

**WEST VIRGINIA
SECRETARY OF STATE
KEN HECHLER
ADMINISTRATIVE LAW DIVISION**

Form #5

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OFFICE OF THE SECRETARY OF STATE
WEST VIRGINIA

**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 CSR 1

CITE AUTHORITY: W.Va. Code 18-29-5(a) & 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, Education and State
Employees Grievance Board

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 1, 2000

Ronald Wright
Authorized Signature

AFSCME West Virginia Council 77, AFL-CIO

P. O. Box 326
Pentress, WV 26544
Phone 1-800-642-1983

RECEIVED
AUG 01 2000

WV Education & State
Employees Grievance Board

August 1, 2000

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

VIA FACSIMILE 304-558-1106

Dear Board Members:

As an advocate for public employees who work for various state government agencies, as well as county boards of education in West Virginia, the American Federation of State, County, and Municipal Employees, Council 77, AFL-CIO, feels it is in a unique position to offer its insight into concerns regarding the procedural rules of the grievance procedure utilized by these employees and administered by this Board. AFSCME is keenly aware that the Grievance Board's mission is to equitably, consistently and expeditiously resolve employment problems between employees and county boards of education, higher education institutions and state agencies so that good morale may be maintained, effective job performance may be enhanced and the citizens of this state may be better served. AFSCME staff are in constant contact with public workers in West Virginia, and know the effects the Board's decisions have on the morale of these workers. Therefore, AFSCME hereby offers the following comments and suggestions regarding the proposed Amendments to the Procedural Rules of the Education and State Employees Grievance Board, and requests that these comments be given consideration in deliberations regarding these Amendments and their implementation.

Upon review of Rule 4.2, it appears that the Board may actually be increasing the amount of time, correspondence, etc., required to get a grievance scheduled for hearing. AFSCME believes that the second sentence should be moved, and become the final sentence in that particular paragraph. The reasoning for this change is actually quite simple. As proposed, the grievant would request a Level Four hearing and the parties would be directed to provide dates for the grievance hearing. Thereafter, an ALJ is assigned by the Board. If, upon assignment of the ALJ either party seeks recusal of the assigned ALJ and such recusal is granted, the parties are back to square one, and must attempt to provide additional dates for a hearing. It appears the Board is putting the cart before the horse in this rule.

AFSCME believes in regard to Rule 4.4.1, lines 3-4, that any "determination" regarding "...whether the case can be submitted for decision on the record made at the earlier levels of the procedure" must be by mutual consent of the parties, and not be a decision rendered by an ALJ on their own volition. The Rule as proposed does not appear to consider the parties' positions.

Further, at line ten (10) of this section, mention is made of separating the grievance into phases such as a "default phase and a merits phase". As the law is clear that should a default occur, the grievant will be "...presumed to have prevailed on the merit.", a "merits phase" should

not be a consideration. To avoid confusion, "merits phase" should be deleted and replaced with the term "remedy phase".

In regard to Rule 4.5.1, which deals with ex parte communications, AFSCME believes that the word "must" in line two(2) should be deleted and the following inserted in its place; "shall be promptly...".

AFSCME believes that the ultimate goal of the grievance procedure is to assure that grievants are given the chance to have a full and fair hearing on their employment grievances in order to improve morale and assure employees of a "fair shake". In pursuit of this goal, AFSCME believes that grievants should be apprized of any reasoning utilized by an ALJ in refusing to issue a subpoena or subpoena duces tecum. Therefore, AFSCME requests that the Board insert the following sentence following the word "judge" at line eight (8), of Rule 4.6 :

"Any denial of the issuance of a subpoena or subpoena duces tecum by an administrative law judge shall be in writing, outlining specifically the reason(s) for such denial."

AFSCME believes that the same principle of informing the grievant of reason(s) for an ALJ's actions should be utilized by administrative law judges when dealing with motions to quash or modify subpoenas or subpoenas duces tecum as outlined in proposed Rule 4.6.2. Therefore, language similar to that suggested for Rule 4.6 should be inserted in this proposed rule.

