

WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION

Form #2

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1988 OCT 13 AM 8:48

OFFICE OF THE
SECRETARY OF STATE

5.10

NOTICE OF A COMMENT PERIOD ON A PROPOSED RULE

AGENCY: WV Education and State Employees Grievance TITLE NUMBER: 156

RULE TYPE: Procedural; CITE AUTHORITY 18-29-5

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: Series 1

TITLE OF RULE BEING PROPOSED: - Procedural Rules of the Board

IN LIEU OF A PUBLIC HEARING, A COMMENT PERIOD HAS BEEN ESTABLISHED DURING WHICH ANY INTERESTED PERSON MAY SEND COMMENTS CONCERNING THESE PROPOSED RULES. THIS COMMENT PERIOD WILL END ON December 10, 1988 AT 4:30 pm. ONLY WRITTEN COMMENTS WILL BE ACCEPTED AND ARE TO BE MAILED TO THE FOLLOWING ADDRESS.

WV Education and State Employees

Grievance Board

240 Capitol St, Suite 508

Charleston, WV 25301

Attn: RULES

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

Carrie Rest

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

FISCAL NOTE

Fiscal Year 1988-89 budget appropriation for the West Virginia
Education and State Employees Grievance Board

| | |
|----------------------------|------------|
| Personal Services | \$356,976 |
| Current Expenses/Equipment | 152,918 |
| TOTAL APPROPRIATION | \$509,894. |

Fiscal impact on the County Boards of Education, Regional
Education Service Agencies, Board of Regents, State Board
of Education, multi-county vocational centers and state agencies
is unknown.

RULE OBJECTIVE:

The purpose of these rules is to inform parties to grievances
filed by certain West Virginia education and state employees
as to certain facts about Level Four and related aspects of
the grievance procedure. These rules shall be construed to
allow the West Virginia Education and State Employees Grievance
Board to do substantial justice, therefore, for good cause,
the Board, at any time, suspend the requirements of any of
these Rules in particular grievances.

PROCEDURAL RULES
WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

1988 OCT 13 AM 8 49

Section I-GENERAL INFORMATION

OFFICE OF THE
SECRETARY OF STATE

1.01:Scope

These Rules are procedural; their purpose is to inform parties to grievances filed by certain West Virginia education and state employees as to certain facts about Level Four and related aspects of the grievance procedure. These Rules shall be construed to allow the West Virginia Education and State Employees Grievance Board (hereafter, "the Board") to do substantial justice; therefore, for good cause, the Board may, at any time, suspend the requirements of any of these Rules in particular grievances.

1.02:Related law

These Rules relate to West Virginia law, specifically including W.Va. Code §§18-29 and 29-6A, which are incorporated by reference herein and which are Appendix A and B, respectively, to these Rules. In the event that the Code provisions referenced in these Rules are amended, these Rules will likewise be amended to conform thereto. These Rules are intended to be supplementary to the pertinent Code provisions.

1.03:Authority

W.Va. Code §§18-29-5, 29-6A-5 grant the Board the authority to promulgate these Rules.

1.04:Filing date

These Rules were filed with the Office of the Secretary of State of West Virginia on _____, 1988.

1.05:Effective date

These Rules shall be effective _____, 198__, and shall apply to all grievances filed before that date but still pending final administrative disposition and to all grievances filed on or after that date.

1.06:Severability

Should one or more of these Rules be declared invalid by an appropriate authority, such declaration shall not be construed to invalidate any other of these Rules.

1.07:Delegation of authority

The Board may delegate any of its powers or duties to its Hearing Examiners and/or its other employees or agents, except as contrary to law.

Section II-DEFINITIONS

2.01:Statutory definitions

Definitions appearing in W.Va. Code §§18-29-2, 29-6A-2 apply to these Rules.

2.02:Additional definitions

(a)To "file" is to ensure that documents or articles are received by the Board in its main offices at 240 Capitol Street, Suite 508, Charleston, West Virginia, 25301;

(b)To "deliver" is to ensure that documents or articles are received by a person or his/her agent(s), which may be accomplished by any commonly accepted means, including, but not limited to, the United States mail;

(c)A "subpoena" is an official document requiring the appearance of an individual at a given time and place;

(d)A "subpoena duces tecum" is a subpoena which additionally requires the individual named to bring a specific item with him/her.

Section III-LEVELS ONE, TWO AND THREE

3.01:Forms

Each governing board (education) and employer (state) should, within ninety days of the effective date of these Rules, adopt one or more official forms for the initiation of grievances at Levels One, Two and Three. These forms should be made available to an employee, upon his/her request, by his/her immediate supervisor. A sample form is Appendix C to these Rules.

3.02:Written procedures

Each governing board (education) and employer (state) should establish written procedures relating to employee grievances at Levels One, Two and Three. These procedures should meet and inform employees of the

provisions of these Rules and of W.Va. Code §§18-29-3 et seq. and 18A-2-8 (education) and 29-6A-3 et seq. (state). Code §18A-2-8 is incorporated by reference herein and is Appendix D to these Rules. Copies of these written procedures should be made available to all employees within ninety days of the effective date of these Rules. Thereafter, each newly-hired employee should be given a copy of these written procedures upon the commencement of his/her employment.

SECTION IV-LEVEL FOUR

4.01:Form

The official form to be used for the filing of a grievance at Level Four is Appendix C to these Rules.

4.02:Assignment of Hearing Examiner

Upon the proper filing of a Level Four grievance, the Board shall assign the matter to a Hearing Examiner and all parties shall be notified of this assignment. Thereafter, all matters pertaining to the grievance shall be delivered to the assigned Hearing Examiner.

4.03:Ex parte communication prohibited

No person shall confer or correspond with any member of the Board, its staff, including its Hearing Examiners, or its agents, concerning the merits or substance of a grievance, unless all parties to the grievance are present.

4.04:Subpoenas and subpoenas duces tecum

Subpoenas and subpoenas duces tecum shall be issued by the Board upon written request of a party, in the discretion of the Hearing Examiner and in compliance with W.Va. Code s29A-5-1(b). Such written request shall include the full name and address of each person to be subpoenaed (and for subpoenas duces tecum, a complete description of all materials to be brought by the individual named), together with a statement accepting responsibility for service and costs incurred relative thereto. No subpoena or subpoena duces tecum will be issued unless a written request for same has been delivered to the Hearing Examiner no less than six work days prior to the scheduled hearing.

4.05:Motions

Except as provided in this Rule, all motions shall be in writing and shall be delivered, as soon as possible

after the reasons for the motion arise, to the Hearing Examiner and to all other parties and their representatives, if any. A certificate of service must be attached to all motions filed, indicating the names and addresses of all persons to whom copies of the motion were delivered. Responses to the motion shall be in writing and shall be delivered to the Hearing Examiner and to all other parties and their representatives as soon as possible thereafter. A certificate of service, as above, must also be attached to all responses to motions.

Only if a situation necessitating a motion arises immediately before, or during, a hearing may an oral motion be made at the hearing. The movant shall be prepared to state cogent reasons as to why the motion was not made sooner. Further, the movant shall 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.

All motions shall be accompanied by a concise statement of its basis, both legal and factual. Motions not timely made in the determination of the Hearing Examiner may be denied on that basis alone.

4.06: Continuances

Any party may move to continue (postpone) hearings or other proceedings related to a grievance. Motions for continuance will be considered only in accordance with Rule 4.05 and will be granted only for good cause shown, in the discretion of the Hearing Examiner. Also for good cause, the Hearing Examiner, upon his/her own motion, may continue hearings or other proceedings.

4.07: Remand

Any party may move to remand (return to a lower level of the grievance procedure) a grievance. Motions for remand will be considered only in accordance with Rule 4.05 and will be granted only for good cause shown, in the discretion of the Hearing Examiner. Also for good cause, the Hearing Examiner, upon his/her own motion, may remand a grievance.

4.08: Recusal

Any party may move to recuse (disqualify) the Hearing Examiner assigned to a grievance. Motions for recusal will be considered only in accordance with Rule 4.05 and will be granted only for good cause shown, in the discretion of the Hearing Examiner. A motion for recusal shall not operate to automatically continue any hearing or other action on the grievance, provided that any party may make a separate motion for the continuance of the hearing or other action until such time as the motion for recusal is resolved.

