

**WEST VIRGINIA  
SECRETARY OF STATE  
BETTY IRELAND  
ADMINISTRATIVE LAW DIVISION**

Form #5

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CITY OF MARTINSBURG  
SECRETARY OF STATE

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

AGENCY: West Virginia Public Employees Grievance Board TITLE NUMBER: 156

CITE AUTHORITY: W. Va. Code §§ 6C-3-4(b)

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: 1

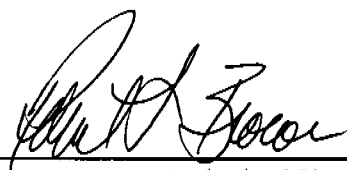
TITLE OF RULE BEING AMENDED: RULES OF PRACTICE AND PROCEDURE OF THE WEST VIRGINIA  
PUBLIC EMPLOYEES GRIEVANCE BOARD

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 27, 2007



Authorized Signature

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WEST VIRGINIA  
SECRETARY OF STATE

**TITLE 156  
PROCEDURAL RULE  
WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

**SERIES 1  
RULES OF PRACTICE AND PROCEDURE OF THE WEST VIRGINIA PUBLIC  
EMPLOYEES GRIEVANCE BOARD**

**§156-1-1. General**

1.1. Scope - The following procedural rules set forth the practice and procedure established by the West Virginia Public Employees Grievance Board for carrying out its responsibilities to administer the grievance procedure for education and state employees contained in W. Va. Code §§ 6C-2-1, et seq. and 6C-3-1, et seq. The Board is responsible for administering the grievance procedure and has jurisdiction regarding procedural matters at all levels of the grievance procedure. These rules apply to all grievances pending, and those filed after the effective date.

1.2. Authority - W. Va. Code § 6C-3-4(b)

1.3. Filing Date - November 27, 2007

1.4. Effective Date - December 27, 2007

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

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

1.7. Availability of Rules - These rules are on file in the Office of the Secretary of State, and are available at each of the Board's offices, and at the Board's web site: [pegboard.state.wv.us](http://pegboard.state.wv.us).

1.8. Delegation of Powers and Duties - Except where contrary to law, the Board may delegate any of its powers and duties to the director, administrative law judges, or other employees or agents of the Board. Pursuant to W. Va. Code §§ 6C-2-1, et seq., and 6C-3-1, et seq., the administrative law judges are authorized to take any other action not inconsistent with the grievance procedure statutes and these rules.

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### §156-1-2. Definitions

2.1. All terms defined in W. Va. Code §6C-2-2 shall have the meanings therein ascribed to them for the purpose of these rules. All other terms shall have the following meanings.

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

2.1.2. "Conference" is an informal meeting between the grievant and the chief administrator or designee to discuss the issues raised by the grievance, exchange information, and attempt to resolve the grievance. The chief administrator may require other individuals to attend and participate in the conference, as needed, to reach a resolution.

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

2.1.4. "File" or "filing" means to place the grievance form in the United States Postal Service mail, addressed to: (1) the Board's main office at 808 Greenbrier Street, Charleston, West Virginia 25311, and (2) the agency's chief administrator. If applicable, a third copy shall be sent to the Division of Personnel. A grievance may also be filed by hand-delivery or by facsimile transmission to the appropriate office. Date of filing will be determined by United States Postal Service postmark. All grievance forms shall be date stamped when received. Grievance forms may not be filed by interdepartmental mail. The key to assessing whether a grievance is properly filed is substantial compliance with the statute and rules. Within two days of receipt, the Grievance Board will e-mail the grievance docket number to the chief administrator.

2.1.5. "Hearing" is a relatively formal proceeding in which witnesses and parties are entitled to be heard and evidence is submitted through witnesses and documents. A hearing is recorded by mechanical means. (See Level One Hearing Guidelines.)

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

2.1.7. "Service" or "Serve" means personal delivery, facsimile transmission, or delivery by first class United States Postal Service mail, postage prepaid and addressed to the person to be served at the person's last known address. This section does not apply to subpoenas and subpoenas duces tecum. A Certificate of Service by the person making the service is to be attached

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to every document requiring service under these rules, indicating that copies have been served on all parties to the grievance or their representatives. Every document filed with the Board shall be served on all other parties in the manner described above.

2.1.8. "Subpoena" means an official document, issued by an administrative law judge in accordance with the West Virginia Administrative Procedures Act, W. Va. Code §§ 29A-5-1, et seq., requiring the appearance of an individual at a given time and place.

2.1.9. "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.

### **§156-1-3. Burden of Proof**

The grievant bears the burden of proving the grievant's 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.

### **§ 156-1-4. Level One**

4.1. Forms - All employers shall use the grievance form issued by the Grievance Board at all levels of the procedure. The chief administrator must provide a grievance form to an employee on request. (*See* Grievance Form.) Copies of this form can be obtained at the Grievance Board's web site.

4.2. Written Procedures - All employers shall provide a copy of the grievance statute and procedural rules to their employees. All newly-hired employees should be given a copy of these documents on commencement of their employment.

4.3. Chief Administrator's Authority - To the extent of the chief administrator's administrative authority, a chief administrator shall require the attendance of witnesses who are necessary for the resolution of the grievance at a level one hearing. Additionally, the chief administrator may consolidate, for hearing or conference, grievances that are substantially similar, waive grievances the chief administrator is without authority to decide to level two or three, such as state compensation and classification grievances, reasonably limit the number of relevant witnesses at hearing, and join parties as needed. If conflicts or questions arise on these issues, any party may submit the matter to the Board's chief administrative law judge for resolution.

4.4. Chief Administrator's Decisions - Level one decisions shall be dated, shall be in writing setting forth the decision or decisions and the reasons therefor, and, unless the time frame is waived

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by all parties, shall be issued within fifteen days to the Board, the parties, and any representative(s) named in the grievance. If the grievant is denied the relief sought, the decision shall inform the grievant that an appeal must be filed with the Board within ten days of receipt, and shall include the name and address of the Board. The chief administrator is required to send the level one decision to the Board, as well as a copy of the Cost Report Form.

4.5. Intervention - On timely request, 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 that employee's rights or property, and when that employee's 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. (*See Intervention Form.*)

### **§156-1-5. Level Two - Mediation**

#### 5.1. Filing, Forms and Essential Matters

5.1.1. After receiving a level one decision, the grievant or intervenor may file to level two using the original grievance form, or a copy thereof, to request one of three alternative dispute resolution methods. The party filing shall indicate on the grievance form which method is selected. If basic mediation by an administrative law judge is not selected, the parties are required to submit written documentation noting the agreement of all parties on the alternative selected. (*See Mediation Agreement Form.*) If a specific method is not selected, the parties will automatically be deemed to have agreed to mediation by an administrative law judge.

5.1.2. If the parties agree that mediation would not be appropriate or helpful, they may request to waive mediation. (*See Mediation Waiver Form.*)

5.1.3. If mediation by an administrative law judge is selected, the Grievance Board will request dates, and notify the parties of the time and date of the mediation. If the mediation was unsuccessful, the administrative law judge will issue an order stating this fact.

5.1.4. If private mediation is selected, and if the mediation is unsuccessful, the mediator shall so inform the Board, in writing, within ten days of the mediation session. If private mediation is unsuccessful, within ten days of notification, the chief administrative law judge shall issue an order notifying the parties of the procedure and the address for appeal to the next level.

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5.1.5. If mediation-arbitration by an administrative law judge is selected, the Board will request dates, and notify the parties of the time and date of the mediation-arbitration. Standard rules and guidelines governing mediation and arbitration will be followed during this process. If the parties select mediation-arbitration and, after unsuccessful mediation, decide not to engage in arbitration, the administrative law judge will issue an order stating this fact, and notifying the parties of the procedure and the address for appeal to the next level.

### 5.2. General Provisions for Mediation

5.2.1 All mediations shall be confidential, and the results of these proceedings shall not be released unless required by law. In the event that mediation is unsuccessful, no documents or records submitted by the parties during level two proceedings will be retained in the grievance file on appeal to level three. The administrative law judge who conducts a level two mediation will not be involved in any subsequent level three proceedings.

5.2.2 All parties shall appear at the mediation, either in person or through a representative, who has the authority to resolve the grievance. If the grievance is settled through mediation, the parties are required to sign a settlement agreement, usually at the mediation session, reflecting the terms of the resolution. The parties may decide to write the settlement agreement after the mediation, but are required to inform the Board as soon as the document is signed and the settlement is finalized so the grievance can be dismissed from the Board's docket.

5.2.3. All parties shall appear at the mediation-arbitration, either in person or through a representative who has the authority to resolve the grievance. If the grievance is resolved through mediation, the settlement agreement is to be signed by all parties. If the grievance is resolved through a decision, this decision shall be in writing and issued to the parties within the stated time frames.

### **§156-1-6. Level Three**

6.1. Assignment of Administrative Law Judge - On proper filing of a level three grievance, the employer will be directed to submit the complete record of the lower level proceedings, including the transcript and all exhibits. If a level three hearing is requested, the parties will be directed to provide proposed hearing dates for the grievance hearing. Thereafter, the Board shall assign the matter to an administrative law judge, and all parties will be notified of the assignment. Once the parties are notified of the assignment, all documents and correspondence are to be delivered to the assigned administrative law judge as provided for in Rule 2.1.7.

6.1.1. By agreement, the parties may decide to submit the case on the record developed below. If the administrative law judge assigned to the case agrees, the parties will then

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be given the option to submit proposed Findings of Fact and Conclusions of Law within a designated time period.

6.2. Authority of Administrative Law Judge - Each administrative law judge has the authority and discretion to control the processing of each grievance assigned such judge and to take any action considered appropriate consistent with the provisions of W. Va. Code §§ 6C-2-1, et seq.

6.3. Prehearing Conferences - As soon as practical after the grievance is assigned, the administrative law judge may conduct a prehearing conference with the parties or their representatives, in person or by telephone, to explore and resolve matters to expedite the grievance proceedings. Any pertinent matters involving the grievance can be discussed at that time. If the grievance has been filed directly to level three, as an expedited grievance, the administrative law judge may encourage the parties to mediate prior to a level three hearing. In the administrative law judge's discretion, such conferences will be recorded by mechanical means. The administrative law judge may issue oral or written orders reflecting the judge's decisions on the above matters and may conduct additional conferences when the need arises.

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

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

6.5. Subpoenas and subpoenas duces tecum - Parties who wish to obtain subpoenas to require the attendance and testimony of witnesses, or subpoenas requiring the production of documents, must file a written motion or request for subpoenas with the administrative law judge assigned to the grievance. The written request should be submitted as soon as possible, so that the subpoena can be served at least five days before to the scheduled hearing, as required by W. Va. Code § 29A-5-1(b). Subpoenas and subpoenas duces tecum will be issued in the discretion of the administrative law judge. The written request shall include the full name and address of each person to be subpoenaed (and for subpoenas duces tecum, a complete description of the document or item to be produced), together with a statement accepting responsibility for service, and for witness and mileage fees, if any. Witness and mileage fees shall be the same as are paid witnesses in the courts of this state. Subpoenas and subpoenas duces tecum may be enforced as provided in W. Va. Code § 29A-5-1(b). Administrative law judges shall have the authority to subpoena witnesses and documents for level three hearings in accordance with the provision of W. Va. Code § 29A-5-1(b), on the written request of any party to the grievance.

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6.5.1. All parties shall provide the Board and all other parties with a list of the witnesses they intend to call at the level three hearing, whether subpoenaed or not, at least six days prior to the hearing.

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

6.6. Motions - An application to an administrative law judge for an order must be by motion, in writing, unless made during a hearing, and must be filed and served on all parties promptly, as soon as the facts or grounds on which the motion is based become known to the moving party. A motion must be accompanied by a concise statement of its basis, both legal and factual. A motion must be served by the moving party on all other parties at the same time it is presented to the administrative law judge. On receipt of a written motion, all non-moving parties shall be given a reasonable time within which to file a written response. A certificate of service must accompany all motions.

6.6.1. If any party desires a hearing on a motion, the party shall make a request for a hearing at the time of the filing of the motion or response. An administrative law judge may, in the judge's 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.