AFSCME has some problems and concerns with regard to the proposal for Rule 5.1 dealing with default and hearings held pursuant thereto. AFSCME believes that default cases, since they deal with two separate and distinct issues should normally be subjected to a bifurcated proceeding, and suggests that the following changes be made to the proposed Rule, by deleting everything after the word "hearing" in line five (5) of the proposed Rule and replacing it with the following,

"At the default hearing, the ALJ shall make a determination as to whether or not a default has occurred at Levels One, Two, or Three, and whether the employer has a statutory excuse for not responding within the time required by law. If a decision is rendered that a default has occurred, a remedy hearing on the matter shall promptly be set by the parties. With the agreement of all parties, the matter may immediately proceed to a hearing on the remedy. If no such agreement is reached, the parties shall set another agreed upon date for the remedy hearing. The issue to be decided at the remedy hearing shall be whether or not the requested relief is contrary to law or clearly wrong. If default is not found to have occurred, the case shall be remanded to the earlier level where default was alleged to have occurred. Upon the filing of a default claim with the Board at Level Four, all lower level proceedings shall be stayed until all default matters have been ruled upon at Level Four. If either party desires, mediation shall continue to be available in accordance with Rule 6.2 while a default matters are pending.

The reasons for AFSCME's concerns with the Rule as proposed vary. For one thing, if a grievant has subpoenaed witnesses for the remedy hearing which "may" occur simultaneously with the default hearing (as appears in the proposed rule), but the ALJ determines that default has not occurred and remands the grievance to a lower level, the grievant is then out any money

spent for witness fees or mileage for these witnesses. Upon resubmitting the same grievance for a Level Four hearing on the merits at a later date, the grievant is then faced with subpoenaing and paying witness fees and mileage for these same witnesses a second time. Such a situation is clearly not fair to any low paid public employee seeking to resolve a work related problem, and flies in the face of fairness and equity.

Additionally, the rule as proposed doesn't outline clearly that the ALJ shall make a determination regarding the default prior to continuing with a hearing on the remedy. If a hearing is held to determine if the employer is in default, and the ALJ takes the arguments of the parties under advisement, then immediately proceeds with a hearing on the propriety and/or legality of the remedy, grievants may become confused as to exactly what the issues to be argued are, and who has the burden of proof. These things most certainly affect the presentation of one's case and should remain clear. We must keep in mind that many grievants will be representing themselves or may be represented by a co-worker. These people are not attorneys and can easily become confused by legalities such as shifting burdens of proof, standards of proof, and the scope of the issues to be argued. Simplification of the process is of the utmost importance. While there will be times when a grievant will feel comfortable with proceeding directly from a default phase into a remedy phase, this should not be forced upon them without their agreement.

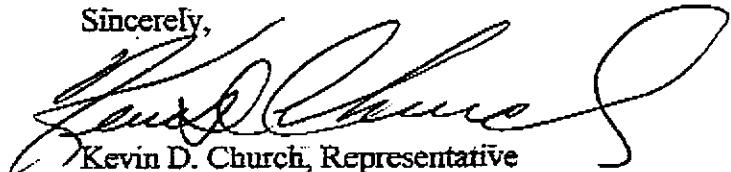
Finally, the simple issue of preparation for a hearing should be taken into consideration. Because the grievance procedure has evolved into a more complex and legalistic process, preparation for hearings is often time-consuming and complex. Hearings on default, remedy hearings, and hearings on the merits of a case, each require different preparation, different strategy, different witnesses, and different documentation. Because a hearing on the remedy can easily be expanded or evolve to more closely resemble a hearing on the merits, preparing for every eventuality without knowing which it will be, can become a juggling act. Further, a premature hearing on the remedy may destroy a grievant's strategy as to when and in what order evidence should most advantageously be presented.

