3

3.X - Grievance Evaluator Authority

I believe it would be a grave error for a chief administrator to be compelled to relinquish decision making authority to a designated level three grievance evaluator for two primary reasons.

First, the proposed regulations create a standard of review for the employer that does not seem to apply to the employee. Under the current system, the employer cannot appeal the level 3 decision and the employee's appeal is reviewed *de novo*. That means that the level 4 hearing is independent of the level 3 hearing and the level 4 Administrative Law Judge is not bound by the level 3 decision on record. Under the current system, both employees and employers are allowed to re-present their case at level 4. Under the proposed regulations, the grievance board has applied a standard of review to the employer similar to the standard of review the Code sets forth for an appeal to the circuit court. This suggests that if the employer loses at level 3 of the grievance process and appeals to level 4, the employer is bound by the record at level 3 and the review by the grievance board would be like an appellate review. However, in the proposed regulations this standard of review only applies to the employer. It appears the employee has no standard of review and may still appeal for any reason and have a *de novo* hearing with the option of re-presenting their entire case. In my opinion, this is a violation of the agency's due process rights and is unconstitutional.

Second, the proposed change is simply impractical. This agency employs attorneys as level three grievance evaluators to write recommended decisions. During the fifteen years or so this agency has used attorneys as level three evaluators, the quality of level three recommended decisions has varied widely. The quality of decisions depends on the experience, expertise and relative competence of the individual evaluator. We have also experienced a relatively high level of turnover in these positions. Due to the difficulties this agency has experienced in attracting and retaining competent level three evaluators, it is imperative that chief administrators retain decision making authority for level three decisions.

3.4 - Intervention

Second Sentence - where employers are "encouraged" to give notice to other employees who might be affected - the Rule should either require notification or eliminate the sentence completely. The same issue exists in the third sentence - either the employee should be required to intervene to protect their interest or lose the right to later object to the decision.

- § 156-1-4

4.1.1 - Designate Your Representative Form

In the Second Sentence, I would change "can" to "may" and after the word "represented" add the word "by." In the third sentence, delete "a."

4.6 - Subpoenas and Subpoenas Duces Tecum

The footnotes are incorrect. The last sentence in this paragraph should have the footnote of 7.

I disagree that the employer should be responsible for paying travel expenses for witnesses subpoenaed by the grievant. The employer should be responsible for allowing them time off without charging it to their annual leave, but mileage and any other expenses should be borne by the grievant unless they prevail upon their grievance. It is prudent to compel the grievant to be judicious with the number of witnesses called.

The proposed change also seems to imply that the level 4 Administrative Law Judges will be issuing subpoenas for witnesses at level 3 hearings instead of the grievance evaluator. I don't think it is possible for this to happen when the level 3 hearing has to occur within 5 days. It is hard enough for the level 3 evaluator to issue something.

4.6.1

While grievants usually have to get a subpoena for co-workers to attend, they don't have to. Moreover, if there are no witness lists exchanged or if the grievant or employer leaves someone off, are they prohibited from testifying?

Second sentence - footnote 7 should become footnote 8.

4.24 - Interpreter Appointment

The term "deaf" should be changed to "hearing impaired" in both locations within the paragraph.

Appendix A - Certificate of Service

Interdepartmental mail, where appropriate, should be sufficient as well.

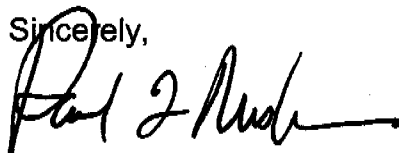
Appendix E - Education & State Employees Grievance Board Form For Designation of Grievant's Representative

In the first paragraph, third sentence -... grievance procedure, employees can (change "can" to "may") also be represented (insert the word "by") an employee organization...

At the bottom of the form where it has "Name", insert "Representative's" before the word "Name." This will avoid any confusion as to whose name should be written there. Where the form requests a telephone number, include parentheses so the individual will remember to include an area code (due to peripheral counties, the Representative may be located in another state).

Thank you for the opportunity to offer comments on the proposed changes to the Procedural Rules. Should you have any questions, please call Mike McCabe at 558-2072.