The Hearing Examiner'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 4.05. Such appeal shall operate to automatically continue any hearing or other action on the grievance. The decision of the Board or its Chairman on the appeal is not an action subject to further appeal or review prior to the disposition of the grievance by the Board; therefore, once the recusal matter is finally decided by the Board or its Chairman, the Board will take such action as is consistent with the orderly and timely disposition of the grievance.

4.09: Failure to state a claim

A grievance may be dismissed, in the discretion of the hearing examiner, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.

4.10: Discovery

The parties are encouraged to participate in informal discovery between or among themselves. This discovery may include, but is not limited to, exchanging a list of proposed witnesses, and a synopsis of each witness's expected testimony; a statement of issues involved in the grievance; proposed findings of fact and conclusions of law; proposed settlement terms; other evidence; etc.

Under specific circumstances, certain materials must be produced, as provided by W.Va. Code §§18-29-6, 29-6A-6.

4.11: Joinder

Any party may move to join (or add as a party to the grievance) a person or entity necessary to the final disposition of the grievance, in accordance with Rule 4.05. In addition, the Hearing Examiner may, on his/her own motion, join a person or entity necessary to the final disposition of the grievance.

4.12: Failure to pursue

When the parties have made request for, and the Board has allowed, a grievance to be held in abeyance, and there has been no action reported to the Board for six months, the Board will send all parties a letter, by certified mail, stating that the case will be dismissed from the docket of the Board thirty calendar days from the date of the letter unless any party objects. If no timely written objection is received by the Board, the Board will enter an

order of dismissal; if, however, the Board receives timely written objection from any party to the dismissal, the grievance will promptly be scheduled for hearing or other action will be taken consistent with the orderly disposition of the grievance.

4.13:Hearings in general

Hearing Examiners shall have full and complete authority to preside over, and control all aspects of, a hearing.

If, in the determination of the Hearing Examiner, an individual present at a hearing is engaging in disruptive conduct, the Hearing Examiner may, in his/her 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.

4.14:Location of hearing

All Level Four hearings shall be conducted in the offices of the Board, either in Charleston, Beckley, Elkins or Wheeling; provided that, upon written motion, in accordance with Rule 4.05; and for good cause shown, the Hearing Examiner may, in his/her discretion, conduct the hearing in the county where the grievance arose, or in another location. In such cases, the party or parties 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 deemed necessary, and requested by, the Hearing Examiner; and a certified copy of the transcript of the hearing, and delivery of the same to the Hearing Examiner within twenty days after the hearing.

4.15:Final dispositions

A copy of the decision or order constituting the final administrative disposition of a grievance will be delivered to each party to the grievance and his/her representative, if any, as soon as possible after the decision or order is entered.

Grievances may be disposed of in three ways: decision on the merits; nonappealable dismissal; and appealable dismissal.

a)Decisions on the merits result in grievances being granted or denied, or granted in part and denied in part. All such decisions are maintained by the staff of the Board and are transmitted monthly to the Office of the Secretary of State, Capitol Complex, Charleston, West

Virginia, 25305. Copies of these decisions may be obtained from that office, at cost. Decisions on the merits are appealable to the Kanawha County Circuit Court, or to the circuit court serving the county where the grievance arose.

b) **Nonappealable dismissals** are those grievances dismissed for the following reasons: settlement of the matter between or among all grievants; withdrawal of all grievants from the grievance; and, in accordance with Rule 4.12, failure to pursue.

c) **Appealable dismissals** are those grievances dismissed for all other reasons, including, but not limited to, failure to state a claim. Such dismissals are appealable in the same manner as decisions on the merits.

4.16: Appeals to circuit court

In every matter appealed from this Board to circuit court, the governing board (education) or the employer (state), as applicable, shall furnish the Board with a copy of the notice of appeal and the circuit court docket number. Upon final decision by the circuit court, the governing board (education) or the employer (state) shall furnish the Board with a copy of that decision and any accompanying order within twenty days of the receipt of same.

4.17: Burden of proof

The grievant always has the burden of proving his/her case by a preponderance of the evidence, with the exception of disciplinary matters. In such cases, the burden of proving, by a preponderance of the evidence, that the action taken against the grievant was justified, is upon the governing board (education) or employer (state).

4.18: Advisory opinions

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

4.19: Registration of employee organizations

All labor unions or other organizations representing West Virginia education and/or state employees and desiring to appear before the Board through its agent(s) must register with the Board at its main office in Charleston.

APPENDICES

Appendix A - W.Va. Code §§18-29-1 et seq.

Appendix B - W.Va. Code §§29-6A-1 et seq.

Appendix C - Form for initiation of grievance

Appendix D - W.Va. Code §18A-2-8

§ 18-28-4

EDUCATION

—tive calendar years, school composite test results are not above the fortieth percentile level, attendance at the school may no longer satisfy the compulsory school attendance requirement exemption of Exemption K, section one [§ 18-8-1], article eight, chapter eighteen, until such time as the percentile standards herein set forth are met. (1983, c. 71.)

§ 18-28-4. Voluntary participation in state programs.

Any private, parochial or church school or school of a religious order or other nonpublic school complying with the provisions of this article may, on a voluntary basis, participate in any state operated or state sponsored program otherwise made available to such schools by law. (1983, c. 71.)

§ 18-28-5. New school notice requirements; termination.

Any new school to which this article relates shall send to the state superintendent of schools of the State of West Virginia a notice of intent to operate, name and address of the school, and name of the school's chief administrator. Any school to which this article applies shall notify the state superintendent of schools of the State of West Virginia upon termination. (1983, c. 71.)

§ 18-28-6. Requirements exclusive.

No private, parochial or church school or school operated by any other religious group or body as part of its religious ministry or other nonpublic school which complies with the requirements of this article shall be subject to any other provision of law relating to education except requirements of law respecting fire, safety, sanitation and immunization. (1983, c. 71.)

ARTICLE 29.

GRIEVANCE PROCEDURE.

| Sec. | Sec. |
|--|---|
| 18-29-1. Legislative purpose and intent. | 18-29-6. Hearings generally. |
| 18-29-2. Definitions. | 18-29-7. Enforcement and reviewability. |
| 18-29-3. Grievance procedure generally. | 18-29-8. Allocation of costs. |
| 18-29-4. Procedural levels and procedure at each level. | 18-29-9. Mandamus proceeding. |
| 18-29-5. Education employees grievance board; hearing examiners. | |

Cross references. — Whistle-blower law, c. 6C, art. 1.

Grievance procedure for state employees, c. 29, art. 6A.

W. Va. Law Review. — "Survey of Developments in West Virginia Law: 1985," 88 W. Va. L. Rev. 293 (1985).

Stated in *Smith v. Board of Educ.*, 341 S.E.2d 625 (W. Va. 1985); *Graf v. Frame*, 323 S.E.2d 31 (W. Va. 1986).

Cited in *Marion County Bd. of Educ. v. Bonfantino*, 366 S.E.2d 650 (W. Va. 1988).

§ 18-29-1. Legislative purpose and intent.

The purpose of this article is to provide a procedure for employees of the board of regents, state board of education, county boards of education, regional educational service agencies and multi-county vocational centers and their employer or agents of the employer to reach solutions to problems which arise between them within the scope of their respective employment relationships to the end that good morale may be maintained, effective job performance may be enhanced and the citizens of the community may be better served. This procedure is intended to provide a simple, expeditious and fair process for resolving problems at the lowest possible administrative level and shall be construed to effectuate this purpose. Nothing herein shall prohibit the informal disposition of grievances by stipulation or settlement agreed to in writing by the parties, nor the exercise of any hearing right provided in article two [§ 18A-2-1 et seq.], chapter eighteen-a of this code or any other section of chapter eighteen or eighteen-a [§§ 18-1-1 et seq. or 18A-1-1 et seq.] of this code: Provided, That employees of the board of regents or of state institutions of higher education shall have the option of filing grievances in accordance with the provisions of this article or in accordance with the provisions of policies, rules and regulations of the board of regents regarding such employees. Any board decision pursuant to such sections may be appealed in accordance with the provisions of this article unless otherwise provided in such section. (1985, c. 71.)