For the above reasons, AFSCME requests that the Board give full consideration to our suggested changes to this proposed Rule.

In regard to proposed Rule 6.I, AFSCME believes that there are many grievants who are not aware of mediation services which are available to them. Therefore, AFSCME suggests that information regarding the provision of mediation services continue to accompany the Notice of Hearing.

Your full and fair deliberation and consideration regarding these comments is anticipated and appreciated.

Sincerely,



Kevin D. Church, Representative
for AFSCME Council 77, AFL-CIO

cc: Pam Ray, AFSCME Executive Director
file

Communications
Workers of America
AFL-CIO
West Virginia Area

Huntington Square, Suite 804
900 Lee Street
Charleston, West Virginia 25301
(304) 342-2023



August 4, 2000

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WV Education & State
Employees Grievance Board

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

VIA FACSIMILE 304-558-1106

Dear Board Members:

As an advocate for public employees who work for various West Virginia State Government Agencies, the Communications Workers of America, AFL-CIO, feels it is in a unique position to offer its insight into concerns regarding the procedural rules of the grievance procedure utilized by these employees and administered by this Board. CWA is keenly aware that the Grievance Board's mission is to equitably, consistently and expeditiously resolve employment problems between employees and county boards of education, higher education institutions and state agencies so that good morale may be maintained, effective job performance may be enhanced and the citizens of this state may be better served. CWA staff are in constant contact with public workers in West Virginia and know the effects the Board's decisions have on the morale of these workers. Therefore, CWA hereby offers the following comments and suggestions regarding the proposed Amendments to the Procedural Rules of the Education and State Employees Grievance Board, and requests that these comments be given consideration in deliberations regarding these Amendments and their implementation.

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The reasons for CWA’s concerns with the Rule as proposed vary. For one thing, if a grievant has subpoenaed witnesses for the remedy hearing which “may” occur simultaneously with the default hearing (as appears in the proposed rule), but the ALJ determines that default has not occurred and remands the grievance to a lower level, the grievant is then out any money spent for witnesses fees or mileage for these witnesses. Upon resubmitting the same grievance for a Level Four hearing on the merits at a later date, the grievant is then faced with subpoenaing and paying witness fees and mileage for these same witnesses a second time. Such a situation is clearly not fair to any low paid public employee seeking to resolve a work related problem, and flies in the face of fairness and equity.

Additionally, the rule as proposed doesn’t outline clearly that the ALJ shall make a determination regarding the default prior to continuing with a hearing on the remedy. If a hearing is held to determine if the employer is in default, and the ALJ takes the arguments of the parties under advisement, then immediately proceeds with a hearing on the propriety and/or legality of the remedy, grievants may become confused as to exactly what the issues to be argued are, and who has the burden of proof. These things most certainly affect the presentation of one’s case and should remain clear. We must keep in mind that many grievants will be representing themselves or may be represent by a co-worker. These people are not attorneys and can easily become confused by legalities such as shifting burdens of proof, standards of proof, and the scope of the issues to be argued.

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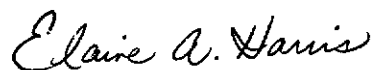
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Your full and fair deliberation and consideration regarding these comments is appreciated.

Sincerely,



Elaine A. Harris
CWA Representative



Jack Ferrell
Field Representative
CWA Local 2055

West Virginia School Service Personnel Association

President: Mary A. Browning
Executive Secretary: Kenneth C. Legg

1610 Washington St., East
Charleston, WV 25311
Telephone: (304) 346-3544
FAX: (304) 346-3548



August 4, 2000

SENT BY FACSIMILE TRANSMISSION ONLY

Mr. Ronald Wright, Director
WV Education & State Employees Grievance Board
808 Greenbrier Street
Charleston, WV 25311

Dear Mr. Wright:

The West Virginia School Service Personnel Association wishes to offer the following comments pertaining to the proposed amendments and revisions to the procedural rules of the Grievance Board:

1. §2.1.7. The proposed language appears to limit the admission of evidence unless it is in the form of oral testimony or written documentation and appears to foreclose the submission of evidence in the form of video or other photographic images.