6.6.2. If a situation necessitating a motion arises immediately before or during a hearing, an oral motion may be made at the hearing. The moving party is to be prepared to proceed with the hearing if the motion is denied and the granting of the motion would have operated to delay the hearing.

6.7. 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 dates for scheduling the hearing. Unless the requesting party demonstrates urgent circumstances, the request for a continuance will not be granted until the parties have agreed to a new hearing date. Requests for a continuance of a hearing will be granted on 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 on all parties of record. The administrative law judge may, on the judge's own motion, continue hearings or other proceedings.

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6.8. Remand and Transfer - Any party may move to remand or transfer (return to a lower level of the grievance procedure) a grievance. Requests for remand or transfer of a grievance will be granted on a showing of good cause. The administrative law judge may, on the judge's own motion, remand or transfer a grievance for good cause.

6.9. Recusal - Any party may move to recuse (disqualify) the administrative law judge assigned to their grievance. Motions for recusal will be considered only in accordance with Rule 6.6 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 continue automatically 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.

6.9.1. The administrative law judge's decision on a motion to recuse may be appealed to the chief administrative law judge, and if the chief administrative law judge is the judge sought to be recused, then the appeal shall be to the Director of the Board. This decision may then be appealed to the Chairperson of the Board by any party to the grievance, in accordance with Rule 6.6. An appeal shall operate to continue automatically any hearing or other action on the grievance. The decision of the Chairperson is final and not subject to further appeal or review prior to the disposition of the grievance.

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

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

6.12. Discovery - The Board strongly encourages parties to participate in informal discovery prior to hearing. All parties 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 a party 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 any representative of the grievant named in the grievance.

6.12.1. 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

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grievance procedure. When a party serves another party with a discovery request, that request need not be filed with the Board.

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

6.13. Joinder - Any party may move to join (or add as a party to the grievance) a person or entity necessary to grant complete relief in the grievance by filing a motion in accordance with Rule 6.6. The administrative law judge may, on the judge's own motion, join a person or entity necessary to grant complete relief in the grievance. The Division of Personnel must be joined and made a party in any state employee grievance involving classification or compensation matters.

6.14. Consolidation - When separate grievances filed by two or more employees contain identical or similar issues, they may be consolidated for hearing or decision by agreement of all parties; on motion of any party; or on the administrative law judge's or chief administrator's own motion.

6.15. Failure to Pursue - Once no action by a party has been taken on a grievance for two months, the Board will send all parties a letter, by certified mail, advising that the case will be dismissed from the docket of the Board twenty calendar days from the date of the letter, unless any party objects and can demonstrate, in writing, 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 the grievant's 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.

6.16. 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 the judge's 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. If, at the close of hearing, the parties wish to submit proposed Findings of Fact and Conclusions of Law, the request shall be granted, but unless there are exigent circumstances, the time frame for submission should be no greater than thirty days.

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6.17. Location - All level two and three proceedings will be conducted in the Board's offices; provided that, on written motion in accordance with Rule 6.6 and for good cause shown, the administrative law judge may, in the judge's discretion, conduct the hearing in another location agreeable to the parties. In such cases, the party requesting the change in hearing site shall be responsible, at no expense to the Board, for providing the following: a suitable hearing room; a separate area for witnesses; such other facilities, equipment or personnel as necessary; and a certified copy of the transcript of the hearing and delivery of the same to the administrative law judge within a specific number of days after the hearing. However, the administrative law judge has the discretion to use the Board's recording equipment to record the testimony, at no cost to the parties.

6.18. Final Disposition - Grievances may be disposed of in three ways: by decision on the merits, nonappealable dismissal order, or appealable dismissal order.

6.18.1. Decisions on the merits will result in the granting or denying of a grievance, in whole or in part. All decisions are maintained by the Board and are electronically transmitted, monthly, to the Office of the Secretary of State, Capitol Complex, Charleston, West Virginia 25305. Decisions on the merits are appealable to the Kanawha County Circuit Court.

6.18.2. Nonappealable dismissal orders may be based on grievances dismissed for the following: settlement; withdrawal; and, in accordance with Rule 6.15, a party's failure to pursue.

6.18.3. 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.

6.19. Appeals to Circuit Court - In every matter appealed to circuit court, the appealing party shall serve a copy of the appeal petition on 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.

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

6.21. Registration of Employee Organizations - All labor unions or other organizations representing West Virginia education or state employees before the Board shall register at the Board's main office in Charleston. (*See Employee Organization Registration Form.*)

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

### **§156-1-7. Claims for Relief by Default**

7.1. A grievant seeking to prevail by default must file with the chief administrator a written notice of intent to proceed to the next level or to enforce the default within ten days of the default. If the chief administrator objects to the default, the chief administrator may file a request for a hearing with the Board within five days. On receipt of the chief administrator's objection, the Board will set the matter for hearing. The issues to be decided may include whether a default has occurred, whether the employer has a statutory excuse for not responding within the time required by law, and whether the relief sought is contrary to law or contrary to proper and available remedies. The default proceeding is usually bifurcated into two hearings. Once a grievant files a written claim for relief by default with the Board, or the chief administrator files an objection, all proceedings at the lower levels are automatically stayed until all default matters have been ruled on 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.

**§156-1-8. Representation** - Employees are entitled to representation at any step of the procedure, including meetings held for the purpose of discussing or considering disciplinary action, prior to the filing of a grievance.

**SUMMARY OF RESPONSES  
TO  
PUBLIC COMMENTS ON GRIEVANCE BOARD PROPOSED PROCEDURAL RULE**

**§ 156-1-1, et seq. - General comments and suggestions**

**Please note that the section numbers reflected in these responses correspond to the final version of the Rule, not those of the original, proposed document.**

Per recommendation, the forms were removed from the Procedural Rules as appendices, so that they can be modified as needed.

At this point in time, the need is for procedural rules so the Public Employees Grievance Board can go about its business of dealing with grievances. This does not preclude the writing or adopting of legislative rules at a future date.

The assertion of a timeliness defense is addressed in the statute, West Virginia Code § 6C-2-3(c), and this Code Section states only that the employer must assert this defense at or before level two. We do not have the authority to expand upon the language of the statute, so no change in the Rule has been made.

**§156-1-2. Definitions**

As suggested, the definitions are now in alphabetical order.

We do not believe it is necessary to define such terms as mediation, days, grievance, and employee, etc., as these terms have been defined by the statute. We have added definitions for terms not defined in the statute, including "conference" and "hearing."

We have also streamlined the definitions of "filing," "service," "conference," and "hearing," in response to the public comments.

The Board has considered the comments and issues regarding state interdepartmental mail and has decided not to allow it for filing or service of any grievance-related documents, due to concerns regarding the reliability of this system. Therefore, the option of state interdepartmental mail has been removed from the rule.

**Section 2.1.1.** The Board believes a Certificate of Service should be required and elects not to make this requested change.

**Section 2.1.2.** The numbering error was corrected, and the definition has been streamlined somewhat. The last sentence has been amended to clarify that the chief administrator may require other necessary individuals to attend. Other changes were not made, because we believe they are encompassed by statute and were unnecessary.

The administrator's authority to contact third parties outside the confines of a conference and use this information in his or her decision, does not appear to be authorized by the statute or otherwise proper under the grievance procedure or rules.

**Section 2.1.4.** This section has been amended to clarify that U.S. Mail postmark will determine the date of filing of the grievance.

With regard to higher education grievances, which do not involve the Division of Personnel, Section 2.1.1 has been amended to state that a third copy goes to DOP only "if applicable."

We believe concerns regarding proper grievance filing are encompassed within the term "substantial compliance," which will allow the Board leeway to assess situations on a case-by-case basis in order to be as fair as possible to every grievant. Therefore, no change of the proposed language has been made.

It was determined that a facsimile transmission of a grievance form is sufficient for filing, so no follow-up with a hard copy will be required.

The rule, as written, requires all grievance forms to be date stamped upon receipt.

**Section 2.1.5. "Hearing"** - We streamlined the definition somewhat, to clarify that it is an evidentiary proceeding on the record. Because the statute gives the option of conference or hearing at level one, it is necessary to make distinctions between the two, so parties will understand how to proceed when choosing one or the other. A witness is someone who gives sworn testimony on the record, which will only occur during a formal hearing.

**Section 2.1.7. "'Serve' or 'Service'"** - This section has been amended to clarify that any documents, except subpoenas, may be served by personal delivery, facsimile, or U.S. Mail.

**Section 2.1.8. "Subpoea"** - Commentators were correct in their assessment that the Board does not have the authority to confer subpoena authority upon chief administrators, and it is not given by statute. The section was amended to reflect that only administrative law judges can issue subpoenas.

**§ 156-1-3. Burden of proof** Per recommendation, this Section was moved from 5.20 to here, because it applies to all levels of the grievance procedure.

#### **§ 156-1-4. Level One**

**Section 4.1.** The statute requires that the Board create the forms and provide them to the administrators, who are to give them to employees when requested. West Virginia

Code § 6C-2-3(i). Therefore, we do not elect to make any of the suggested changes, and providing the forms on the Board's website appears to be sufficient.

**Section 4.2.** Per the suggestions, the term "procedures" has been changed to "statute." Additional suggested changes were deemed unnecessary at this time.

**Section 4.3.** As discussed above, we have removed the language giving administrators subpoena authority. We have added language to clarify that administrators have the authority to require employees to attend level one proceedings, along with other powers which will facilitate the process at that level.

We also clarified that administrators may join other parties, such as the Division of Personnel or intervenors, at level one, and grievances may be waived to level two or three when the administrator lacks authority on the issue (such as classification and compensation matters).

Because of the administrator's lack of subpoena authority, and to make sure that level one proceedings are conducted in good faith, the provision allowing disputes to be brought to the Chief Administrative Law Judge remains in the section. This should also provide a mechanism for employees to obtain relief if an administrator unreasonably limits or excludes evidence.

We have declined to allow automatic waiver of classification and compensation grievances to level three, because the administrator may already do this when he/she is without authority to resolve the grievance. Providing for this in the Rule could very well go beyond the agency's authority, because the legislature did not provide for such an automatic waiver.

It is not necessary to add "or designee" when discussing chief administrators, because the term "chief administrator" is defined by statute as including a designee. West Virginia Code § 6C-2-2(b).

Likewise, it is not necessary to state in the Rule that the Division of Personnel should be joined as a party, because the statute already states that they are a party in all state employee grievances. West Virginia Code § 6C-2-2(i).

**Section 4.4.** Several suggested changes were made, including changing the term "transmitted" to "issued", providing for waiver of time frames, clarifying that all "parties" are to receive the decision, and insertion of time limitations.

**Section 4.5.** Suggested changes were not made, because the Rule's language tracks what is in the grievance statute, and the Board does not want to create a conflict with the statute or go beyond its authority.

## **§ 156-1-5. Level Two – Mediation**

**Section 5.1.1.** As suggested, we have inserted a provision that, if no particular method is indicated on the grievance form, mediation by an administrative law judge is automatically selected.

Other suggested changes were not made, due to potential conflicts with the statute.

**Section 5.1.2.** As suggested, we removed the language allowing the administrative law judge to determine whether mediation should be waived, because it could potentially conflict with the statute, which allows the parties to agree to waive this level. West Virginia Code § 6C-2-4(a)(3).

**Section 5.1.4.** We have added language to clarify that the mediator must notify the Board of the outcome of private mediation, and that the Board will notify the parties of how to proceed if the mediation was unsuccessful.

**Section 5.1.5.** This language has been modified to comport more closely with the statute and to clarify that the Board will notify the parties of how to proceed if the mediation-arbitration was unsuccessful.

**Section 5.2.1.** As suggested, language has been inserted to ensure that level two proceedings will remain confidential, and that the mediator will not be involved in any subsequent level three proceedings.

**Sections 5.2.2 & 5.2.3.** As suggested, we clarified that all “parties” participate in mediation, which will encompass the Division of Personnel and intervenors.

We have declined to require the Division of Personnel's approval of all settlements in this Rule. If the case is one requiring such approval, it would be incumbent upon the employer to ensure that all DOP requirements are followed.