§ 18-29-2. Definitions.

For the purpose of this article:

(a) "Grievance" means any claim by one or more affected employees of the board of regents, state board of education, county boards of education, regional educational service agencies and multi-county vocational centers alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of the board; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective classroom instruction, job performance or the health and safety of students or employees.

Any pension matter or other issue relating to the state teachers retirement system in accordance with article seven-a [§ 18-7A-1 et seq.] of this chapter or other retirement system administered outside the jurisdiction of the applicable governing board, any matter relating to public employees insurance in accordance with article sixteen [§ 5-16-1 et seq.], chapter five of this code, or any other matter in which authority to act is not vested with the employer shall not be the subject of any grievance filed in accordance with the provisions of this article.

(b) "Days" means days of the employee's employment term or prior to or subsequent to such employment term exclusive of Saturday, Sunday, official holidays or school closings in accordance with section two [§ 18A-5-2], article five, chapter eighteen-a of this code.

(c) "Employee" means any person hired by an institution either full or part time. A substitute is considered an employee only on matters related to days worked for an institution or when there is a violation, misapplication or misinterpretation of a statute, policy, rule, regulation or written agreement relating to such substitute.

(d) "Grievant" means any named employee or group of named employees filing a grievance as defined in subsection (a) of this section.

(e) "Institution" means any state institution of higher education, the board of regents, any institution whose employees are hired by the state board of education including the department of education, and any public school, regional educational service agency or multi-county vocational center.

(f) "Employer" means that institution contracting the services of the employee.

(g) "Immediate supervisor" means that person next in rank above the grievant possessing a degree of administrative authority and designated as such in the employee's contract, if any.

(h) "Chief administrator" means the president of a state institution of higher education, the chancellor of the board of regents only as to those employees not assigned to a state institution of higher education, the state superintendent of schools as to employees hired by the state board of education, the county superintendent, the executive director of a regional educational service agency or the director of a multi-county vocational center.

(i) "Governing board" means the administrative board of any state or county educational institution, including institutions whose employees are hired by the state board of education, and refers, as is applicable, to the board of regents, state board of education, county boards of education, the school board members of any board of directors of a regional educational service agency or the school board members of any administrative council of a multi-county vocational center.

(j) "Grievance evaluator" means that individual or governing board authorized to render a decision on a grievance.

(k) "Board" means the education employees grievance board.

(l) "Hearing examiner" means the individual or individuals employed by the board in accordance with section five [§ 18-29-5] of this article.

(m) "Discrimination" means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

(n) "Harassment" means repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.

(o) "Favoritism" means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.

(p) "Reprisal" means the retaliation of an employer or agent toward a grievant or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.

(q) "Employee organization" means any employee advocacy organization whose membership includes employees as defined in this section which has filed with the board the name, address, chief officer and membership criteria of the organization.

(r) "Representative" means any employee organization, fellow employee, legal counsel or other person or persons designated by the grievant as the grievant's representative. (1985, c. 71.)

§ 18-29-3. Grievance procedure generally.

(a) A grievance must be filed within the times specified in section four [§ 18-29-4] of this article and shall be processed as rapidly as possible. The number of days indicated at each level specified in section four of this article shall be considered as the maximum number of days allowed and, if a decision is not rendered at any level within the prescribed time limits, the grievant may appeal to the next level: Provided, That the specified time limits may be extended by mutual written agreement and shall be extended whenever a grievant is not working because of such circumstances as provided for in section ten [§ 18A-4-10], article four, chapter eighteen-a of this code.

(b) If the employer or agent intends to assert the applicability of any statute, policy, rule, regulation or written agreement or submits any written response to the filed grievance at any level, a copy thereof shall be forwarded to the grievant and any representative of the grievant so named in the filed grievance. Anything so submitted and the grievant's response thereto, if any, shall become part of the record. Failure to assert such statute, policy, rule, regulation or written agreement at any level shall not prevent the subsequent submission thereof in accordance with the provisions of this subsection.

(c) The grievant may file the grievance at the level vested with authority to grant the requested relief if each lower administrative level agrees in writing thereto. In the event a grievance is filed at a higher level, the employer shall provide copies to each lower administrative level.

(d) An employee may withdraw a grievance at any time by notice, in writing, to the level wherein the grievance is then current. Such grievance may not be reinstated by the grievant unless such reinstatement is granted by the grievance evaluator at the level where the grievance was withdrawn. If more than one employee is named as grievant in a particular grievance, the withdrawal of one employee shall not prejudice the rights of any other employee named in the grievance. In the event a grievance is withdrawn or an employee withdraws from a grievance, such employer shall notify in writing each lower administrative level.

(e) Grievances may be consolidated at any level by agreement of all parties.

(f) An employee may have the assistance of one or more fellow employees, an employee organization representative or representatives, legal counsel or any other person in the preparation and presentation of the grievance. At the

request of the grievant, such person or persons may be present at any step of the procedure.

(g) If a grievance is filed which cannot be resolved within the time limits set forth in section four [§ 18-29-4] of this article prior to the end of the employment term, the time limit set forth in said section shall be reduced as agreed to in writing by both parties so that the grievance procedure may be concluded within ten days following the end of the employment term or an otherwise reasonable time.

(h) No reprisals of any kind shall be taken by any employer or agent of the employer against any interested party, or any other participant in the grievance procedure by reason of such participation. A reprisal constitutes a grievance, and any person held to be responsible for reprisal action shall be subject to disciplinary action for insubordination.

(i) Except for the informal attempt to resolve the grievance as provided for in subsection (a), section four [§ 18-29-4(a)] of this article, decisions rendered at all levels of the grievance procedure shall be dated, shall be in writing setting forth the decision or decisions and the reasons therefor, and shall be transmitted within the time prescribed to the grievant and any representative named in the grievance. If the grievant is denied the relief sought, the decision shall include the name of the individual at the next level to whom appeal may be made.

(j) Once a grievance has been filed, supportive or corroborative evidence may be presented at any conference or hearing conducted pursuant to the provisions of this article. Whether evidence substantially alters the original grievance and renders it a different grievance is within the discretion of the grievance evaluator at the level wherein the new evidence is presented. If the grievance evaluator rules that the evidence renders it a different grievance, the party offering the evidence may withdraw same, the parties may consent to such evidence, or the grievance evaluator may decide to hear the evidence or rule that the grievant must file a new grievance. The time limitations for filing the new grievance shall be measured from the date of such ruling.

(k) Any change in the relief sought by the grievant shall be consented to by all parties or may be granted at level four within the discretion of the hearing examiner.

(l) Forms for filing grievances, giving notice, taking appeals, making reports and recommendations, and all other necessary documents shall be made available by the immediate supervisor to any employee upon request. Such forms shall include information as prescribed by the board. The grievant shall have access to the institution's equipment for purposes of preparing grievance documents subject to the reasonable rules of the employer governing the use of such equipment.

(m) Notwithstanding the provisions of section three [§ 6-9A-3], article nine-a, chapter six of this code, or any other provision relating to open proceedings, all conferences and hearings pursuant to this article shall be conducted in private except that, upon the grievant's request, conferences and hearings at levels two and three shall be public. Within the discretion of the hearing examiner, conferences and hearings may be public at level four.

(n) No person or governing board to which appeal has been made shall confer or correspond with a grievance evaluator at a previous level regarding the merits of the grievance unless all parties to the grievance are present.

(o) Grievances may be processed at any reasonable time, but attempts shall be made to process the grievance in a manner which does not interfere with the normal operation of the institution or with employees' normal working hours. Grievances processed on work time shall not result in any reduction in salary, wages, rate of pay or other benefits of the employee and shall be counted as time worked.

Should any employer or the employer's agent cause a conference or hearing to be postponed without adequate notice to employees who are scheduled to appear during their normal work day, such employees will not suffer any loss in pay for work time lost.

(p) Any grievance evaluator may be excused from participation in the grievance process for reasonable cause, including, but not limited to, conflict of interest or incapacitation, and in such case the grievance evaluator at the next higher level shall designate an alternate grievance evaluator if such is deemed reasonable and necessary.