2. §4.6. We wish to request the insertion of the following phrase, "upon the request of the witness" to the proposed statement of acceptance of responsibility for the payment of witness and mileage fees in a request for a subpoena or subpoena duces tecum. Many witnesses do not seek payment of either witness and/or mileage fees and the imposition of such an obligation should not be imposed upon a moving party unless requested by the witness.

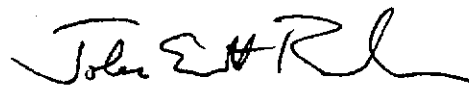
3. §4.7. The proposed rule should define what is considered to be a "reasonable time" to respond to a motion such as ten working days, etc. This language is simply too vague. What is considered to be "reasonable" to one party is often unreasonable to another.

4. §4.7.2. As drafted, this section simply does not make sense. The moving party is making an oral motion at the hearing because the "situation necessitating a motion arises immediately before or during a hearing." The moving party would not have reason to file a motion on or before a hearing because the "situation necessitating a motion" has not occurred.

Mr. Ronald Wright, Director
Page Two
August 4, 2000

5. §4.7.3. Please see comment to §4.7 pertaining to a response to a motion. Motions should not be dismissed as untimely filed unless the rules require a party to file motions within a specific time period.

Sincerely,

A handwritten signature in black ink, appearing to read "John E. Roush". The signature is fluid and cursive, with a large, stylized "R" at the end.

John Everett Roush
Legal Services



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

CECIL H. UNDERWOOD
Governor

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Billy Coffindaffer
Roger Smith II
Lowell Witters

DIRECTOR
Ronald Wright

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grievanc/grievanc.htm](http://www.state.wv.us/admin/grievanc/grievanc.htm)

**MODIFICATION OF PROPOSED PROCEDURAL RULES
BASED UPON WRITTEN COMMENTS RECEIVED**

The Board and all staff reviewed the written comments on September 28. After discussion the following changes were made (the changes are in bold print on the paper copy for ease of reference):

Rule 4.4.1, on pages 4 and 5.

The word "determining" was changed to "discussing" and "merits" was changed to "remedy".

Rule 4.5.1 on page 5.

The words "must be" were changed to "shall be promptly".

Rule 4.6 on page 5.

The third from the last sentence was modified by adding the words "if any" immediately after "witness and mileage fees" and the words "incurred relative thereto" at the end of the sentence were deleted.

Rule to 4.7 and 4.7.2 and 4.7.3 on page 6.

Rule 4.7.3 was eliminated by deleting the second sentence, and moving the first sentence up to Rule 4.7.

The second sentence in Rule 4.7.2 was deleted, along with the first word in the next sentence.

Rule 5.1 on page 10.

The following sentence was added at the end of that proposed Rule: "Mediation shall continue to be available while default matters are pending."

FILED
OCT 26 11 52 AM '00
OFFICE OF THE SECRETARY OF STATE

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

§156-1-1. General

1.1. Scope - The following procedural rules sets forth the practice and procedure established by the West Virginia Education and State Employees Grievance Board for carrying out its responsibilities ~~in the administration and enforcement of the West Virginia Education and State Employees Grievance Statutes, W. Va. Code §§ 18-29-1, et seq., and 29-6A-1 et seq., as amended.~~ 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. This rule applies~~ These rules apply to all grievances pending and those filed after ~~this~~ the effective date.