Sincerely,



Paul L. Nusbaum
Secretary

Communications
Workers of America
AFL-CIO
West Virginia Area

Huntington Square, Suite 1212
900 Lee Street
Charleston, West Virginia 25301
(304) 342-2023



March 30, 2004

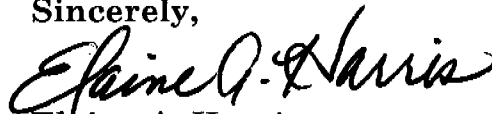
Ronald Wright, Director
West Virginia Education and State Employees
Grievance Board
808 Greenbrier Street
Charleston, WV 25311

RECEIVED
MAR 31 2004
WV Education & State
Employees Grievance Board

Dear Mr. Wright:

Enclosed please find "COMMENTS REGARDING PROPOSED
RULE CHANGES" hereby submitted by the Communications Workers of
America.

Sincerely,



Elaine A. Harris
CWA Representative

EAH/lm/opei#2/afl-cio

BEFORE THE
WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD

COMMENTS REGARDING PROPOSED RULE CHANGES

SUBMITTED BY THE COMMUNICATIONS WORKERS OF AMERICA
March 30, 2004

The Communications Workers of American (hereinafter CWA) has reviewed the proposed changes to Title 156, Procedural Rules of the West Virginia Education and State Employees Grievance Board as published on their website. With two exceptions, which will each be discussed below, CWA has no objection to these proposed changes.

CWA takes exception to proposed changes to § 156-1-3. Levels One, Two and Three, Section 3.X "Grievance Evaluator Authority". The proposed rule change would allow an agency's chief administrator at level three of the procedure to appeal the agency's own decision to level four.

WV Code §29-6A-4(c) states, in pertinent part, "The chief administrator or his or her designee shall hold a hearing in accordance with section six of this article within seven days of receiving the appeal... The chief administrator or his or her designee shall issue a written decision affirming, modifying or reversing the level two decision within five days of the hearing." The statute goes on to state that, should the grievant not be satisfied with the level three decision he/she may file an appeal at level four of the procedure.

Additionally, WV Code §29-6A-2(j) defines "Grievance evaluator" as "that individual authorized to render a decision on a grievance under procedural levels one, two and three as set out in section four."

The statute makes no provision for the employer to file an appeal with a hearing examiner at level four of the procedure, except in the case of default, wherein the employer may request a level four hearing "for the purpose of showing that the remedy received by the prevailing grievant is contrary to law or clearly wrong." The statute is very specific as to when and for what reasons an employer may make appeal to level four.

Moreover, the statute is quite clear that the evaluator at level three, whether it be the agency's chief administrator or his/her designee, has the authority to conduct a hearing, take testimony, accept evidence and render a decision. To permit an agency to appeal its own evaluator's decision would be contrary to law. The Grievance Board is without authority to make changes in administrative rules that are not supported by statute.

It has been common practice for the chief administrators of many state agencies to designate evaluators at level three of the process. However, many chief administrators often treat the decisions of the designees as merely recommendations which the chief administrator can then accept or reject. We do concur with the portion of the proposed rule change which indicates that the level three evaluator's decision is final and that the

“chief administrator shall have no authority to override or reverse the decision.”. CWA believes that this is in line with statute. To go beyond this by giving the employer a right to appeal, is not provided for in the law and is inappropriate.

CWA, therefore, supports a rule which treats the decision of the level three evaluator as final. This is supported by statute. However, CWA strongly argues against permitting the agency head to appeal the decision of their own evaluator to level four.

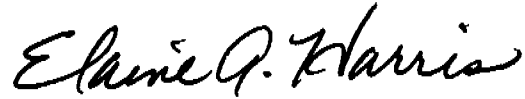
The second issue in the proposed rule changes with which CWA disagrees is § 156-1-3. Level One, Two and Three, Section 3.xx, “Level Three Hearings”. The proposed change would permit a grievance evaluator to hold a telephonic hearing in cases where the grievant demands a level three hearing within the seven day time limit set by statute.

It is CWA’s belief that telephonic hearings do not provide the grievant or the employer with an adequate opportunity to present and view evidence. In the few instances when this type of hearing has been conducted, it has been a cumbersome process, to say the least. Evidence may have to be submitted and shared via facsimile transmission, and questioning a witness about a document is quite awkward when the questioner is in one location and the witness in another.