## **§156-1-6. Level Three**

**Section 6.1.** The statute does not provide a procedure for transcription of the record of a level one hearing, once the grievance has reached level three. Therefore, if the parties wish to rely on the record of a level one hearing, the employer should bear that cost.

**Section 6.1.1.** The only “record” to be transmitted to level three would be from level one, because, as set forth above, records submitted during mediation are confidential.

**Section 6.2.** The suggested changes were minor and cosmetic and were determined to be unnecessary.

**Section 6.3.** Mediations are not recorded, so no change is necessary.

**Section 6.5.** Historically, subpoenas in grievances have been served upon witnesses by mail at their work address, so the Board does not believe this is an area of concern. Either a work or home address is sufficient, so no change in the Rule appears warranted.

Likewise, the Board has historically not gotten involved with issues regarding witness fees, which should be sorted out between the parties. As to time off from work for witnesses and grievants, this is addressed by the statute in West Virginia Code §6C-2-3(m)(2).

**Section 6.5.2.** No clarification is deemed necessary, because the administrative law judge uses his or her discretion and judgment to determine whether a subpoena is reasonable, etc. Requiring a party to pay the cost of production is an extraordinary measure that is seldom, if ever, used, but which is available in extreme circumstances. These matters should be left to the administrative law judge's discretion, so no change has been made.

**Section 6.6.** The suggested changes were deemed unnecessary. Prehearing conferences take place before the hearing, so, even if a motion is made at that time, it can still be reduced to writing, if the administrative law judge deems this necessary. The phrase "reasonable time" will not be defined, because what is reasonable will vary on a case-by-case basis, depending on the complexity of the issues presented. As written, the Rule gives the administrative law judges flexibility in determining how much time will be needed in any given case.

**Section 6.6.1.** The suggested changes were not made, in order to allow the administrative law judges flexibility and use of discretion on a case-by-case basis. Not all motions will require a conference, and not all rulings on motions are issued in a written order, depending on circumstances.

**Section 6.7.** The final decision as to whether a continuance will be granted has always rested with the administrative law judge.

**Section 6.8.** The term "transfer" was inserted to address situations where the grievance was initially filed at the highest level. When the grievance is dismissed and ordered to be heard at a lower level, this is technically a transfer, not a remand. Remand occurs when the grievance has already received action at a lower level, but it is being sent back for some reason. It is unnecessary to define these terms, because the administrative law judges will know which action is necessary in each case.

**Section 6.9.1.** A few changes were made in order to address concerns regarding delays when a recusal issue must be presented to the Board. Therefore, if the decision is

appealed to the final level, it will only be decided by the Chairperson, not the full Board. No other changes were made, because parties are not required to appeal the recusal decision to multiple levels, and it will most likely not go beyond the Director's level.

**Section 6.10.** The appeal period is set by statute, so it need not be specifically set forth in this Rule. West Virginia Code § 6C-2-5(c).

**Section 6.12.** The terms "parties" and "party" have been substituted for "employer," in order to ensure that this section addresses the requirements for the Division of Personnel and intervenors.

**Section 6.13.** Suggested changes were deemed unnecessary, because, as discussed above, the statute mandates that the Division of Personnel be a party in all state employee grievances, and higher education grievances are not included. The statute also states that the Division of Personnel may participate at any level of the grievance procedure. West Virginia Code §§ 6C-2-2(l) and 6C-2-4(a)(1). The suggestion to correct the reference to Section 5.6 has been corrected.

**Section 6.14.** The suggested change was deemed unnecessary, because cases which could result in inconsistent relief are also cases which contain "similar or identical issues."

**Sections 6.15. & 6.16.** In Section 6.15, the change in terminology was deemed unnecessary. In Section 6.16, the typographical error in "circumstance" has been corrected. The suggested change from "should" to "shall" was not made, because an administrative law judge must have the discretion to grant parties an extension for filing proposals, when necessary.

**Section 6.17.** Parties and the administrative law judge can always agree to hold a hearing at an off-site location, but this normally comes about because one party or the other requests it, so no change in existing language has been made.

**Section 6.18.1.** The suggested change cannot be made, because the statute requires appeals to be filed in Kanawha County only. West Virginia Code § 6C-2-5(a) and (c).

**Section 6.21.** As suggested, "should" has been changed to "shall."

**Section 6.22.** Accommodations for the handicapped are always made by the Board, so it does not appear necessary to make changes in the language.

**Section 7.1.** The term "working" has been removed, so that this section will comport with the statute, which only defines the term "days." West Virginia Code § 6C-2-2(c). Other suggested changes regarding this definition were not made, in order to avoid conflicts with

the statute, and to ensure that the administrative law judges have discretion to address issues on a case-by-case basis. The language of this section regarding the standard for determining appropriate relief was taken from the statute, so the Board does not have the authority to change this language. West Virginia Code § 6C-2-3(b)(2).

**§156-1-8. Representation.**

This section has been amended to reflect the exact language of the statute on this issue. West Virginia Code § 6C-2-3(g). Because this is a new provision in the statute which has not yet been interpreted or discussed by the courts, we believe no further alterations or additions should be made to this portion of the Rule at this time.

## Chriceous (Cricket) Powell

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**From:** Delphene Haddox [dbhaddox@hotmail.com]  
**Sent:** Friday, September 28, 2007 7:36 AM  
**To:** WVGB Account  
**Cc:** omanda@zoominternet.net  
**Subject:** proposed rules

1. Allow the employee grievants to use interdepartmental mail for filing grievances. This can reduce the overall cost to the employee. Ask the grievance board to Note that the grievant should retain a copy of each document filed at each step for their own records. The rule is confusing and at one point says yes and then says no. Clear up the rule and allow interdepartmental mail where appropriate.

2. Require the employer/ administrator to inform every employee prior to any predetermination meeting that the employee has the right to have a representative present in the meeting. This is called an affirmative right and should be added to the proposed rule.

And,

3. If a hearing examiner is going to prohibit witnesses, the hearing examiner must state the reason (s) in writing and deliver to the grievant at least three days prior to any scheduled hearing. The rules should also allow a grievant to offer rebuttal testimony to that written denial of witnesses which shall become entered into the official record at any step in the grievance process where witnesses are denied. This is basic due process and should be added to the rule.

There will be other things we need to write certainly, but this grievance board stuff is time sensitive. We have until next Friday, September 28, to make our concerns known. Tell all of our friends, even an e-mail will do.

Good work out there every one and keep up the fighting spirit.

omanda@zoominternet.net

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Get a FREE small business Web site and more from Microsoft® Office Live!  
<http://clk.atdmt.com/MRT/go/aub0930003811mrt/direct/01/>

From Jennifer Meeks

Comments due 9/28

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

**§156-1-1. General**

1.1. Scope - The following procedural rules set forth the practice and procedure established by the West Virginia ~~Education and State~~ Public Employees Grievance Board for carrying out its responsibilities to administer the grievance procedure for educational and state employees contained in W. Va. Code §§ ~~18-29-1, 6C-2-1~~, et seq. and W. Va. Code §§ ~~29-6A-1 6C-3-1~~, 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~~ all levels of both the grievance procedures. These rules apply to all grievances pending, and those filed after the effective date.

1.2. Authority - W. Va. Code §§ ~~18-29-5(a), and 29-6A-5(a)~~: 6C-3-4(b)

1.3. Filing Date - ~~November 3, 2004~~

1.4. Effective Date - ~~December 4, 2004~~

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

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

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

1.8. Delegation of Powers and Duties - Except where contrary to law, the Board may delegate any of its powers and duties to the director, administrative law judges, or other employees or agents of the Board. Pursuant to W. Va. Code §§ ~~18-29-1 6C-2-1~~, et seq., and ~~29-6A-1, et seq., 6C-3-1, et seq.~~, the administrative law judges are authorized to take any other action not inconsistent with the grievance procedure statutes and these rules.

**§156-1-2. Definitions**

2.1. All terms defined in W. Va. Code §§ ~~18-29-2 and 29-6A-2 6C-2-2~~ shall have the meanings therein ascribed to them for the purpose of these rules, ~~except the term "administrative law~~

judge" will be used, instead of the statutory term "hearing examiner". All other terms shall have the following meanings.

2.1.1. "File" or "filing" means to place an appropriate grievance form or letter evidencing an intent to appeal in an official depository of the United States Postal Service, postage prepaid, and addressed to: 1) the Board's main offices at 808 Greenbrier Street, Charleston, West Virginia 25311, and 2) the agency's chief administrator. If it is a state employee grievance, a third copy shall be sent to the Division of Personnel. A grievance may also be filed by hand-delivery or by facsimile transmission to the appropriate office. A hard copy of any grievance filed by facsimile must be mailed to the Board's main appropriate offices or by facsimile transmission to that office. ~~A hard copy of any grievance filed by facsimile must be mailed to the main office~~ within a reasonable time following the facsimile transmission, and ~~should~~ shall be identified as a duplicate. All grievance forms shall be date stamped when received. No grievance forms may be filed by interdepartmental mail. The key to assessing whether a grievance is properly filed is substantial compliance with the statute and rules. Within two days of receipt, the Grievance Board will e-mail the grievance docket number to the chief administrator.

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

*This will cause confusion w/ 2.1.1*

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 state interdepartmental mail or ~~in~~ the United States mail, postage pre-paid, in a properly addressed envelope, a true copy of the document he is filing with the Board, for the other parties, or their representatives, at their last known address. (Appendix A is the Certificate of Service Form.)

*define*

2.1.4. "Subpoena" means an official document, issued by an administrative law judge or ~~a grievance evaluator~~ chief administrator in accordance with the West Virginia Administrative Procedures Act, W. Va. Code §§ 29A-5-1 et seq., requiring the appearance of an individual at a given time and place.

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

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

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

2.1.8. "Grievance evaluator" means that individual or governing board authorized to render a decision on a grievance at Levels One, Two or Three of the grievance procedure: "Conference" is a meeting between the grievant and the chief administrator or designee to discuss the issues raised by the grievance, exchange information, and attempt to resolve the grievance. Other individuals may attend this meeting, as needed, to reach a resolution.

2.1.9. "Hearing" is a proceeding of relative formality with definite issues of fact or law to be tried, and in which witnesses and parties are entitled to be heard and evidence is submitted through witnesses and documents. A hearing is recorded by mechanical means. (Level One Hearing Guidelines are attached at Appendix B.)

### **§156-1-3. Levels One, Two and Three**

3.1. Forms - All governing boards (education) and employers (state) should ~~shall~~ use the applicable grievance <sup>57</sup> 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 . The chief administrator must provide a grievance form to an employee upon request. (Appendix B C is the Grievance Form for Education Employees. Appendix C is the Form for Higher Education Employees. Appendix D is the Form for State Employees. Copies of these forms can be obtained at the Grievance Board's web site.

3.2. Written procedures - All governing boards (education) and employers (state) should establish written ~~shall provide a copy of the grievance procedures relating to employee grievances at Levels One, Two and Three. These procedures should inform employees of the provisions of these rules and of W. Va. Code §§ 18-29-3, et seq., 18A-2-8, and 29-6A-3, et seq. Copies of these procedures should be made available to all existing employees. and procedural rules to their employees.~~ All newly-hired employees should be given a copy of these procedures documents upon commencement of their employment.

ref. to ?  
website OK.

3.3. ~~Grievance Evaluator~~ Chief administrator authority - ~~Grievance evaluators~~ Chief administrators may issue subpoenas for witnesses and documents if a hearing is requested. ~~Grievance evaluators at Level Three~~ Additionally, chief administrators, in state employee grievances, may issue subpoenas for documents in the possession or control of the Division of Personnel in accordance with W. Va. Code §§ 29A-5-1 et seq. Documents must not be privileged, and must be relevant to a claim or defense in the pending grievance. In addition, documents must be redacted of confidential information; Confidential information in these documents, such as social security numbers and personal health information, must be redacted before disclosure. Further, a chief administrator may consolidate, for hearing or conference, grievances that are substantially similar, and waive grievances he/she is without authority to decide to level three, such as state compensation and classification grievances, and limit the number of relevant witnesses at hearing. If conflicts/questions arise on these issues, any party may submit the matter to the Board's chief administrative law judge for resolution.

potentially  
- discontinue

3.4. ~~Grievance Evaluator~~ Chief administrator 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~~ Level one decisions shall be dated, shall be in writing setting forth the decision or decisions and the reasons therefore, and shall be transmitted within the time prescribed to the grievant and any representative named in the grievance. If the grievant is denied the relief sought, the decision shall include the name and address of the individual at the next level to whom appeal may be made. The chief administrator is required to send the level one decision to the Board as well as a copy of the Cost Report Form, Appendix D.