(q) No less than one year following resolution of a grievance at any level, the grievant may by request in writing have removed any record of the grievance from any file kept by the employer.

(r) All grievance forms and reports shall be kept in a file separate from the personnel file of the employee and shall not become a part of such personnel file, but shall remain confidential except by mutual written agreement of the parties.

(s) The number of grievances filed against an employer or agent or by an employee shall not, per se, be an indication of such employer's or agent's or such employee's job performance.

(t) Any chief administrator or governing board of an institution in which a grievance was filed may appeal such decision on the grounds that the decision (1) was contrary to law or lawfully adopted rule, regulation or written policy of the chief administrator or governing board, (2) exceeded the hearing examiner's statutory authority, (3) was the result of fraud or deceit, (4) was clearly wrong in view of the reliable, probative and substantial evidence on the whole record, or (5) was arbitrary or capricious or characterized by abuse of discretion. Such appeal shall follow the procedure regarding appeal provided the grievant in section four [§ 18-29-4] of this article and provided both parties in section seven [§ 18-29-7] of this article. (1985, c. 71.)

§ 18-29-4. Procedural levels and procedure at each level.

(a) Level one.

(1) Before a grievance is filed and within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date on which the event became known to the grievant or within fifteen days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative shall schedule a con-

ference with the immediate supervisor to discuss the nature of the grievance and the action, redress or other remedy sought.

The conference with the immediate supervisor concerning the grievance shall be conducted within three days of the request therefor, and any discussion shall be by the grievant in the grievant's own behalf or by both the grievant and the designated representative.

(2) The immediate supervisor shall respond to the grievance within two days of the conference.

(3) Within ten days of receipt of the response from the immediate supervisor following the informal conference, a written grievance may be filed with said supervisor by the grievant or the designated representative on a form furnished by the employer or agent.

(4) The immediate supervisor shall state the decision to such filed grievance within five days after the grievance is filed.

(b) Level two.

Within five days of receiving the decision of the immediate supervisor, the grievant may appeal the decision to the chief administrator, and such administrator or his or her designee shall conduct a hearing in accordance with section six [§ 18-29-6] of this article within five days of receiving the appeal and shall issue a written decision within five days of such hearing. Such decision may affirm, modify or reverse the decision appealed from.

(c) Level three.

Except as to faculty and classified employees of the board of regents or any state institution of higher education who shall have the option to proceed directly to level four, within five days of receiving the decision of the chief administrator, the grievant may appeal the decision to the governing board of the institution. Within five days of receiving the appeal, such governing board may conduct a hearing in accordance with section six [§ 18-29-6] of this article, may review the record submitted by the chief administrator and render a decision based on such record, or may waive the right granted herein and shall notify the grievant of such waiver. Any decision by the governing board, including a decision to waive participation in the grievance, must be in writing, and, if a hearing be held under the provisions of this subsection, the governing board shall issue a decision affirming, modifying or reversing the decision of the chief administrator within five days of such hearing.

(d) Level four.

(1) If the grievant is not satisfied with the action taken by the governing board, within five days of the written decision the grievant may request, in writing, on a form furnished by the employer, that the grievance be submitted to a hearing examiner as provided for in section five [§ 18-29-5] of this article, such hearing to be conducted in accordance with section six of this article within ten days following the request therefor: Provided, That such hearing may be held within thirty days following the request, or within such time as is mutually agreed upon by the parties, if the hearing examiner gives reasonable cause, in writing, as to the necessity for such delay.

(2) Within thirty days following the hearing, the hearing examiner shall render a decision in writing to all parties setting forth findings and conclu-

sions on the issues submitted. Subject to the provisions of section seven [§ 18-29-7] of this article, the decision of the hearing examiner shall be final upon the parties and shall be enforceable in circuit court. (1985, c. 71.)

W. Va. Law Review. — "Survey of Developments in West Virginia Law: 1985," 88 W. Va. L. Rev. 293 (1985).

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

(a) There is hereby created and shall be an education employees grievance board which shall consist of three members who shall be citizens of the state appointed by the governor by and with the advice and consent of the Senate for overlapping terms of three years, except that the original appointments shall be for a period of one, two and three years, respectively, commencing on the first day of July, one thousand nine hundred eighty-five. No two members shall be from the same congressional district, and no more than two of the appointed members shall be from the same political party. No person shall be appointed to membership on the board who is a member of any political party executive committee or holds any other public office or public employment under the federal government or under the government of this state. Members shall be eligible for reappointment, and any vacancy on the board shall be filled within thirty days of the vacancy by the governor by appointment for the unexpired term.

A member of the board may not be removed from office except for official misconduct, incompetence, neglect of duty, gross immorality or malfeasance, and then only in the manner prescribed in article six [§ 6-6-1 et seq.], chapter six of this code for the removal by the Governor of state elected officers.

The board shall hold at least two meetings yearly at such times and places as it may prescribe and may meet at such other times as may be necessary, such meetings to be agreed to in writing by at least two of the members. Members of the board shall each be paid seventy-five dollars for each calendar day devoted to the work of the board, but not more than seven hundred and fifty dollars during any one fiscal year. Each member shall be reimbursed for all reasonable and necessary expenses actually incurred in the performance of board duties, but shall submit a request therefor upon sworn itemized statement.

The board is hereby authorized and required to administer the grievance procedure at level four as provided for in section four [§ 18-29-4] of this article and shall employ at least two full-time hearing examiners on an annual basis and such clerical help as is necessary to implement the legislative intent expressed in section one [§ 18-29-1] of this article.

The board shall hire hearing examiners who reside in different regional educational service agency areas unless and until the number of hearing examiners exceeds the number of such areas, at which time two hearing examiners may be from the same such area. These hearing examiners shall serve at the will and pleasure of the board.

The board shall submit a yearly budget and shall report annually to the governor and Legislature regarding receipts and expenditures, number of level four hearings conducted, synopses of hearing outcomes and such other information as the board may deem appropriate. The board shall further evaluate on an annual basis the level four grievance process and the performance of all hearing examiners and include such evaluation in the annual report to the governor and Legislature. In making such evaluation, the board shall notify all institutions, employee organizations and all grievants participating in level four grievances in the year for which evaluation is being made and shall provide for the submission of written comment and/or the hearing of testimony regarding the grievance process. The board shall provide suitable office space for all hearing examiners in space other than that utilized by any institution as defined in section two [§ 18-29-2] of this article and shall ensure that reference materials are generally available.

The board is authorized to promulgate rules and regulations consistent with the provisions of this article, such rules and regulations to be adopted in accordance with chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code.

(b) Hearing examiners are hereby authorized and shall have the power to consolidate grievances, allocate costs among the parties in accordance with section eight [§ 18-29-8] of this article, subpoena witnesses and documents in accordance with the provisions of section one [§ 29A-5-1], article five, chapter twenty-nine-a of this code, provide such relief as is deemed fair and equitable in accordance with the provisions of this article, and such other powers as will provide for the effective resolution of grievances not inconsistent with any rules or regulations of the board or the provisions of this article. (1985, c. 71.)

Cross references. — Grievance procedure for state employees, c. 29, art. 6A.

Education employees grievance board renamed education and state employees grievance board, § 29-6A-5.

W. Va. Law Review. — "Survey of Developments in West Virginia Law: 1985," 88 W. Va. L. Rev. 293 (1985).

§ 18-29-6. Hearings generally.

The chief administrator or his or her designee, the governing board or the hearing examiner shall conduct all hearings in an impartial manner and shall ensure that all parties are accorded procedural and substantive due process. All parties shall have an opportunity to present evidence and argument with respect to the matters and issues involved, to cross examine and to rebut evidence. Notice of a hearing shall be sent to all parties and their named representative and shall include the date, time and place of the hearing.

The institution that is party to the grievance shall produce prior to such hearing any documents, not privileged, and which are relevant to the subject matter involved in the pending grievance, that has been requested by the grievant, in writing.