1.2. Authority - ~~This rule is issued under authority of W. Va. Code §§ 18-29-5(a)1, et seq., and 29-6A-5(a)1, et seq.~~

1.3. Filing Date - October 26, 2000.

1.4. Effective Date - December 1, 2000.

1.5. ~~Repeal and Replace - This rule repeals and replaces the former Procedural Rule promulgated in 1996 at 156-CSR-1.~~

1.56. Liberal Construction - The provisions of ~~these~~ this 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 ~~regulations~~.

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

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

1.89. 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 this 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 purposes of these rules this rule, 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 ~~a lower level grievance decision~~ in an official depository of the United States Postal Service, postage prepaid, and addressed to the Board's main offices at 808 Greenbrier Street, Charleston, West Virginia 25311. A grievance may also be filed by hand-delivery to the Board's main office or by facsimile transmission to the that Board's offices. A hard copy of any grievance filed by facsimile must be mailed to received by the main Board 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 this rule, indicating that copies have been served on all parties to the grievance or their representatives.

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

2.1.4. "Subpoena" means an official document, issued by an Administrative Law Judge pursuant to the provisions of the West Virginia Administrative Procedures Act, ~~West Virginia Code~~ 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 or application 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. ~~means substance of proof, presented in a hearing on the merits of a grievance, by testimony given under oath, records, documents or other concrete objects, for the purpose of meeting one's burden of proof.~~

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 - ~~Each~~ 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 State Employees. Copies of these forms can be obtained at the Grievance Board's web site.

~~, within ninety days of the effective day date of this rule, adopt one official form for the initiation of grievances at Levels One, Two and Three. This form is to be made available to an employee, upon request, by his immediate supervisor. A sample form is attached as Appendix A to this rule.~~

3.2. Written procedures - ~~Each~~ 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 ~~this rule~~ and of W. Va. Code §§ 18-29-3, et seq., 18A-2-8, and 29-6A-3, et seq. Copies of these procedures should be made available to all existing employees. and ~~All~~ newly-hired employees should be given a copy of these procedures upon commencement of their employment.

3.3. 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 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.

3.4. Intervention - Upon timely request in a grievance filed against an education

employer under W. Va. Code §§ 18-29-1, 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. Forms - A Sample grievance forms which should may be used for filing a grievance at all levels in the procedure are Level Four is attached as Appendix A B (Form for Education Employees) and Appendix C (Form for State Employees).

4.2. Assignment of Administrative Law Judge - At Level Four IV, hearing examiners are known as an administrative law judges. 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 this assignment. Once the parties are notified of the assignment, all documents and or correspondence are is to be delivered to the assigned administrative law judge as provided for in Rule 2.1.2.

4.3. Authority of Administrative Law Judge - Each Administrative Law Judge 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 as is deemed considered appropriate consistent with the provisions of West Virginia Code 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** determining 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 merits** 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.

4.45. 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 must be** disclosed to the other parties and an opportunity for rebuttal allowed.

4.56. 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 by the Board to any party to a grievance upon written request, in compliance with W. Va. Code § 29A-5-1(b), 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. costs (including applicable witness and mileage fees) incurred relative thereto. 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).

4.56.1. Any party requesting a subpoena or subpoenas duces tecum must advise all other parties of the request at the time it is made. The parties are encouraged to exchange a list of witnesses prior to the Level Four hearing.

4.5.2. No subpoena or subpoena duces tecum will be issued unless a written

request has been received by the administrative law judge within six work days prior to the scheduled hearing.

4.5-36.2. Upon motion made promptly, and in any event at or before the time specified in the subpoena for compliance therewith, an administrative law judge may (1) quash or modify the 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 advancement 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.

4.67. 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 its their basis, both legal and factual. All motions must be served by the movant moving party upon the non-moving party all other parties at the same time it is presented to the administrative law judge. Upon receiving a written motion, the 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.

4.67.1. 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.

4.67.2. 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 movant shall be prepared to state the reasons as to why the motion was not made in conformance with Rule 4.76. Further, The moving party movant~~ is to be prepared to proceed with the hearing if the motion is denied and the granting of the motion would have operated to delay the hearing.