*lots of paperwork?*

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

#### **§156-1-4. Level Four Two - Mediation**

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

~~4.2. Assignment of Administrative Law Judge - Upon proper filing of a Level Four grievance, the Board shall assign the grievance a docket number, and the employer will be directed to submit the complete record of the lower level proceedings, including the transcript and all exhibits, if any. If a Level Four hearing is requested, the parties will be directed to provide proposed hearing dates for the grievance hearing. Thereafter, the Board shall assign the matter to an administrative law judge and all parties will be notified of the assignment. Once the parties are notified of the assignment, all documents and correspondence are to be delivered to the assigned administrative law judge as provided for in Rule 2.1.2.~~

#### 4.1. Filing, Forms and Essential Matters

4.1.1. After receiving a level one decision, the grievant may file to level two using the original grievance form, or a copy thereof, to request one of three alternative dispute resolution methods. The parties shall indicate on the grievance form which method is selected. If basic mediation by an administrative law judge is not selected, both parties are required to submit written documentation noting the agreement of all parties on the alternative selected. (See Appendix F - Mediation Agreement Form.)

*This usually requires mutual agreement*

4.1.2. If the parties agree that mediation would not be appropriate or helpful, they may request to waive mediation. The final decision on whether mediation should be waived rests with the administrative law judge. (See Appendix G for Mediation Waiver Form.)

4.1.3. If mediation by an administrative law judge is selected, the Grievance Board will request dates, and notify the parties of the time and date of the mediation. If the mediation was unsuccessful, the administrative law judge will issue an order stating this fact.

*Continuance  
in another  
G. Party  
requesting  
agreeable  
dates for  
Bd.*

4.1.4. If private mediation is selected, the grievant is to inform the Grievance Board, in writing, of the outcome of this mediation. If a level three hearing is required, the grievant is required to file his/her request to come to level three on the original grievance form, or a copy thereof.

4.1.5. If mediation-arbitration by an administrative law judge is selected, the Board will request dates, and notify the parties of the time and date of the mediation-arbitration. Standard rules and guidelines governing mediation and arbitration will be followed during this process. If the mediation-arbitration was unsuccessful, the administrative law judge will issue an order stating this fact.

4.2. General Provisions for Mediation and Mediation-Arbitration

4.2.1 All mediations and mediation-arbitrations shall be confidential, and the results of these proceedings shall not be released unless required by law.

4.2.2 Both the employee and the employer shall either appear at the mediation, or through a representative who has the authority to resolve the grievance. If the grievance is settled through mediation, the parties are required to sign a settlement agreement, usually at the mediation session, reflecting the terms of the resolution. The parties may decide to write the settlement agreement after the mediation, but are required to inform the Board as soon as the document is signed and the settlement is finalized so the grievance can be dismissed from the Board's docket.

*appear*

4.2.3. Both the employee and the employer shall either appear at the mediation-arbitration, or through a representative who has the authority to resolve the grievance. If the grievance is resolved through mediation, the settlement agreement is to be signed by all parties. If the grievance is resolved through a decision, this decision shall be in writing and issued to the parties within the stated time frames.

*appear*

§156-1-5. Level Three

4.2: 5.1. Assignment of Administrative Law Judge - Upon proper filing of a level three 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 a level four three hearing is requested, the parties will be directed to provide proposed

*Model  
for level 2*

*notice  
given to  
move  
to level 3*

hearing dates for the grievance hearing. Thereafter, the Board shall assign the matter to an administrative law judge and all parties will be notified of the assignment. Once the parties are notified of the assignment, all documents and correspondence are to be delivered to the assigned administrative law judge as provided for in Rule 2.1.2.

5.1.1. By agreement, the parties may decide to submit the case on the record developed below. If the administrative law judge assigned to the case agrees, the parties will then be given the option to submit proposed Findings of Fact and Conclusions of Law within a designated time period.

~~4.3:~~ 5.2. Authority of Administrative Law Judge - Each administrative law judge has the authority and discretion to control the processing of each grievance assigned to him or /her and to take any such action considered appropriate consistent with the provisions of W. Va. Code §§~~18-29-5 and 29-6A-5~~ 6C-2-1, et seq.

~~4.4:~~ 5.3. 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. Any pertinent matters involving the grievance can be discussed at that time. If the grievance has been filed directly to level three, as an expedited grievance, the administrative law judge may encourage the parties to mediate prior to a level three hearing. In the ~~ALJ's~~ administrative law judge's discretion, such conferences will be recorded by mechanical means.

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

~~4.5:~~ 5.4. Ex Parte Communication - No person shall confer or correspond with any member of the Board, its administrative law judges, staff of agents, concerning the merits or substance of a pending grievance, unless all parties to the grievance are present.

OK  
as is

4.5.1: 5.4.1. Any ex parte communication made to an administrative law judge concerning the merits or substance of a grievance shall be promptly disclosed to the other parties and an opportunity for rebuttal allowed.

who is responsible for doing this?

4.6: 5.5. 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 the scheduled hearing, as required by W. Va. Code § 29A-5-1(b). Subpoenas and subpoenas duces tecum will be issued in the discretion of the administrative law judge. The written request shall include the full name and address of each person to be subpoenaed (and for subpoenas duces tecum, a complete description of the document or item to be produced), together with a statement accepting responsibility for service, and for witness and mileage fees, if any. Witness and mileage fees shall be the same as are paid witnesses in the courts of this state. Subpoenas and subpoenas duces tecum may be enforced as provided in W. Va. Code § 29A-5-1(b). Administrative law judges shall have the authority to subpoena witnesses and documents for Level Three hearings in accordance with the provision of section one [§ 29A-5-1], article five, chapter twenty-nine-a of this code, upon the written request of any party to the grievance.

this should be longer  
conflict

4.6.1: 5.5.1. All parties shall provide the Board and all other parties with a list of the witnesses it intends to call at the ~~Level IV~~ level three hearing, whether subpoenaed or not, at least six days prior to the hearing.

4.6.2: 5.5.2. Upon motion made promptly, and in any event at or before the time specified in the subpoena for compliance, an administrative law judge may (1) quash or modify a subpoena or subpoena duces tecum if it is unreasonable and oppressive, or requires disclosure of privileged information or (2) condition denial of the motion upon the advance payment by the person in whose behalf the subpoena duces tecum is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

may create access probs

4.7: 5.6. Motions - An application to an administrative law judge for an order must be by written motion, ~~in writing~~, unless made during a hearing, and must be filed and served upon all parties promptly, as soon as the facts or grounds upon which the motion is based becomes known to the moving party. All motions are to be accompanied by a concise statement of their basis, both legal and factual. All motions must be served by the moving party upon all other parties at the same time it is presented to the administrative law judge. Upon receiving a written motion, all non-moving parties shall be given a reasonable time within which to file a written response. A certificate of service must accompany all motions.

4.7.1: 5.6.1. If any party desires a hearing on a motion, he shall make a request for a hearing at the time of the filing of his motion or response. An administrative law judge may, in his discretion, hold a hearing on a motion if it is determined that a hearing is necessary to the

development of a full and complete record on which a proper decision can be made. Such hearing may be conducted via telephone conference call, with all parties or their representatives participating.

~~4.7.2:~~ 5.6.2. If a situation necessitating a motion arises immediately before or during a hearing, an oral motion may be made at the hearing. The moving party is to be prepared to proceed with the hearing if the motion is denied and the granting of the motion would have operated to delay the hearing.

~~4.8:~~ 5.7. 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. Unless the requesting party demonstrates urgent circumstances, the request for a continuance will not be granted until the parties have agreed to a new hearing date. Requests for a continuance of a hearing will be granted upon a showing of good cause. Unless time does not permit, a request for a continuance is to be made in writing to the administrative law judge and served upon all parties of record. The administrative law judge may, upon his or her own motion, continue hearings or other proceedings.

~~4.9:~~ 5.8. Remand/transfer - Any party may move to remand/transfer (return to a lower level of the grievance procedure) a grievance. Requests for remand/transfer of a grievance will be granted upon a showing of good cause. The administrative law judge may, upon his or her own motion, remand/transfer a grievance for good cause.

~~4.10:~~ 5.9. Recusal - Any party may move to recuse (disqualify) the administrative law judge assigned to their grievance. Motions for recusal will be considered only in accordance with Rule ~~4.7~~ 5.6 and will be granted only for good cause shown, in the discretion of the administrative law judge. A motion for recusal will not operate to automatically continue a hearing or other action on the grievance; provided, that any party may make a separate motion for a continuance until such time as a decision is made on the motion for recusal.

~~4.10.1:~~ 5.9.1. The administrative law judge's decision on a motion to recuse may be appealed to the chief administrative law judge, and if the chief administrative law judge is the judge sought to be recused, then the appeal shall be to the Director of the Board. This decision may then be appealed to the Chairperson of the Board Board or its Chairman by any party to the grievance, in accordance with Rule ~~4.7~~ 5.6. The Chairperson will then call an emergency meeting of the Board to respond to the Motion. An appeal shall operate to automatically continue any hearing or other action on the grievance. The decision of the Board or its Chairman is final and not subject to further appeal or review prior to the disposition of the grievance.

~~4.11:~~ 5.10. Errata Notice - After the administrative law judge issues a final decision in a grievance, the Board retains jurisdiction to amend the decision to correct clerical errors by errata notice during the appeal period.

~~4.12:~~ 5.11. Failure to state a claim - A grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.

~~4.13:~~ 5.12. Discovery - W. Va. Code §§ 18-29-6 and 29-6A-6 of the grievance procedure ~~statutes encourage~~ The Board strongly encourages 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.

*and are not unduly burdensome*

~~4.13.1:~~ 5.12.1. The administrative law judge shall have authority to order such additional discovery, by way of deposition, interrogatory, document production, or otherwise, as considered necessary for a fair determination of the issues in dispute, consistent with the expedited nature of the grievance procedure. When a party serves another party with a discovery request, that request need not be filed with the Board.

~~4.13.2:~~ 5.12.2. Parties shall attempt to resolve any discovery disputes among themselves before making a motion requesting an order compelling discovery. Any such motion must state that the parties have attempted to resolve the dispute, as well as the reason why the discovery is needed.

~~4.14:~~ 5.13. Joinder - Any party may move to join (or add as a party to the grievance) a person or entity necessary to grant complete relief in the grievance by filing a motion in accordance with Rule 4.7. The administrative law judge may on his or her own motion, join a person or entity necessary to grant complete relief in the grievance. The Division of Personnel must be joined and made a party in any state employee grievance involving classification and/or compensation matters.

~~4.15:~~ 5.14. Consolidation - Separate grievances filed by two or more employees may be consolidated for hearing and decision because the grievances contain identical or similar issues. Grievances may be consolidated by agreement of all parties, ~~or by~~ the administrative law judge, or the ~~grievance evaluator~~ chief administrator on his or /her own motion. Any party may move to join two or more grievances filed by the same party for purposes of hearing and/or decision, or the ~~grievance evaluator at Level Three~~ chief administrator or the administrative law judge may join such cases for united consideration on his or /her own motion.

~~4.16:~~ 5.15. Failure to pursue - Once no action by a party has been taken on a grievance for ~~four~~ two months, the Board will send all parties a letter, by certified mail, advising that the case will be dismissed from the docket of the Board twenty calendar days from the date of the letter, unless any party objects and can demonstrate, in writing, why the case should not be dismissed. If no timely written objection is received by the Board, an order of dismissal will be entered. If timely written objection is received by the Board, the grievance will be promptly scheduled for hearing or other

action will be taken consistent with the orderly disposition of the grievance. If neither the grievant nor the grievant's representative, if applicable, appears for a scheduled grievance hearing, the administrative law judge may issue a show cause order, requiring the grievant to show good cause for his or her absence, and advising that the failure to respond with a set time limit will result in the dismissal of the grievance for failure to prosecute.