The superintendent, the president of the state or county board of education or the state or county board member designated by such president, the executive director of the regional educational service agency, the director of the

multi-county vocational center, the chancellor of the board of regents, the president of any state institution of higher education, the chief administrator or his or her designee, each member of the governing board or the hearing examiner shall have the power to (1) administer oaths and affirmations, (2) regulate the course of the hearing, (3) hold conferences for the settlement or simplification of the issues by consent of the parties, (4) exclude immaterial, irrelevant or repetitious evidence, (5) sequester witnesses, (6) restrict the number of advocates, and take any other action not inconsistent with the rules and regulations of the board or the provisions of this article.

All the testimony and evidence at any hearing shall be recorded by mechanical means, and all recorded testimony and evidence at such hearing shall be transcribed and certified at the request of any party to the institution or board. The institution shall be responsible for promptly transcribing the testimony and evidence and for providing a copy of the certified transcription to the party requesting same. The hearing examiner may also request and be provided a transcript upon appeal to level four and allocate the costs therefor as prescribed in section eight [§ 18-29-8] of this article.

Formal rules of evidence shall not be applied, but parties shall be bound by the rules of privilege recognized by law.

All materials submitted in accordance with section three [§ 18-29-3] of this article; the mechanical recording of all testimony and evidence or the transcription thereof, if any; the decision; and any other materials considered in reaching the decision shall be made a part and shall constitute the record of a grievance. Such record shall be submitted to any level at which appeal has been made, and such record shall be considered, but the development of such record shall not be limited thereby.

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

Prior to such decision any party may propose findings of fact and conclusions of law. (1985, c. 71.)

§ 18-29-7. Enforcement and reviewability.

The decision of the hearing examiner shall be final upon the parties and shall be enforceable in circuit court: Provided, That either party may appeal to the circuit court of the county in which the grievance occurred on the grounds that the hearing examiner's decision (1) was contrary to law or lawfully adopted rule, regulation or written policy of the chief administrator or governing board, (2) exceeded the hearing examiner's statutory authority, (3) was the result of fraud or deceit, (4) was clearly wrong in view of the reliable, probative and substantial evidence on the whole record, or (5) was arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Such appeal shall be filed in the circuit court of Kanawha County or in the circuit court of the county in which the grievance occurred within thirty days of receipt of the hearing examiner's decision. The decision of the hearing examiner shall not be stayed, automatically, upon the filing of an appeal, but a stay may be granted by the circuit court upon separate motion therefor.

§ 29-6-15

MISCELLANEOUS BOARDS AND OFFICERS

§ 29-6-15. Appeals by employees to commission; hearings; review by court of appeals.

Dismissal for good cause.

As a classified civil service employee, the appellant was subject to dismissal under this section only for "good cause." It would be constitutionally unacceptable to ignore this protected status and to deny the appellant a pretermination hearing by declaring his employment void ab initio and vacated by § 29-6-10(11). *Fraley v. Civil Serv. Comm'n*, 356 S.E.2d 483 (W. Va. 1987).

Sovereign immunity. — The sovereign immunity doctrine is not implicated in the con-

text of employee relations where the state, acting through its agents, as an employer, has unlawfully withheld all or a part of an employee's salary. *American Fed'n of State, County & Mun. Employees v. Civil Serv. Comm'n*, 341 S.E.2d 693 (W. Va. 1985).

Applied in *West Virginia Dep't of Health v. West Virginia Civil Serv. Comm'n*, 358 S.E.2d 798 (W. Va. 1987).

Stated in *Jacobus v. Heydinger*, 643 F. Supp. 550 (S.D.W. Va. 1986).

ARTICLE 6A.

GRIEVANCE PROCEDURE FOR STATE EMPLOYEES.

| Sec. | Sec. |
|--|--|
| 29-6A-1. Purpose. | 29-6A-6. Hearings generally. |
| 29-6A-2. Definitions. | 29-6A-7. Enforcement and reviewability; costs; good faith. |
| 29-6A-3. Grievance procedure generally. | 29-6A-8. Allocation of costs. |
| 29-6A-4. Procedural levels and procedure at each level. | 29-6A-9. Mandamus proceeding. |
| 29-6A-5. Education and state employees grievance board; hearing examiners. | 29-6A-10. Employee's right to attorney's fees and costs. |
| | 29-6A-11. Application of article. |

Effective dates. — Acts 1988, c. 62 provided an effective date of July 1, 1988.

§ 29-6A-1. Purpose.

The purpose of this article is to provide a procedure for the equitable and consistent resolution of employment grievances raised by nonelected state employees who are classified under the state civil service system, or employed in any department, other governmental agencies, or by independent boards or commissions created by the Legislature, with the exception of employees of the board of regents, state institutions of higher education, the Legislature, any employees of any constitutional officer unless they are covered under the civil service system, and members of the department of public safety. (1988, c. 62.)

§ 29-6A-2. Definitions.

For the purpose of this article:

(a) "Board" means the education employees grievance board created in section five [§ 18-29-5], article twenty-nine, chapter eighteen of this code and hereafter known as the education and state employees grievance board.

(b) "Chief administrator" means the commissioner, director or head of any state department, board, commission or agency.

(c) "Days" means working days exclusive of Saturday, Sunday or official holidays.

(d) "Discrimination" means any differences in the treatment of employees unless such differences are related to the actual job responsibilities of the employees or agreed to in writing by the employees.

(e) "Employee" means any person hired for permanent employment, either full or part-time, by any department, agency, commission or board of the state created by an act of the Legislature, except those persons employed by the board of regents or by any state institution of higher education, members of the department of public safety, any employees of any constitutional officer unless they are covered under the civil service system and any employees of the Legislature. The definition of "employee" shall not include any patient or inmate employed in a state institution.

(f) "Employee organization" means any employee advocacy organization whose membership includes employees as defined in this section which has filed with the board the name, address, chief officer and membership criteria of the organization.

(g) "Employer" means that state department, board, commission or agency utilizing the services of the employee covered under this article.

(h) "Favoritism" means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another or other employees.

(i) "Grievance" means any claim by one or more affected state employees alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of their employer; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the employees.

Any pension matter or other issue relating to public employees insurance in accordance with article sixteen [§ 5-16-1 et seq.], chapter five of this code, retirement, or any other matter in which authority to act is not vested with the employer shall not be the subject of any grievance filed in accordance with the provisions of this article.

(j) "Grievance evaluator" means that individual authorized to render a decision on a grievance under procedural levels one, two and three as set out in section four [§ 29-6A-4].

(k) "Grievant" means any named employee or group of named employees filing a grievance as defined in subsection (i) of this section.

(l) "Harassment" means repeated or continual disturbance, irritation or annoyance of an employee which would be contrary to the demeanor expected by law, policy and profession.

(m) "Hearing examiner" means the individual or individuals employed by the board in accordance with section five [§ 29-6A-5] of this article.

(n) "Immediate supervisor" means that person next in rank above the grievant possessing a degree of administrative authority and designated as such in the employee's contract, if any.

(o) "Representative" means any employee organization, fellow employee, legal counselor or other person or persons designated by the grievant as the grievant's representative.

(p) "Reprisal" means the retaliation of an employer or agent toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it. (1988, c. 62.)

§ 29-6A-3. Grievance procedure generally.

(a) A grievance must be filed within the times specified in section four [§ 29-6A-4] of this article and shall be processed as rapidly as possible. The number of days indicated at each level specified in section four of this article shall be considered as the maximum number of days allowed and, if a decision is not rendered at any level within the prescribed time limits, the grievant may appeal to the next level: Provided, That the specified time limits shall be extended whenever a grievant is not working because of accident, sickness, death in the immediate family or other cause necessitating the grievant to take personal leave from his or her employment.

(b) If the employer or its agent 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 thereof shall be forwarded to the grievant and any representative of the grievant named in the filed grievance. Anything submitted and the grievant's response thereto, if any, shall become part of the record. Failure to assert such statute, policy, rule, regulation or written agreement at any level shall not prevent the subsequent submission thereof in accordance with the provisions of this subsection.

(c) The grievant may file the grievance at the level vested with authority to grant the requested relief if each lower administrative level agrees in writing thereto. In the event a grievance is filed at a higher level, the employer shall provide copies to each lower administrative level.