~~4.67.3. All motions are to be accompanied by a concise statement of its their basis, both legal and factual. Motions not timely made in the determination of the administrative law judge may be denied on that basis alone.~~

4.78. 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.

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

4.89. 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.

4.910. 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 4.67 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.

4.910.1. 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 4.67. 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.

4.110. 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.

4.142. 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.

4.123. 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.

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

4.123.2. 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.

4.134. 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 final disposition of the grievance by filing a motion in accordance with Rule 4.67. The administrative law judge may on his or her own motion, join a person or entity necessary to grant complete relief in the final disposition of 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. Any party may move to join two or more grievances filed by the same party for purposes of hearing and/or decision, or the administrative law judge may join such cases for united consideration on his or her own motion.

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

4.157. 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.

4.168. Location - All Level Four hearings will be conducted in the Board's offices; provided that, upon written motion in accordance with Rule 4.67 and for good cause shown, the administrative law judge may, in his or her discretion, conduct the hearing in another ~~neutral~~ 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.

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

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

4.179.2. Nonappealable dismissal orders may be based upon grievances dismissed for the following: settlement, withdrawal and, in accordance with Rule 4.154, a party's failure to pursue.

4.179.3. 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.

4.1820. Appeals to circuit court - In every matter appealed ~~from this Board~~ to circuit court, the appealing party shall ~~furnish the Board with a copy of the notice of appeal and the circuit court docket number~~ 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.

4.4921. 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.

4.2022. 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.

4.2423. 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 should must register at the Board's main office in Charleston in accordance with W. Va. Code § 18-29-2(g) 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 deaf person makes a request for an interpreter, the Board, at its own expense, shall appoint an interpreter to interpret the proceeding to the deaf 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.**

§156-1-56. Mediation

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

56.2. Request for mediation - Motion for Mediated Settlement Conference - Any party to a grievance may request a mediated settlement conference mediation by contacting the Board's main office in Charleston, orally or in writing prior to hearing. 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. those services will not be rendered.

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

56.3.1. All of the information that is provided by the parties during mediation shall remain confidential. Mediators shall not be called as witnesses to provide testimony in unresolved grievances that proceed to a grievance hearing, and any administrative law judge involved in a mediation process shall not hear the grievance nor be consulted regarding the merits of the grievance. 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.

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

56.5. Time - The mediation session conference will be scheduled by agreement of

~~the parties and the mediator. sometime prior to the scheduled hearing of the grievance. In some instances~~ If possible and the parties agree, the mediation session conference will be scheduled on the same day as the Level Four hearing, in which event and the parties must be prepared to go forward with the hearing should they be unable to resolve their dispute that day attempt at mediation fail.

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

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

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

APPENDICES

Appendix A - ~~Sample grievance form~~ Certificate of Service form

Appendix B - ~~Certificate of Service form~~ Grievance Form for Education Employees

Appendix C - Grievance 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**

(Visit our web site at www.state.wv.us/admin/grievanc/grievanc.htm)

SEE BACK OF FORM FOR INSTRUCTIONS

For Levels I, II, III, IV

Part A: Grievant's Information:

_____ v. _____	_____	_____
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 list the specific statutes, policies, rules, regulations or agreements you claim have been violated, misapplied or misinterpreted.) Additional pages can be added if necessary.

RELIEF SOUGHT: _____

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: _____

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.**

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.

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

(Visit our web site at www.state.wv.us/admin/grievanc/grievanc.htm)

SEE BACK OF FORM FOR INSTRUCTIONS

For Levels I, II, III, IV

Part A: Grievant's Information:

_____ v. _____	_____	_____
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 list the specific statutes, policies, rules, regulations or agreements you claim have been violated, misapplied or misinterpreted.) Additional pages can be added if necessary.

RELIEF SOUGHT: _____

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: _____

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**. However, 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.**

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.