~~4.17:~~ <sup>other</sup> 5.16. 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. If, at the close of hearing, the parties wish to submit proposed Findings of Fact and Conclusions of Law, the request shall be granted, but unless there are exigent circumstance, the time frame for submission should be no greater than thirty days.

~~4.18:~~ 5.17. Location - All ~~Level Four~~ level two and three proceedings will be conducted in the Board's offices; provided that, upon written motion in accordance with Rule ~~4.7~~ 5.6 and for good cause shown, the administrative law judge may, in his ~~or~~ her discretion, conduct the hearing in another location agreeable to the parties. In such cases, the party requesting the change in hearing site shall be responsible, at no expense to the Board, for providing the following: a suitable hearing room; a separate area for witnesses; such other facilities, equipment or personnel as necessary; and a certified copy of the transcript of the hearing and delivery of the same to the administrative law judge within a specific number of days after the hearing. However, the administrative law judge has the discretion to use the Board's recording equipment to record the testimony, at no cost to the parties.

*Bd should retain control of transcripts*

~~4.19:~~ 5.18. Final disposition - Grievances may be disposed of in three ways: by decision on the merits; nonappealable dismissal order; or appealable dismissal order.

~~4.19.1:~~ 5.18.1. Decisions on the merits will result in the granting or denying of a grievance, in whole or in part. All decisions are maintained by the Board and are transmitted electronically, monthly to the Office of the Secretary of State, Capitol Complex, Charleston, West Virginia 25305. Decisions on the merits are appealable to the Kanawha County Circuit Court ~~or the circuit court of the county in which the grievance arose.~~

~~4.19.2:~~ 5.18.2. Nonappealable dismissal orders may be based upon grievances dismissed for the following: settlement, withdrawal and, in accordance with Rule ~~4.15~~ 5.15, a party's failure to pursue.

~~4.19.2:~~ 5.18.3. Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits.

~~4.20:~~ 5.19. Appeals to circuit court - In every matter appealed to circuit court, the appealing party shall serve a copy of the appeal petition upon the Board as required by W. Va. Code § 29A-5-4(b), and will provide the Board with the civil action number so that the certified record can be properly filed with the circuit court. The party prevailing on the appeal shall furnish the Board with a copy of the final decision of the circuit court and any accompanying order within twenty days of its receipt.

~~4.21:~~ 5.20. Burden of proof - The grievant bears the burden of proving his case by a preponderance of the evidence, except in disciplinary matters, where the burden is on the employer to prove that the action taken was justified. Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence.

~~4.22:~~ 5.21. Advisory opinions - The Board will, under no circumstances, issue an advisory opinion, i.e., an opinion on an issue not directly raised before the Board in a grievance.

~~4.23:~~ 5.22. Registration of employee organizations - All labor unions or other organizations representing West Virginia education and/or state employees before the Board should register at the Board's main office in Charleston in accordance with ~~W. Va. Code § 18-29-2(q) and W. Va. Code § 29-6A-2(f).~~ (See Appendix H for Employee Organization Registration Form.)

~~4.24:~~ 5.23. Interpreter Appointment - In accordance with the requirements of W. Va. Code § 5-14A-5, if a hearing impaired person makes a request for an interpreter, the Board, at its own expense, shall appoint an interpreter to interpret the proceeding to the hearing impaired person and/or to interpret his or her testimony.

#### **§156-1-6. Claims for Relief by Default**

6.1. A grievant seeking to prevail by default must file, with the chief administrator, a written claim notice of intent to proceed to the next level or to enforce the default within ten days of the default, seeking relief by default with his or her employer and may, at the same time, file the claim with the Board. If the chief administrator objects to the default, After the employer receives the written claim for default, it he/she may file a request for a hearing with the Board within five working days. Upon receipt of a claim for relief by default of the chief administrator's objection, the Board will place the claim for default on its docket, assign a docket number, and set the claim matter 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 or contrary to proper and available remedies. The default proceeding is usually bifurcated into two hearings. Once a grievant files a written claim for relief by default with the Board at Level Four, or the chief administrator files an objection, 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.

§156-1-7. Representation - Employees are entitled to representation at any step of the procedure, including meetings held with employees to discuss disciplinary action.

APPENDIX A

**CERTIFICATE OF SERVICE AND MAILING**

**THE UNDERSIGNED** certifies the attached [*NAME OF DOCUMENT*] has been sent to the following persons and addresses by United States Mail, postage prepaid, by Facsimile, by State Interdepartmental Mail, or by Personal Hand Delivery:

Certified sent this the \_\_\_\_ day of \_\_\_\_\_, 200\_.

---

Title:

Appendix B  
Level One Hearing Guidelines<sup>1</sup>

At a level one hearing, the chief administrator, or his designee, should:

- Utilize a sign-in sheet for all parties and witnesses
- Turn on the recording device prior to any discussion about the grievance
- Introduce himself or herself and explain what will happen during the hearing
- Clarify any necessary issues before starting the actual hearing process
- Allow only one person to talk at a time
- Identify who has the burden of proof
- Allow the parties to make a brief opening statement if desired
- Start the hearing with the party that has the burden of proof
- Swear (or affirm) each witness <sup>K</sup> in separately and ask his/her name and position on the record
- Allow each party to question and cross-examine each witness, but only one person for each party may cross-examine the witness (no tag-teaming)
- Complete the testimony of each witnesses as they are called
- Limit the number of witnesses to prevent repetitious testimony
- Mark each document you admit clearly and separately, noting which party submitted the document
- Ensure the hearing does not become an open discussion, but allow all parties to ask the witness questions as appropriate
- Allow the parties to give a closing statement at the end of the hearing, if desired.
- Complete the "Cost Report" at the close of the hearing and submit it with your written decision to the West Virginia Public Employees Grievance Board.

*what if E parties have potential divergent interests (DHR vs DOP)?*

The parties may submit proposed Findings of Fact and Conclusions of Law, if they agree to waive the timelines for the issuance of the Decision. If the parties elect this option, have this agreement stated on the record, and set a date certain for the submission of these proposals and a new post-mark date for the issuance of the level one Decision.

---

<sup>1</sup>The Board realizes many of the individuals conducting hearings have extensive experience. These Guidelines are to assist with that process.

APPENDIX C

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

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

web site: pegboard.state.wv.us

GRIEVANCE FORM FOR LEVELS 1, 2, AND 3

Grievant's Information: (all information is required) Grievant's Title and/or Classification:

Grievant's Full Name Agency, Institution, Board, Division 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.

Grievant's Home E-mail Address Grievant's Work E-Mail Address Representative's E-Mail Address

STATEMENT OF GRIEVANCE: (Please state the event causing this grievance and list the specific statutes, policies, rules, regulations or agreements you claim have been violated, misapplied or misinterpreted. Additional sheets may be attached.)

RELIEF SOUGHT:

Level One (choose one): Hearing \_\_\_ Conference \_\_\_ Waiver to Level 3 (must read instructions first) Chief Administrator's Initials for Waiver \_\_\_ Date Filed: \_\_\_ Decision Date: \_\_\_ Decision Outcome: \_\_\_

Level Two (choose one, default option is Mediation by Grievance Board): Date Filed: \_\_\_

Mediation by Grievance Board (free) \_\_\_

Before one of the following options can be chosen, it must be agreed to by all parties by signing a Mediation Agreement Form, which must be completed and attached to a copy of this document.

Mediation/Arbitration (free) \_\_\_ Private Mediation (Cost to be paid by parties) \_\_\_

Level Three (choose) Hearing \_\_\_ Submit on Level 1 Hearing Record \_\_\_ Date Filed: \_\_\_

Grievant's Signature

FOR GRIEVANCE BOARD USE ONLY

Docket Number: \_\_\_

Topic: \_\_\_

Level 2 ALJ: \_\_\_

Level 3 ALJ: \_\_\_

This form is to be used at all levels of the grievance procedure.

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

**Level one - W. Va. Code § 6C-2-4 (a)(1)**

o File grievance form with the chief administrator within fifteen (15) days of the grievable event. Indicate whether a conference or a hearing is desired. The grievant must also submit a copy of the grievance form to the West Virginia Public Employees Grievance Board, 808 Greenbrier Street, Charleston, West Virginia 25311. If it is a state employee grievance, a third copy shall be sent to the Division of Personnel.

o Chief administrator must hold the conference or hearing within ten (10) days of receipt of written grievance and issue written decision within fifteen (15) days of the chosen proceeding.

**Level two - W. Va. Code § 6C-2-4 (b)(1)**

o Grievant may appeal the chief administrator decision within ten (10) days of receiving the Level one decision. Indicate which method of alternative dispute resolution is desired.

o The alternative dispute resolution proceeding is to be scheduled within twenty (20) days and the outcome of this proceeding ~~is~~ is to be documented, in writing, ~~in~~ within fifteen (15) days.

**Level three - W. Va. Code § 6C-2-4 (c)(1)**

o Grievant may appeal to the Grievance Board within ten (10) days of the level two decision to request a level three hearing. A copy of this appeal must be sent to the employer.

o A State 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.

o The grievant must select whether to request a level three hearing or to submit the case on the level one hearing record.

o A Level three hearing, if requested, is to be held within a reasonable time following the request. **Note: In practice, hearings are usually held on a date agreed upon by the parties.**

o The Administrative Law Judge must issue a written decision within thirty (30) days of the hearing. **Note: If the parties agree to file proposed findings of fact and conclusions of law, the Board considers the 30-day deadline to be automatically extended until the agreed date.**

**NOTE: WAIVER TO LEVEL THREE**

Pursuant to W. Va. Code § 6C-2-4(3), a grievant may proceed to level three for 2 reasons: 1) with a written agreement between the grievant and the chief administrator, or 2) when the grievant has been discharged, suspended without pay, or demoted or reclassified resulting in a loss of compensation or benefits.

APPENDIX D

**WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

808 Greenbrier Street, Charleston, WV 25311 (304) 558-3361 Fax (304) 558-1106 Toll-Free (866) 747-6743  
web site: pegboard.state.wv.us

**COST ANALYSIS FORM**

Pursuant to *W. Va. Code* § 6C-3-3(c) (3) & (4) each employer is required to report the estimated and actual costs associated with each grievance. The following form is to assist the employer in identifying these costs.

Cost of chief administrator's time:  
(include hearing and conference time, as well as the time required to write the Decision.)

\_\_\_\_\_

Cost of Grievant's time:

\_\_\_\_\_

Cost of Grievant's representative's time, if a public employee:

\_\_\_\_\_

Cost of witnesses' time, if applicable:

\_\_\_\_\_

Cost of preparation time:

\_\_\_\_\_

Cost of additional staff time:  
(Such as secretarial assistance, transcript completion, filing and processing of forms and responses)

\_\_\_\_\_

Cost of materials/equipment/evid \_\_\_\_\_

APPENDIX E

**WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

808 Greenbrier Street, Charleston, WV 25311 (304) 558-3361 Fax (304) 558-1106 Toll-Free (866) 747-6743  
web site: pegboard.state.wv.us

**INTERVENTION FORM**

**Case Information:** (all information is required)

\_\_\_\_\_  
Intervenor,  
v. \_\_\_\_\_ Docket No. \_\_\_\_\_  
\_\_\_\_\_  
Respondent.

Pursuant to *W. Va. Code* § 6C-2-3(e), I request to be made a party in this grievance which may substantially and adversely affect my rights or property. My interest is not adequately represented by the existing parties.

**Intervenor's Information:** (all information is required)

Intervenor's Title and/or Classification:

Intervenor's Full Name	Agency, Institution, Board, Division	Intervenor's Representative (if applicable)
_____	_____	_____
Intervenor's Home Address	Intervenor's Work Address	Representative's Address
_____	_____	_____
City, State and Zip Code	City, State and Zip Code	City, State and Zip Code
_____	_____	_____
Intervenor's Home Telephone No.	Intervenor's Work Telephone No.	Representative's Telephone No.
_____	_____	_____
Intervenor's Home E-mail Address	Intervenor's Work E-Mail Address	Representative's E-Mail Address
_____	_____	_____

hand  
- has  
sit one?