(d) An employee may withdraw a grievance at any time by notice, in writing, to the level wherein the grievance is then current. The grievance may not be reinstated by the grievant unless reinstatement is granted by the grievance evaluator at the level where the grievance was withdrawn. If more than one employee is named as grievant in a particular grievance, the withdrawal of one employee shall not prejudice the rights of any other employee named in

GRIEVANCE PROCEDURE FOR STATE EMPLOYEES § 29-6A-3

the grievance. In the event a grievance is withdrawn or an employee withdraws from a grievance, such employer shall notify in writing each lower administrative level.

(e) Grievances may be consolidated at any level by agreement of all parties.

(f) A grievant may be represented by an employee organization representative, legal counsel or any other person, including a fellow employee, in the preparation or presentation of the grievance. At the request of the grievant, such person or persons may be present at any step of the procedure: Provided, That at level one of such grievance, as set forth in section four [§ 29-6A-4] of this article, a grievant may have only one such representative.

(g) If a grievance is filed which cannot be resolved within the time limits set forth in section four of this article prior to the end of the employment term, the time limit set forth in said section shall be reduced as agreed to in writing by both parties so that the grievance procedure may be concluded within ten days following the end of the employment term or an otherwise reasonable time.

(h) No reprisals of any kind shall be taken by any employer or agent of the employer against any interested party, or any other participant in the grievance procedure by reason of such participation. A reprisal constitutes a grievance, and any person held to be responsible for reprisal action shall be subject to disciplinary action for insubordination.

(i) Decisions rendered at all levels of the grievance procedure shall be dated, shall be in writing setting forth the decision or decisions and the reasons therefor, and shall be transmitted to the grievant and any representative named in the grievance within the time prescribed. If the grievant is denied the relief sought, the decision shall include the name of the individual at the next level to whom appeal may be made.

(j) Once a grievance has been filed, supportive or corroborative evidence may be presented at any conference or hearing conducted pursuant to the provisions of this article. Whether evidence substantially alters the original grievance and renders it a different grievance is within the discretion of the grievance evaluator at the level wherein the new evidence is presented. If the grievance evaluator rules that the evidence renders it a different grievance, the party offering the evidence may withdraw same, the parties may consent to such evidence, or the grievance evaluator may decide to hear the evidence or rule that the grievant must file a new grievance. The time limitation for filing the new grievance shall be measured from the date of such ruling.

(k) Any change in the relief sought by the grievant shall be consented to by all parties or may be granted at level four within the discretion of the hearing examiner.

(l) Forms for filing grievances, giving notice, taking appeals, making reports and recommendations, and all other necessary documents shall be made available by the immediate supervisor to any employee upon request. Such forms shall include information as prescribed by the board. The grievant shall have access to the employer's equipment for purposes of preparing grievance documents subject to the reasonable rules of the employer governing the use of such equipment.

(m) Notwithstanding the provisions of section three [§ 6-9A-3], article nine-a, chapter six of this code, or any other provision relating to open proceedings, all conferences and hearings pursuant to this article shall be conducted in private except that, upon the grievant's request, conferences and hearings at levels two and three shall be open to employees of the grievant's immediate office or work area or, at the request of the grievant, shall be public. Within the discretion of the hearing examiner, conferences and hearings may be public at level four.

(n) No person shall confer or correspond with a hearing examiner regarding the merits of the grievance unless all parties to the grievance are present.

(o) Grievances shall be processed during regular working hours. Attempts shall be made to process the grievance in a manner which does not interfere with the normal operation of the employer.

(p) The grievant or the employee selected by a grievant to represent him in the processing of a grievance through this procedure, or both, shall be granted necessary time off during working hours for the grievance procedure without loss of pay and without charge to annual or compensatory leave credits. In addition to actual time spent in grievance conferences and hearings, the grievant or the employee representative, or both, shall be granted time off during working hours, not to exceed four hours per grievance, for the preparation of such grievance without loss of pay and without charge to annual or compensatory leave credits. However, it shall be understood by all parties that the first responsibility of any state employee is the work assigned by the appointing authority to the employee. Grievance preparation and representation activities by an employee shall not seriously affect the overall productivity of the employee.

(q) The aggrieved employee, employing agency and representatives of both shall have the right to call, examine and cross-examine witnesses who are employees of the agency against which the grievance is lodged and who have knowledge of the facts at issue.

(r) Both parties may produce witnesses other than employees of the agency against which the grievance is lodged, and such witnesses shall be subject to examination and cross-examination.

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

(t) Any grievance evaluator may be excused from participation in the grievance process for reasonable cause, including, but not limited to, conflict of interest or incapacitation, and in such case the grievance evaluator at the next higher level shall designate an alternative grievance evaluator if such is deemed reasonable and necessary.

(u) No less than one year following resolution of a grievance at any level, the grievant may by request in writing have removed any record of the grievant's identity from any file kept by the employer.

(v) All grievance forms and reports shall be kept in a file separate from the personnel file of the employee and shall not become a part of such personnel

file, but shall remain confidential except by mutual written agreement of the parties.

(w) The number of grievances filed against an employer or agent or by an employee shall not, per se, be an indication of such employer's or agent's or such employee's job performance.

(x) Any chief administrator with whom a grievance was filed may appeal a level four decision on the grounds that the decision (1) was contrary to law or lawfully adopted rule, regulation or written policy of the employer, (2) exceeded the hearing examiner's statutory authority, (3) was the result of fraud or deceit, (4) was clearly wrong in view of the reliable, probative and substantial evidence on the whole record, or (5) was arbitrary or capricious or characterized by abuse of discretion. Such appeal shall follow the procedure regarding appeal provided the grievant in section four [§ 29-6A-4] of this article and provided both parties in section seven [§ 29-6A-7] of this article. (1988, c. 62.)

§ 29-6A-4. Procedural levels and procedure at each level.

(a) *Level one.*

Within ten days following the occurrence of the event upon which the grievance is based, or within ten days of the date on which the event became known to the grievant, or within ten days of the most recent occurrence of a continuing practice giving rise to a grievance, the grievant or the designated representative, or both, may file a written grievance with the immediate supervisor of the grievant. At the request of the grievant or the immediate supervisor, an informal conference shall be held to discuss the grievance within three days of the receipt of the written grievance. The immediate supervisor shall issue a written decision within six days of the receipt of the written grievance.

(b) *Level two.*

Within five days of receiving the decision of the immediate supervisor, the grievant may file a written appeal to the administrator of the grievant's work location, facility, area office, or other appropriate subdivision of the department, board, commission or agency. The administrator or his designee shall hold a conference within five days of the receipt of the appeal and issue a written decision upon the appeal within five days of the conference.

(c) *Level three.*

Within five days of receiving the decision of the administrator of the grievant's work location, facility, area office, or other appropriate subdivision of the department, board, commission or agency, the grievant may file a written appeal of the decision with the chief administrator of the grievant's employing department, board, commission or agency. A copy of the appeal and the level two decision shall be served upon the personnel director of the state civil service commission by the grievant.

The chief administrator or his designee shall hold a hearing in accordance with section six [§ 29-6A-6] of this article within seven days of receiving the appeal. The personnel director of the state civil service commission or his designee may appear at such hearing and submit oral or written evidence upon the matters in the hearing.

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

(d) *Level four.*

(1) If the grievant is not satisfied with the action taken by the chief administrator or his designee, within five days of the written decision the grievant may request, in writing, on a form furnished by the employer, that the grievance be submitted to a hearing examiner as provided for in section five [§ 29-6A-5] of this article, such hearing to be conducted in accordance with section six of this article within fifteen days following the request therefor. Provided, That such hearing may be held within thirty days following the request, or within such time as is mutually agreed upon by the parties, if the hearing examiner gives reasonable cause, in writing, as to the necessity for such delay. A copy of the appeal shall be served by the grievant upon the director of personnel of the state civil service commission. The director of personnel of the state civil service commission, or his designee, may appear at such hearing and submit oral or written evidence upon the matters in the hearing.

(2) Within thirty days following the hearing, the hearing examiner shall render a decision in writing to all parties setting forth findings and conclusions on the issues submitted. Subject to the provisions of section seven of this article, the decision of the hearing examiner shall be final upon the parties and shall be enforceable in circuit court.