Additionally, given that credibility is often a major determination in grievance matters, it is difficult to assess the credibility of a witness when that individual is offering testimony over the telephone.

For the reasons stated above, CWA would urge the Grievance Board to delete this proposed rule change regarding telephonic hearings.

Respectfully submitted,

A handwritten signature in cursive script that reads "Elaine Q. Harris".

Elaine Harris, CWA Representative
Communications Workers of America
Huntington Square, Suite 1212
900 Lee Street
Charleston, West Virginia 25301
Phone (304) 342-2023

Memo

RECEIVED

MAR 31 2004

WV Education & State
Employees Grievance Board

To: West Virginia Education and State Employees Grievance Board
From: Ed Hartman
Date: March 30, 2004
Subject: Public Comment Regarding Title 156 Procedural Rules, West Virginia Education and State Grievance Board, Series 1

1. Proposed Rule 156-1-3.x:

The proposed new language for this subsection addresses the authority of a Grievance Evaluator at Level III. Specifically, the new language provides, as follows:

Grievance Evaluator Authority - At Level III of the procedure for State and Higher Education employees, i.e., W.Va. Code, §29-6A-4(3), Grievance Evaluator's designated by the Chief Administrator shall issue the final decision, and the Chief Administrator shall have no authority to override or reverse the decision. The Chief Administrator may appeal the Evaluator's decision to Level IV of the grievance procedure on the grounds that the decision: 1) was contrary to law of lawfully adopted rule, regulation or written policy of the Chief Administrator; 2) exceeded the Grievance Evaluator's statutory authority; 3) was the result of fraud or deceit; 4) was clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or, 5) was arbitrary or capricious or characterized by abuse of discretion. Such appeal shall follow the procedure regarding appeal provided the grievant in Section 4 of the W.Va. Code, §29-6A-4, and provided both parties in §7 of W.Va. Code, §29-6A-7. Such Grievance Evaluators may issue subpoenas for witnesses and documents in accordance with W.Va. Code, §29-5-1.

The proposed language alters the grievance process in two ways. First, it permits the chief administrator of an agency to appeal a Level III decision to the Grievance Board. A review of the pertinent statutory provision demonstrates that this proposed change is beyond

the statutory authority provided by W. Va. Code, §29-6A-4(d)(1) which authorizes an appeal only on behalf of the Grievant:

(1) If the grievant is not satisfied with the action taken by the chief administrator, or his or her designee, within five days of the written decision the grievant may request, in writing, on a form furnished by the employer, that the grievance be submitted to a hearing examiner as provided in Section 5 of this article. [Emphasis supplied.]

A review of the provision clearly indicates that only the Grievant may appeal a Level III decision; no authority is provided for the agency, by its chief administrator, to appeal its decision. Thus, the proposal exceeds the scope of the statutory authority and is contrast to law. W. Va. Code, §29A-3-11; Appalachian Power Company v. State Tax Department, 466 S.E.2d 424 (W. Va. 1995). The Legislature has determined that where a chief administrator or his or her designee issues any ruling—particularly one against an agency—such a decision is final and no appeal should be taken.

It also appears from the proposed language that the Grievance Board is attempting to provide a route of appeal in order to offset language in the rule that now, purportedly, makes a Grievance Evaluator's decision "final" and declares that the "Chief Administrator" shall have no authority to override or reverse the decision." A review of W. Va. Code, §29-6A-4(c) provides, in pertinent part that:

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

Nothing in the statutory language provides that a chief administrator may alter a decision of his or her designee. Based upon the plain language of the existing statute, as well as the absence of any specific authority permitting the chief administrator to modify or reject the decision of his or her designee, the language in the proposed rule with regard to the issue is surplusage and may be removed.

2. Proposed Rule 156-1-4.1.1

The proposed language is, as follows:

Designate Your Representative Form - Employees have the right to represent themselves at all levels of 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 an employee decides to have someone

represent them at Level IV, the attached Designation of Representation form, Appendix "E", must be completed and signed by the employee and the representative.

This proposal seems to add little to the existing statutory authority that permits an employee to represent themselves; to have lay representation *via* a Union or any other person; or permits them to have legal representation. In light of the fact that this language is largely duplicative of the statute, it seems to be surplusage and unnecessary in a proposed rule.