\_\_\_\_\_  
Intervenor's Signature

APPENDIX F

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

808 Greenbrier Street, Charleston, WV 25311 (304) 558-3361 Fax (304) 558-1106 Toll-Free (866) 747-6743  
web site: pegboard.state.wv.us

MEDIATION AGREEMENT FORM

Do not use this form if you intend to use Mediation by Grievance Board.  
This form must be submitted before Mediation-Arbitration or Private Mediation will be permitted.

Case Information: (all information is required)

\_\_\_\_\_  
Grievant,

v.

Docket No. \_\_\_\_\_

\_\_\_\_\_  
Respondent.

**Choice 1 - Mediation-Arbitration:** (this service is free): The Parties request this grievance be submitted to Mediation-Arbitration pursuant to the provisions of *W. Va. Code § 6C-2-4(b)(1)(C)*. An administrative law judge of the Grievance Board will be appointed to serve as a mediator/arbitrator.

\_\_\_\_\_  
Grievant's Signature

\_\_\_\_\_  
Employer's Signature

**Choice 2 - Private Mediation:** (Cost to be paid by parties): The Parties agree this grievance be submitted to mediation by a private mediator pursuant to the provisions of *W. Va. Code § 6C-2-4(b)(1)(B)*.

Private Mediator's Full Name: \_\_\_\_\_

Address: \_\_\_\_\_

City, State and Zip Code: \_\_\_\_\_

Telephone No(s): \_\_\_\_\_

E-mail Address: \_\_\_\_\_

Costs of private mediator shall be borne by the parties as noted below:

Employee Pays: \$ \_\_\_\_\_

Employer Pays: \$ \_\_\_\_\_

\_\_\_\_\_  
Grievant's Signature

\_\_\_\_\_  
Employer's Signature

\_\_\_\_\_  
Private Mediator's Signature

APPENDIX G

**WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

808 Greenbrier Street, Charleston, WV 25311 (304) 558-3361 Fax (304) 558-1106 Toll-Free (866) 747-6743  
web site: pegboard.state.wv.us

**MEDIATION WAIVER FORM**

The parties, after discussion, agree mediation would not be appropriate and/or helpful and request to waive mediation and come to level three. The parties realize the final decision on this issue rests with the administrative law judge assigned to the case.

---

Grievant's Signature

Employer's Signature

Approve \_\_\_\_\_

Deny \_\_\_\_\_

---

Administrative Law Judge






# West Virginia Division of Personnel

Tari Crouse, Acting Director

Joe Manchin III, Governor  
Robert W. Ferguson, Jr., Cabinet Secretary  
STATE PERSONNEL BOARD  
Robert W. Ferguson, Jr., Chairman  
John A. Canfield ♦ Mark W. Carbone  
Sharon Lynch ♦ Eugene Stump  
Elizabeth Walker

## MEMORANDUM

**TO:** Robin Perdue, Director  
Public Employee Grievance Board

**FROM:** Tari Crouse, Acting Director  
Division of Personnel 

**DATE:** September 26, 2007

**SUBJ:** Grievance Board's Proposed Procedural Rule

Attached are the Division of Personnel's comments relative to the Grievance Board's proposed procedural rule. We have limited our comments to those areas with which we are most concerned, and for which we strongly request consideration of our concerns.

Please let me know if you have any questions.

TMC/SF

## **GENERAL COMMENTS/SUGGESTIONS/RECOMMENDATIONS**

DOP suggests that it be made clear that former employees do not have standing to file a grievance, unless an event which occurred during employment is timely grieved and relief is available.

DOP suggests that time frames may be waived if all parties agree, and by ALJ or Chief administrator, if deemed necessary and appropriate. This clarification is necessary to ensure that all parties have the opportunity to be present at hearings and conferences, as DOP, for example, may be scheduled for conflicting hearings and conferences.

### **ALL APPENDICES:**

DOP suggests that, by incorporating forms and instructions in the Rule, the opportunity to make necessary amendments or clarification are limited and complicated. DOP suggests that the Board consider not incorporating procedure and forms into the Rule.

### **SPECIFIC APPENDICES AND GRIEVANCE FORM:**

#### **APPENDIX D. Cost Analysis Form**

DOP suggests that "preparation time" be clearly defined, and that the following costs be included: witness time (if State employees); witness fees; intervener time; supplies, postage, etc, and; cost of document production, in response to a *subpoena duces tecum*.

### **INSTRUCTIONS TO GRIEVANCE FORM**

DOP suggests that it be included in the instructions that time frames can be waived.

DOP suggests that language be added in last "NOTE" addressing the fact that a Chief Administrator shall waive to Level III any case they do not have the authority to decide.

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

**§156-1-1. General**

1.1. Scope - The following procedural rules set forth the practice and procedure established by the West Virginia Education and State Public Employees Grievance Board for carrying out its responsibilities to administer the grievance procedure for educational and state employees contained in W. Va. Code §§ ~~18-29-1~~, 6C-2-1, et seq. and W. Va. Code §§ ~~29-6A-1~~ 6C-3-1, 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~~ all levels of both the grievance procedures. These rules apply to all grievances pending, and those filed after the effective date.

1.2. Authority - W. Va. Code §§ ~~18-29-5(a)~~, and ~~29-6A-5(a)~~: 6C-3-4(b)

DOP suggests that W. Va Code §6C-3-4(b) gives authority to do procedural rules, but should note that § 6C-3-4(c) tells Grievance Board to modify their legislative rules as well. DOP suggests that W. Va. Code §6C-3-4 clearly indicates the intent of the legislature that the Board have both procedural and legislative rules, and for the Grievance Board to provide their rules to the legislative rule making committee for appropriate disposition.

1.3. Filing Date - ~~November 3, 2004~~

1.4. Effective Date - ~~December 4, 2004~~

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

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

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

1.8. Delegation of Powers and Duties - Except where contrary to law, the Board may delegate any of its powers and duties to the director, administrative law judges, or other employees

or agents of the Board. Pursuant to W. Va. Code §§ ~~18-29-1~~ 6C-2-1, et seq., and ~~29-6A-1~~, et seq., 6C-3-1, et seq., the administrative law judges are authorized to take any other action not inconsistent with the grievance procedure statutes and these rules.

The matter of timeliness is not addressed in the Rule. DOP suggests that (§6C-2-3(c)) include something in regard to timeliness, and make it clear that any party may raise the issue of timeliness upon becoming a party.

## **§156-1-2. Definitions**

2.1. All terms defined in W. Va. Code §§ ~~18-29-2~~ and ~~29-6A-2~~ 6C-2-2 shall have the meanings therein ascribed to them for the purpose of these rules; ~~except the term "administrative law judge" will be used, instead of the statutory term "hearing examiner"~~. All other terms shall have the following meanings.

DOP suggests that the Rule also define: administrator/designee; days; intervener; conference; employee representative; mediation, and; mediation/arbitration.

2.1.1. "File" or "filing" means to place an appropriate grievance form or letter evidencing an intent to appeal in an official depository of the United States Postal Service, postage prepaid, and addressed to: 1) the Board's main offices at 808 Greenbrier Street, Charleston, West Virginia 25311, and 2) the agency's chief administrator. If it is a state employee grievance, a third copy shall be sent to the Division of Personnel. A grievance may also be filed by hand-delivery or by facsimile transmission to the appropriate office. A hard copy of any grievance filed by facsimile must be mailed to the Board's main appropriate offices or by facsimile transmission to that office. A hard copy of any grievance filed by facsimile must be mailed to the main office within a reasonable time following the facsimile transmission, and should shall be identified as a duplicate. All grievance forms shall be date stamped when received. No grievance forms may be filed by interdepartmental mail. The key to assessing whether a grievance is properly filed is substantial compliance with the statute and rules. Within two days of receipt, the Grievance Board will e-mail the grievance docket number to the chief administrator.

DOP suggests that the Rule make it clear that ALL parties will receive notice of Level I hearing. Many times third parties do not receive notice until less than 24 hours before hearing or conference, or sometimes not until after the Level I has occurred.

DOP suggests that grievance hand-delivered, as described in line five of 2.2.1., must be date-stamped upon receipt.

2.1.2. "Service" or "Serve" means personal delivery, state interdepartmental mail delivery, or delivery by first class United States Postal Service mail, postage prepaid and addressed to the person to be served at his or her last known address. A Certificate of Service by the person making the service is to be attached to every document requiring service under these rules, indicating

that copies have been served on all parties to the grievance or their representatives.

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

2.1.4. "Subpoena" means an official document, issued by an administrative law judge or ~~a grievance evaluator~~ chief administrator in accordance with the West Virginia Administrative Procedures Act, W. Va. Code §§ 29A-5-1 et seq., requiring the appearance of an individual at a given time and place.

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

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

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

~~2.1.8. "Grievance evaluator" means that individual or governing board authorized to render a decision on a grievance at Levels One, Two or Three of the grievance procedure. "Conference" is a meeting between the grievant and the chief administrator or designee to discuss the issues raised by the grievance, exchange information, and attempt to resolve the grievance. Other individuals may attend this meeting, as needed, to reach a resolution.~~

2.1.9. "Hearing" is a proceeding of relative formality with definite issues of fact or law to be tried, and in which witnesses and parties are entitled to be heard and evidence is submitted through witnesses and documents. A hearing is recorded by mechanical means. (Level One Hearing Guidelines are attached at Appendix B.)

### **§156-1-3. Levels One, ~~Two and Three~~**

3.1. Forms - All ~~governing boards (education) and employers (state) should~~ shall 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 . The chief administrator~~ must provide a grievance form to an employee upon request. (Appendix ~~B C~~ C is the Grievance Form for Education Employees. Appendix ~~C~~ C is the Form for Higher Education Employees. Appendix ~~D~~ D is the Form for State Employees. Copies of these forms can be obtained at the Grievance Board's web site.

3.2. Written procedures - All ~~governing boards (education) and employers (state) should~~

~~establish written shall provide a copy of the grievance procedures relating to employee grievances at Levels One, Two and Three. These procedures should inform employees of the provisions of these rules and of W. Va. Code §§ 18-29-3, et seq., 18A-2-8, and 29-6A-3, et seq. Copies of these procedures should be made available to all existing employees, and procedural rules to their employees. All newly-hired employees should be given a copy of these procedures documents upon commencement of their employment.~~

3.3. ~~Grievance Evaluator~~ Chief administrator authority - ~~Grievance evaluators~~ Chief administrators may issue subpoenas for witnesses and documents if a hearing is requested. ~~Grievance evaluators at Level Three~~ Additionally, chief administrators, in state employee grievances, may issue subpoenas for documents in the possession or control of the Division of Personnel in accordance with W. Va. Code §§ 29A-5-1 et seq. Documents must not be privileged, and must be relevant to a claim or defense in the pending grievance. ~~In addition, documents must be redacted of confidential information; Confidential information in these documents,~~ such as social security numbers and personal health information, must be redacted before disclosure. Further, a chief administrator may consolidate, for hearing or conference, grievances that are substantially similar, and waive grievances he/she is without authority to decide to level three, such as state compensation and classification grievances, and limit the number of relevant witnesses at hearing. If conflicts/questions arise on these issues, any party may submit the matter to the Board's chief administrative law judge for resolution.

DOP suggests that it be vested with right to appeal Level I decisions.

DOP suggests that the Chief Administrator be vested with the authority to join parties at Level I, OR need to make clear that DOP can be a party at any level of process, to ensure that DOP is not left out of the early stages of the grievance process. DOP suggests that it be mandatory that matters be waived for which the Chief Administrator does not have authority to decide.