(e) *Expedited grievance process.*

An employee may grieve a final action of the employer involving a dismissal, demotion or suspension exceeding twenty days directly to the hearing examiner. The expedited grievance shall be in writing and must be filed within ten days of the date of the final action with the chief administrator and the director of personnel of the state civil service commission. (1988, c. 62.)

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

(a) The education employees grievance board, created by virtue of the provisions of section five [§ 18-29-5], article twenty-nine, chapter eighteen of this code, shall be hereafter known and referred to as the education and state employees grievance board and, in addition to those duties set forth in said chapter eighteen [§ 18-1-1 et seq.], is hereby authorized and required to administer the grievance procedure at level four as provided for in section four of this article. The board shall employ, in addition to those persons employed as hearing examiners for educational employee grievances, at least two full-time hearing examiners for the purpose of conducting hearings at level four as provided in section four [§ 29-6A-4] of this article. Such hearing examiners shall be employed on an annual basis along with such clerical help as is necessary to implement the legislative intent expressed in section one [§ 29-6A-1] of this article.

In addition to the budget required for submission to the Legislature by virtue of the provisions of section five, article twenty-nine, chapter eighteen of this code, the board shall submit a yearly budget and shall report annually to the governor and the Legislature regarding proceedings conducted under this article, including receipts and expenditures, number of level four hearings conducted, synopses of hearing outcomes and such other information as the board may deem appropriate. The board shall further evaluate on an annual basis the level four grievance process and the performance of all hearing examiners and include such evaluation in the annual report to the governor and the Legislature. In making such evaluation the board shall notify all employers, employee organizations, the director of personnel of the state civil service commission and all grievants participating in level four grievances in the year for which evaluation is being made and shall provide for the submission of written comment and/or the hearing of testimony regarding the grievance process.

The board shall provide suitable office space for all hearing examiners in space other than that utilized by any employer as defined in section two [§ 29-6A-2] of this article and shall ensure that reference materials are generally available. The board shall provide forms for filing grievances, giving notice, taking appeals, making reports and recommendations and such other documents as the board deems necessary for any stage of a grievance under this article.

The board is authorized to promulgate rules and regulations consistent with the provisions of this article, such rules and regulations to be adopted in accordance with chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code.

(b) Hearing examiners are hereby authorized and shall have the power to consolidate grievances, allocate costs among the parties in accordance with section eight of this article, subpoena witnesses and documents in accordance with the provisions of section one [§ 29A-5-1], article five, chapter twenty-nine-a of this code, provide such relief as is deemed fair and equitable in accordance with the provisions of this article, and such other powers as will provide for the effective resolution of grievances not inconsistent with any rules and regulations of the board or the provisions of this article: Provided, That in all cases the hearing examiner shall have the authority to provide appropriate remedies including, but not limited to, making the employee whole. (1988, c. 62.)

§ 29-6A-6. Hearings generally.

The chief administrator or his designee acting as a grievance evaluator or the hearing examiner shall conduct all hearings in an impartial manner and shall ensure that all parties are accorded procedural and substantive due process. All parties shall have an opportunity to present evidence and argument with respect to the matters and issues involved, to cross-examine and to rebut evidence. Reasonable notice of a hearing shall be sent prior to the hearing to all parties and their named representative and shall include the date, time and place of the hearing. Level one, level two and level three

hearings shall be at a convenient place accessible to the aggrieved employee. All such hearings shall be held on the employer's premises or on other premises mutually agreeable to the parties and within regular working hours: Provided, That any such hearing might continue beyond normal working hours. Level four hearings shall be at a place to be designated by the hearing examiner.

The employer that is party to the grievance shall produce prior to such hearing any documents, not privileged, and which are relevant to the subject matter involved in the pending grievance, that have been requested by the grievant, in writing.

The chief administrator or his designee or the hearing examiner shall have the power to (1) administer oaths and affirmations, (2) subpoena witnesses, (3) regulate the course of the hearing, (4) hold conferences for the settlement or simplification of the issues by consent of the parties, (5) exclude immaterial, irrelevant or repetitious evidence, (6) sequester witnesses, (7) restrict the number of advocates, and take any other action not inconsistent with the rules and regulations of the board or the provisions of this article.

All the testimony and evidence at any level three or level four hearing shall be recorded by mechanical means, and all recorded testimony and evidence at such hearing shall be transcribed and certified by affidavit. The chief administrator shall be responsible for promptly providing a copy of the certified transcript of a level three hearing to any party to that hearing who requests such transcript. The hearing examiner may also request and be provided a transcript upon appeal to level four and allocate the costs therefor as prescribed in section eight [§ 29-6A-8] of this article. The board shall be responsible for promptly providing a copy of the certified transcript of a level four hearing to any party to that hearing who requests such transcript.

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

All materials submitted in accordance with section three [§ 29-6A-3] of this article; the mechanical recording of all testimony and evidence or the transcription thereof, if any; the decision, and any other materials considered in reaching the decision shall be made a part and shall constitute the record of a grievance. Such record shall be submitted to any level at which appeal has been made, and such record shall be considered, but the development of such record shall not be limited thereby.

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

Prior to such decision any party may propose findings of fact and conclusions of law. (1988, c. 62.)

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

The decision of the hearing examiner shall be final upon the parties and shall be enforceable in circuit court: Provided, That either party or the state civil service commission may appeal to the circuit court of the county in which the grievance occurred on the grounds that the hearing examiner's decision (1) was contrary to law or a lawfully adopted rule, regulation or written policy of the employer, (2) exceeded the hearing examiner's statutory authority, (3) was the result of fraud or deceit, (4) was clearly wrong in view of the reliable, probative and substantial evidence on the whole record, or (5) was arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. Such appeal shall be filed in the circuit court of the county in which the grievance occurred within thirty days of receipt of the hearing examiner's decision. The decision of the hearing examiner shall not be stayed, automatically, upon the filing of an appeal, but a stay may be granted by the circuit court upon separate motion therefor.

The court's ruling shall be upon the entire record made before the hearing examiner, and the court may hear oral arguments and require written briefs. The court may reverse, vacate or modify the decision of the hearing examiner or may remand the grievance to the appropriate chief administrator for further proceedings.

Both employer and employee shall at all times act in good faith and make every possible effort to resolve disputes at the lowest level of the grievance procedure. The hearing examiner may make a determination of bad faith and in extreme instances allocate the cost of the hearing to the party found to be acting in bad faith. Such allocation of costs shall be based on the relative ability of the party to pay such costs. (1988, c. 62.)

§ 29-6A-8. Allocation of costs.

Any expenses incurred relative to the grievance procedure at levels one through three shall be borne by the party incurring such expenses. (1988, c. 62.)

§ 29-6A-9. Mandamus proceeding.

Any employer failing to comply with the provisions of this article may be compelled to do so by mandamus proceeding and shall be liable to any party prevailing against the employer for court costs and attorney fees, as determined and established by the court. (1988, c. 62.)

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

If an employee shall appeal to a circuit court an adverse decision of a hearing examiner rendered in a grievance proceeding pursuant to provisions of this article or is required to defend an appeal and such person shall substantially prevail, the adverse party or parties shall be liable to such employee, upon final judgment or order, for court costs, and for reasonable attorney's fees, to be set by the court, for representing such employee in all administrative hearings and before the circuit court and the supreme court of appeals, and shall be further liable to such employee for any court reporter's costs incurred during any such administrative hearings or court proceedings: Provided, That in no event shall such attorney's fees be awarded in excess of a total of one thousand dollars for the administrative hearings and circuit court proceedings nor an additional one thousand dollars for supreme court proceedings: Provided, however, That the requirements of this section shall not be construed to limit the employee's right to recover reasonable attorney's fees in a mandamus proceeding brought under section nine [§ 29-6A-9] of this article. (1988, c. 62.)

§ 29-6A-11. Application of article.

This article applies to all grievances arising on or after the effective date of this article [July 1, 1988]. This article supersedes and replaces the civil service grievance and appeals procedure currently authorized under the rules and regulations of the Civil Service Commission upon the resolution of all grievances and appeals pending in the civil service grievance system on the effective date of this article [July 1, 1988]. (1988, c. 62.)