DOP suggests that "or designee" be added after references to Chief Administrators

DOP suggests adding that All Classification and Compensation grievances shall be waived to Level Three. Eliminate the administrative loop regarding waiver to level three and requiring a review by a judge for decision in these situations. It only delays the proceeding, increases potential cost, and burdens the staff calendars. Classification and Compensation issues must be decided uniformly and with subject matter expertise that is not routinely present with agency-level staff. If not waived to level three, then specific training and expertise (specify credentials) must be required for hearing evaluators prior to reviewing a grievance on the issues of Classification and Compensation. The goal should be efficient decision making at the level fully qualified to review the issue at hand and make a reasonable/just and unbiased determination. That is not likely by agency staff lacking theoretical knowledge and practical application experience in the subject-matter. Maybe a test of relevant knowledge would be appropriate for Level 1 adjudicators prior to hearing issues requiring specific technical knowledge. There may be a history of other issues that should be advanced immediately to level three and if there are obvious ones based on the past record, then they must be specified in

the rule, such as matters pertaining to retirement and insurance law, promulgated rules, etc.

~~3.4. Grievance Evaluator Chief administrator 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 Level one decisions shall be dated, shall be in writing setting forth the decision or decisions and the reasons therefore, and shall be transmitted within the time prescribed to the grievant and any representative named in the grievance. If the grievant is denied the relief sought, the decision shall include the name and address of the individual at the next level to whom appeal may be made. The chief administrator is required to send the level one decision to the Board as well as a copy of the Cost Report Form, Appendix D.~~

DOP suggests that it be clarified that decisions shall be sent to ALL parties, not just the grievant, representative, and Board.

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

#### **§156-1-4. Level Four Two - Mediation**

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

~~4.2. Assignment of Administrative Law Judge - Upon proper filing of a Level Four grievance, the Board shall assign the grievance a docket number, and the employer will be directed to submit the complete record of the lower level proceedings, including the transcript and all exhibits, if any. If a Level Four hearing is requested, the parties will be directed to provide proposed hearing dates for the grievance hearing. Thereafter, the Board shall assign the matter to an administrative law judge and all parties will be notified of the assignment. Once the parties are notified of the assignment, all documents and correspondence are to be delivered to the assigned administrative law judge as provided for in Rule 2.1.2.~~

#### **4.1. Filing, Forms and Essential Matters**

4.1.1. After receiving a level one decision, the grievant may file to level two using the original grievance form, or a copy thereof, to request one of three alternative dispute resolution methods. The parties shall indicate on the grievance form which method is selected. If basic mediation by an administrative law judge is not selected, both parties are required to submit written documentation noting the agreement of all parties on the alternative selected. (See Appendix F - Mediation Agreement Form.)

4.1.2. If the parties agree that mediation would not be appropriate or helpful, they may request to waive mediation. The final decision on whether mediation should be waived rests with the administrative law judge. (See Appendix G for Mediation Waiver Form.)

DOP suggests that classification and compensation issues not be subject to mediation, and should proceed directly to Level III..

4.1.3. If mediation by an administrative law judge is selected, the Grievance Board will request dates, and notify the parties of the time and date of the mediation. If the mediation was unsuccessful, the administrative law judge will issue an order stating this fact.

4.1.4. If private mediation is selected, the grievant is to inform the Grievance Board, in writing, of the outcome of this mediation. If a level three hearing is required, the grievant is required to file his/her request to come to level three on the original grievance form, or a copy thereof.

4.1.5. If mediation-arbitration by an administrative law judge is selected, the Board will request dates, and notify the parties of the time and date of the mediation-arbitration. Standard rules and guidelines governing mediation and arbitration will be followed during this process. If the mediation-arbitration was unsuccessful, the administrative law judge will issue an order stating this fact.

#### 4.2. General Provisions for Mediation and Mediation-Arbitration

4.2.1 All mediations and mediation-arbitrations shall be confidential, and the results of these proceedings shall not be released unless required by law.

4.2.2 Both the employee and the employer shall either appear at the mediation, or through a representative, who has the authority to resolve the grievance. If the grievance is settled through mediation, the parties are required to sign a settlement agreement, usually at the mediation session, reflecting the terms of the resolution. The parties may decide to write the settlement agreement after the mediation, but are required to inform the Board as soon as the document is signed and the settlement is finalized so the grievance can be dismissed from the Board's docket.

DOP suggests that it be made clear that ALL parties are included at all times, as there may be times when third parties, such as DOP, are involved in mediation.

DOP suggests that all settlements be approved by DOP, in accordance with Legislative Rule 143 CSR 1 (2007). Therefore, DOP must be contacted before verbal resolution.

4.2.3. Both the employee and the employer shall either appear at the mediation-arbitration, or through a representative, who has the authority to resolve the grievance. If the grievance is resolved through mediation, the settlement agreement is to be signed by all parties. If the grievance is resolved through a decision, this decision shall be in writing and issued to the parties within the stated time frames.

DOP suggests that the Rule define how an intervener is involved in the mediation and mediation-arbitration process.

### **§156-1-5. Level Three**

~~4.2.~~ 5.1. Assignment of Administrative Law Judge - Upon proper filing of a level three ~~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 a level four~~ three hearing is requested, the parties will be directed to provide proposed hearing dates for the grievance hearing. Thereafter, the Board shall assign the matter to an administrative law judge and all parties will be notified of the assignment. Once the parties are notified of the assignment, all documents and correspondence are to be delivered to the assigned administrative law judge as provided for in Rule 2.1.2.

5.1.1. By agreement, the parties may decide to submit the case on the record developed below. If the administrative law judge assigned to the case agrees, the parties will then be given the option to submit proposed Findings of Fact and Conclusions of Law within a designated time period.

~~4.3.~~ 5.2. Authority of Administrative Law Judge - Each administrative law judge has the authority and discretion to control the processing of each grievance assigned to him or /her and to take any such action considered appropriate consistent with the provisions of W. Va. Code §§~~18-29-5 and 29-6A-5~~ 6C-2-1, et seq.

~~4.4.~~ 5.3. 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. Any pertinent matters involving the grievance can be discussed at that time. If the grievance has been filed directly to level three, as an expedited grievance, the administrative law judge may encourage the parties to mediate prior to a level three hearing. In the ~~ALJ's~~ administrative law judge's discretion, such conferences will be recorded by mechanical means.

~~4.4.1. The specific matters that may be addressed include: explaining the Board's~~

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

~~4.5. 5.4. Ex Parte Communication - No person shall confer or correspond with any member of the Board, its administrative law judges, staff or agents, concerning the merits or substance of a pending grievance, unless all parties to the grievance are present.~~

~~4.5.1. 5.4.1. Any ex parte communication made to an administrative law judge concerning the merits or substance of a grievance shall be promptly disclosed to the other parties and an opportunity for rebuttal allowed.~~

~~4.6. 5.5. Subpoenas and subpoenas duces tecum - Parties who wish to obtain subpoenas to require the attendance and testimony of witnesses, or subpoenas requiring the production of documents, must file a written motion or request for subpoenas with the administrative law judge assigned to the grievance. The written request should be submitted as soon as possible, so that the subpoena can be served at least five days before to the scheduled hearing, as required by W. Va. Code § 29A-5-1(b). Subpoenas and subpoenas duces tecum will be issued in the discretion of the administrative law judge. The written request shall include the full name and address of each person to be subpoenaed (and for subpoenas duces tecum, a complete description of the document or item to be produced), together with a statement accepting responsibility for service, and for witness and mileage fees, if any. Witness and mileage fees shall be the same as are paid witnesses in the courts of this state. Subpoenas and subpoenas duces tecum may be enforced as provided in W. Va. Code § 29A-5-1(b). Administrative law judges shall have the authority to subpoena witnesses and documents for Level Three hearings in accordance with the provision of section one [§ 29A-5-1], article five, chapter twenty-nine-a of this code, upon the written request of any party to the grievance.~~

~~DOP suggests that line five be corrected to read, in pertinent part, that “. . . at least five days before to the scheduled hearing as required by . . . .”~~

~~DOP suggests that the Rule clarify whether this is to be home address, or work address, or where the subpoena can be delivered. Home addresses are personal information, with disclosure protection in § 5A-8-21. Also, DOP suggests guidance on what action to take if the address of a witness is~~

unknown, and whether the agency is required to provide it to a grievant, or is prohibited from doing so under § 5A-8-21.

DOP suggests that the Rule clarify: whether witness fees are to be paid, even if the witness is a State employee; whether employees are required to file for leave in order to receive a witness fee; whether agencies are expected to put staff on paid hearing leave and then pay them a witness fee, and; if there is no subpoena, how is a witness excused to attend (if a State employee), and how the witness is compensated.

~~4.6.1.~~ 5.5.1. All parties shall provide the Board and all other parties with a list of the witnesses it intends to call at the ~~Level IV~~ level three hearing, whether subpoenaed or not, at least six days prior to the hearing.

~~4.6.2.~~ 5.5.2. Upon motion made promptly, and in any event at or before the time specified in the subpoena for compliance, an administrative law judge may (1) quash or modify a subpoena or subpoena duces tecum if it is unreasonable and oppressive, or requires disclosure of privileged information or (2) condition denial of the motion upon the advance payment by the person in whose behalf the subpoena duces tecum is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

~~4.7.~~ 5.6. Motions - An application to an administrative law judge for an order must be by motion, in writing, unless made during a hearing, and must be filed and served upon all parties promptly, as soon as the facts or grounds upon which the motion is based becomes known to the moving party. All motions are to be accompanied by a concise statement of their basis, both legal and factual. All motions must be served by the moving party upon all other parties at the same time it is presented to the administrative law judge. Upon receiving a written motion, all non-moving parties shall be given a reasonable time within which to file a written response. A certificate of service must accompany all motions.

~~4.7.1.~~ 5.6.1. If any party desires a hearing on a motion, he shall make a request for a hearing at the time of the filing of his motion or response. An administrative law judge may, in his discretion, hold a hearing on a motion if it is determined that a hearing is necessary to the development of a full and complete record on which a proper decision can be made. Such hearing may be conducted via telephone conference call, with all parties or their representatives participating.

~~4.7.2.~~ 5.6.2. If a situation necessitating a motion arises immediately before or during a hearing, an oral motion may be made at the hearing. The moving party is to be prepared to proceed with the hearing if the motion is denied and the granting of the motion would have operated to delay the hearing.

~~4.8.~~ 5.7. 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. Unless the requesting party demonstrates urgent circumstances, the request for a continuance will not be granted until the parties have agreed to a new hearing date. Requests for a continuance of a hearing will be granted upon a showing of good cause. Unless time does not permit, a request for a continuance is to be made in writing to the administrative law judge and served upon all parties of record. The administrative law judge may, upon his or her own motion, continue hearings or other proceedings.

~~4-9:~~ 5.8. Remand/transfer - Any party may move to remand/transfer (return to a lower level of the grievance procedure) a grievance. Requests for remand/transfer of a grievance will be granted upon a showing of good cause. The administrative law judge may, upon his or her own motion, remand/transfer a grievance for good cause.

~~4-10:~~ 5.9. Recusal - Any party may move to recuse (disqualify) the administrative law judge assigned to their grievance. Motions for recusal will be considered only in accordance with Rule ~~4-7~~ 5.6 and will be granted only for good cause shown, in the discretion of the administrative law judge. A motion for recusal will not operate to automatically continue a hearing or other action on the grievance; provided, that any party may make a separate motion for a continuance until such time as a decision is made on the motion for recusal.

~~4-10-1:~~ 5.9.1. The administrative law judge's decision on a motion to recuse may be appealed to the chief administrative law judge, and if the chief administrative law judge is the judge sought to be recused, then the appeal shall be to the Director of the Board. This decision may then be appealed to the Chairperson of the Board Board or its Chairman by any party to the grievance, in accordance with Rule ~~4-7~~ 5.6. The Chairperson will then call an emergency meeting of the Board to respond to the Motion. 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.

DOP suggests that the Director of the Grievance Board would be the more appropriate person to serve in the role of next level of appeal for recusal issues. That way there is no time delay, and the Director could report on recusal requests to the Board at each Board meeting.

~~4-11:~~ 5.10. Errata Notice - After the administrative law judge issues a final decision in a grievance, the Board retains jurisdiction to amend the decision to correct clerical errors by errata notice during the appeal period.

DOP suggests that the appeal period of a final decision be clarified.