ARTICLE 12.**STATE INSURANCE.****§ 29-12-5. Powers and duties of board.**

W. Va. Law Review. — Comment, "Tort Reform: The Reemergence of Local Government Immunity," 89 W. Va. L. Rev. 466 (1987).

§ 29-12-5a. Liability insurance for county boards of education, their employees and members, the county superintendent of schools, and for employees and officers of the state department of corrections.

W. Va. Law Review. — Comment, "Tort Reform: The Reemergence of Local Government Immunity," 89 W. Va. L. Rev. 466 (1987).

WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

Grievance Form
Levels I, II, III, IV

Grievant's Name

Grievant's Representative/Organization

Street or Route No.

Street or Route No.

City, State, Zip Code

City, State, Zip Code

Home Phone

Work Phone

Work Phone

vs.

Agency/Board of Education /Institution

STATEMENT OF GRIEVANCE: (include a brief but complete description of the grievable event and the relief you are seeking; attach additional sheets if necessary).

PROCEDURAL SUMMARY:

A level one decision was issued by _____ on _____
(immediate supervisor) (date)

and I hereby appeal this decision to level two.

A level two decision was issued by _____ on _____
(Chief Adm./Superintendent) (date)

and I hereby appeal this decision to level three.

A level three decision was issued by _____ on _____
(governing board/agency) (date)

and I hereby appeal this decision to level four.

CHECK ONE: _____ A hearing is requested.
_____ A decision may be made on the evidence presented at levels one through three.

UPON APPEAL TO LEVEL FOUR THE GRIEVANT MUST:

- (1) Forward a copy of this appeal to the chief administrator of the agency, board of education or institution and
- (2) Submit this form and all lower level responses to the

WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD
240 Capitol Street, Suite 508
Charleston, West Virginia 25301

Grievant's Signature

Date

§ 18A-2-8. Suspension and dismissal of school personnel by board; appeal.

Notwithstanding any other provisions of law, a board may suspend or dismiss any person in its employment at any time for: Immorality, incompetency, cruelty, insubordination, intemperance or willful neglect of duty, but the charges shall be stated in writing served upon the employee within two days of presentation of said charges to the board. The employee so affected shall be given an opportunity, within five days of receiving such written notice, to request, in writing, a level four hearing and appeals pursuant to provisions of article twenty-nine [§ 18-29-1 et seq.], chapter eighteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended. (1863, c. 137, § 7; 1866, c. 74, § 21; 1867, c. 98, § 15; Code 1868, c. 45, § 15; 1872-3, c. 123, § 13; 1877, c. 77, § 13; 1879, c. 74, § 13; 1881, c. 15, § 13; 1891, c. 60, § 13; 1893, c. 26, § 13; 1901, c. 71, § 13; 1908, c. 27, § 58; 1919, c. 2, § 57; 1921, c. 10, § 57; Code 1923, c. 45, § 57; 1969, c. 140; 1985, c. 71.)

Editor's notes. — Many of the cases cited in the note below were decided under former § 18-7-6, providing for the suspension or dismissal of principals and teachers.

ALR references. — What amounts to waiver of status or rights under teachers' tenure statute, 145 ALR 1078.

Constitutionality and construction of repeal or modification in regards to retrospective operation of teachers' tenure statute, 147 ALR 293.

W. Va. Law Review. — Goldberg, Employment Issues, 84 W. Va. L. Rev. 551 (1982).

Note, "Teachers' Union and Employment Rights: A Survey of West Virginia Law," 85 W. Va. L. Rev. 239 (1983).

Survey of Recent Developments in West Virginia Law: Board of Education Employees, 85 W. Va. L. Rev. 451 (1983).

Developments in Administrative Law (Elizabeth L. Crittenden), 86 W. Va. L. Rev. 479 (1983).

This chapter and chapter 18 considered in *pari materia*. — Chapter 18 and this chapter, though not enacted at the same time, should be considered in *pari materia* and, therefore, they should be read and considered together. *Smith v. Siders*, 155 W. Va. 193, 183 S.E.2d 433 (1971).

Section not in conflict with § 18-4-3. — The provision in this section for appeal to the state superintendent of schools is perhaps supplemental to, but not in conflict with, § 18-4-3. *Smith v. Siders*, 155 W. Va. 193, 183 S.E.2d 433 (1971).

"Board". — The definitions in § 18-1-1 demonstrate beyond doubt that the word "board," as used in this section, refers to a county board of education rather than the West Virginia board of education, the predecessor of

the West Virginia board of regents. Consequently, any provision for a hearing prior to the suspension or dismissal of any person in the board's employment relates only to the personnel employed by a county board of education. *State ex rel. Kondos v. West Virginia Bd. of Regents*, 154 W. Va. 276, 175 S.E.2d 165 (1970), abstracted in 73 W. Va. L. Rev. 207 (1971).

No provision as to tenure of faculty and college personnel. — Nowhere in article 26 of chapter 18 is there any provision relating to tenure of faculty and college personnel or to the manner in which they are to be suspended or discharged. Nowhere in the article relating to the West Virginia board of education do such provisions exist. *State ex rel. Kondos v. West Virginia Bd. of Regents*, 154 W. Va. 276, 175 S.E.2d 165 (1970).

Provisions applied analogously. — The statutory requirements of § 18A-3-1 and this section applying to regular and substitute teachers should be applied analogously to a student teacher under § 18-2-6. *James v. West Virginia Bd. of Regents*, 322 F. Supp. 217 (S.D.W. Va.), *aff'd*, 448 F.2d 785 (4th Cir. 1971).

State must preserve integrity of schools. — A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the State has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. *James v. West Virginia Bd. of Regents*, 322 F. Supp. 217 (S.D.W. Va.), *aff'd*, 448 F.2d 785 (4th Cir. 1971).



Members
 James Paul Geary
 Chairman
 Orton A. Jones
 David L. White

**WEST VIRGINIA EDUCATION AND
 STATE EMPLOYEES GRIEVANCE BOARD**
 ARCH A. MOORE, JR.
 Governor

Offices
 240 Capitol Street
 Suite 508
 Charleston, WV 25301
 Telephone: 348-3361

NOTICE

REQUEST FOR PUBLIC COMMENT ON PROPOSED PROCEDURAL RULES

TO ALL PERSONS CONCERNED:

You are hereby advised that the attached proposal is being considered for adoption as the official procedural rules of the West Virginia Education and State Employees Grievance Board. Your comment on the merits of any portion of the proposal is solicited and welcomed.

Such comments will be accepted in writing only and must be submitted to: West Virginia Education and State Employees Grievance Board, 240 Capitol Street, Suite 508, Charleston, West Virginia 25301, ATTN: RULES. Comments will not be accepted after the close of the work day December 10, 1988.

This notice is prepared and filed in the state register in compliance with W.Va. Code §§29A-3-4, 29A-3-5 and 29A-3-7.

JAMES P. GEARY, CHAIRMAN
 Dated: October 13, 1988

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FILED
 1988 OCT 13 AM 8:49
 BILL G. J.
 SECRETARY OF STATE



Members
James Paul Geary
Chairman
Orton A. Jones
David L. White

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

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October 13, 1988

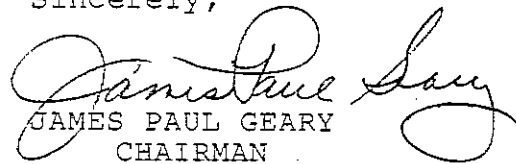
Richard O. Hartman, Director
Administrative Law Division
Secretary of State's Office
Building 1, Suite 157-K
Charleston, West Virginia 25305

Dear Mr. Hartman:

Pursuant to W.Va. Code §29A-3-4, 29A-3-5 and 29A-3-7,
filed this date are the proposed procedural rules for the
West Virginia Education and State Employees Grievance Board.

These proposed rules and notice of public comment have
been forwarded to all parties normally appearing on our monthly
mailings.

Sincerely,


JAMES PAUL GEARY
CHAIRMAN

attachments