~~4-12:~~ 5.11. Failure to state a claim - A grievance may be dismissed, in the discretion of the administrative law judge, if no claim upon which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested.

~~4-13.~~ 5.12. Discovery - ~~W. Va. Code §§ 18-29-6 and 29-6A-6 of the grievance procedure statutes encourage~~ The Board strongly encourages parties to participate in informal discovery prior to hearing. All employers must produce, prior to any hearing on the merits, any documents requested in writing by the grievant that are relevant and are not privileged. Further, if an employer intends to assert the application of any statute, policy, rule, regulation or written agreement or submits any written response to the filed grievance at any level, a copy is to be forwarded to the grievant and/or any representative of the grievant named in the grievance.

~~4-13-1.~~ 5.12.1. The administrative law judge shall have authority to order such additional discovery, by way of deposition, interrogatory, document production, or otherwise, as considered necessary for a fair determination of the issues in dispute, consistent with the expedited nature of the grievance procedure. When a party serves another party with a discovery request, that request need not be filed with the Board.

~~4-13-2.~~ 5.12.2. Parties shall attempt to resolve any discovery disputes among themselves before making a motion requesting an order compelling discovery. Any such motion must state that the parties have attempted to resolve the dispute, as well as the reason why the discovery is needed.

~~4-14.~~ 5.13. Joinder - Any party may move to join (or add as a party to the grievance) a person or entity necessary to grant complete relief in the grievance by filing a motion in accordance with Rule 4.7. The administrative law judge may on his or her own motion, join a person or entity necessary to grant complete relief in the grievance. The Division of Personnel must be joined and made a party in any state employee grievance involving classification and/or compensation matters.

DOP suggests that joinder or party status be applied to it at all levels.

~~4-15.~~ 5.14. Consolidation - Separate grievances filed by two or more employees may be consolidated for hearing and decision because the grievances contain identical or similar issues. Grievances may be consolidated by agreement of all parties, ~~or by the administrative law judge,~~ or the ~~grievance evaluator~~ chief administrator on his or /her own motion. Any party may move to join two or more grievances filed by the same party for purposes of hearing and/or decision, or the ~~grievance evaluator at Level Three~~ chief administrator or the administrative law judge may join such cases for united consideration on his or /her own motion.

~~4-16.~~ 5.15. Failure to pursue - Once no action by a party has been taken on a grievance for ~~four~~ two months, the Board will send all parties a letter, by certified mail, advising that the case will be dismissed from the docket of the Board twenty calendar days from the date of the letter, unless any party objects and can demonstrate, in writing, why the case should not be dismissed. If no timely written objection is received by the Board, an order of dismissal will be entered. If timely written objection is received by the Board, the grievance will be promptly scheduled for hearing or other action will be taken consistent with the orderly disposition of the grievance. If neither the grievant nor the grievant's representative, if applicable, appears for a scheduled grievance hearing, the

administrative law judge may issue a show cause order, requiring the grievant to show good cause for his or her absence, and advising that the failure to respond with a set time limit will result in the dismissal of the grievance for failure to prosecute.

~~4.17.~~ 5.16. 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. If, at the close of hearing, the parties wish to submit proposed Findings of Fact and Conclusions of Law, the request shall be granted, but unless there are exigent circumstance, the time frame for submission should be no greater than thirty days.

~~4.18.~~ 5.17. Location - All ~~Level Four~~ level two and three proceedings will be conducted in the Board's offices; provided that, upon written motion in accordance with Rule ~~4.7~~ 5.6 and for good cause shown, the administrative law judge may, in his/~~or~~ her discretion, conduct the hearing in another location agreeable to the parties. In such cases, the party requesting the change in hearing site shall be responsible, at no expense to the Board, for providing the following: a suitable hearing room; a separate area for witnesses; such other facilities, equipment or personnel as necessary; and a certified copy of the transcript of the hearing and delivery of the same to the administrative law judge within a specific number of days after the hearing. However, the administrative law judge has the discretion to use the Board's recording equipment to record the testimony, at no cost to the parties.

~~4.19.~~ 5.18. Final disposition - Grievances may be disposed of in three ways: by decision on the merits; nonappealable dismissal order; or appealable dismissal order.

~~4.19.1.~~ 5.18.1. Decisions on the merits will result in the granting or denying of a grievance, in whole or in part. All decisions are maintained by the Board and are transmitted electronically, monthly to the Office of the Secretary of State, Capitol Complex, Charleston, West Virginia 25305. Decisions on the merits are appealable to the Kanawha County Circuit Court ~~or the circuit court of the county in which the grievance arose.~~

~~4.19.2.~~ 5.18.2. Nonappealable dismissal orders may be based upon grievances dismissed for the following: settlement, withdrawal and, in accordance with Rule ~~4.15~~ 5.15, a party's failure to pursue.

~~4.19.2.~~ 5.18.3. Appealable dismissal orders may be issued in grievances dismissed for all other reasons, including, but not limited to, failure to state a claim or a party's failure to abide by an appropriate order of an administrative law judge. Appeals of any cases dismissed pursuant to this provision are to be made in the same manner as appeals of decisions on the merits.

~~4.20:~~ 5.19. Appeals to circuit court - In every matter appealed to circuit court, the appealing party shall serve a copy of the appeal petition upon the Board as required by W. Va. Code § 29A-5-4(b), and will provide the Board with the civil action number so that the certified record can be properly filed with the circuit court. The party prevailing on the appeal shall furnish the Board with a copy of the final decision of the circuit court and any accompanying order within twenty days of its receipt.

~~4.21:~~ 5.20. Burden of proof - The grievant bears the burden of proving his case by a preponderance of the evidence, except in disciplinary matters, where the burden is on the employer to prove that the action taken was justified. Any party asserting the application of an affirmative defense bears the burden of proving that defense by a preponderance of the evidence.

~~4.22:~~ 5.21. Advisory opinions - The Board will, under no circumstances, issue an advisory opinion, i.e., an opinion on an issue not directly raised before the Board in a grievance.

~~4.23:~~ 5.22. Registration of employee organizations - All labor unions or other organizations representing West Virginia education and/or state employees before the Board should register at the Board's main office in Charleston in accordance with W. Va. Code § 18-29-2(q) and W. Va. Code § 29-6A-2(f). (See Appendix H for Employee Organization Registration Form.)

~~4.24:~~ 5.23. Interpreter Appointment - In accordance with the requirements of W. Va. Code § 5-14A-5, if a hearing impaired person makes a request for an interpreter, the Board, at its own expense, shall appoint an interpreter to interpret the proceeding to the hearing impaired person and/or to interpret his or her testimony.

#### **§156-1-6. Claims for Relief by Default**

6.1. A grievant seeking to prevail by default must file, with the chief administrator, a written claim notice of intent to proceed to the next level or to enforce the default within ten days of the default. ~~seeking relief by default with his or her employer and may, at the same time, file the claim with the Board. If the chief administrator objects to the default, After the employer receives the written claim for default, it he/she may file a request for a hearing with the Board within five working days. Upon receipt of a claim for relief by default of the chief administrator's objection, the Board will place the claim for default on its docket, assign a docket number, and set the claim matter 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 or contrary to proper and available remedies. The default proceeding is usually bifurcated into two hearings. Once a grievant files a written claim for relief by default with the Board at Level Four, or the chief administrator files an objection, 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.~~

§156-1-7. Representation - Employees are entitled to representation at any step of the procedure, including meetings held with employees to discuss disciplinary action.

DOP suggests that the issue of when representation is permitted needs be further clarified, as it is already an issue that has been raised multiple times since the passing of the legislation. Specifically, when representation is triggered. Whether this includes coaching/counseling sessions, verbal reprimands, etc. Or only when a pre-determination conference is required (suspension w/o pay, demotion, or dismissal).

DOP suggests that it be clarified whether a meeting may be "continued" until the employee secures a representative, or until a time "convenient" for the representative. Also, how long an employer must wait for an employee to secure representation.

APPENDIX A

**CERTIFICATE OF SERVICE AND MAILING**

**THE UNDERSIGNED** certifies the attached [*NAME OF DOCUMENT*] has been sent to the following persons and addresses by United States Mail, postage prepaid, by Facsimile, by State Interdepartmental Mail, or by Personal Hand Delivery:

Certified sent this the \_\_\_\_ day of \_\_\_\_\_, 200\_.

---

Title:

Appendix B  
Level One Hearing Guidelines<sup>1</sup>

At a level one hearing, the chief administrator, or his designee, should:

- Utilize a sign-in sheet for all parties and witnesses
- Turn on the recording device prior to any discussion about the grievance
- Introduce himself or herself and explain what will happen during the hearing
- Clarify any necessary issues before starting the actual hearing process
- Allow only one person to talk at a time
- Identify who has the burden of proof
- Allow the parties to make a brief opening statement if desired
- Start the hearing with the party that has the burden of proof
- Swear (or affirm) each witnesses in separately and ask his/her name and position on the record
- Allow each party to question and cross-examine each witness, but only one person for each party  
may cross-examine the witness (no tag-teaming)
- Complete the testimony of each witnesses as they are called
- Limit the number of witnesses to prevent repetitious testimony
- Mark each document you admit clearly and separately, noting which party submitted the  
document
- Ensure the hearing does not become an open discussion, but allow all parties to ask the witness  
questions as appropriate
- Allow the parties to give a closing statement at the end of the hearing, if desired.
- Complete the "Cost Report" at the close of the hearing and submit it with your written decision to  
the West Virginia Public Employees Grievance Board.

The parties may submit proposed Findings of Fact and Conclusions of Law, if they agree to waive the timelines for the issuance of the Decision. If the parties elect this option, have this agreement stated on the record, and set a date certain for the submission of these proposals and a new post-mark date for the issuance of the level one Decision.

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<sup>1</sup>The Board realizes many of the individuals conducting hearings have extensive experience. These Guidelines are to assist with that process.

APPENDIX C

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

808 Greenbrier Street, Charleston, WV 25311 (304) 558-3361 Fax (304) 558-1106 Toll-Free (866) 747-6743
web site: pegboard.state.wv.us

GRIEVANCE FORM FOR LEVELS 1, 2, AND 3

Grievant's Information: (all information is required) Grievant's Title and/or Classification: \_\_\_\_\_

Grievant's Full Name Agency, Institution, Board, Division 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.

Grievant's Home E-mail Address Grievant's Work E-Mail Address Representative's E-Mail Address

STATEMENT OF GRIEVANCE: (Please state the event causing this grievance and list the specific statutes, policies, rules, regulations or agreements you claim have been violated, misapplied or misinterpreted. Additional sheets may be attached)

RELIEF SOUGHT:

Level One (choose one): Hearing \_\_\_ Conference \_\_\_ Waiver to Level 3 (must read instructions first) Chief Administrator's Initials for Waiver
Date Filed: \_\_\_ Decision Date: \_\_\_ Decision Outcome: \_\_\_

Level Two (choose one, default option is Mediation by Grievance Board): Date Filed: \_\_\_\_\_

Mediation by Grievance Board (free) \_\_\_\_\_

Before one of the following options can be chosen, it must be agreed to by all parties by signing a Mediation Agreement Form, which must be completed and attached to a copy of this document.

Mediation/Arbitration (free) \_\_\_\_\_ Private Mediation (Cost to be paid by parties) \_\_\_\_\_

Level Three (choose Hearing \_\_\_ Submit on Level I Hearing Record \_\_\_ Date Filed: \_\_\_\_\_

FOR GRIEVANCE BOARD USE ONLY

Docket Number: \_\_\_\_\_

Topic: \_\_\_\_\_

Level 2 ALJ: \_\_\_\_\_

Level 3 ALJ: \_\_\_\_\_

---

Grievant's Signature

This form is to be used at all levels of the grievance procedure.

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

**Level one - W. Va. Code § 6C-2-4 (a)(1)**

- o File grievance form with the chief administrator within fifteen (15) days of the grievable event. Indicate whether a conference or a hearing is desired. The grievant must also submit a copy of the grievance form to the West Virginia Public Employees Grievance Board, 808 Greenbrier Street, Charleston, West Virginia 25311. If it is a state employee grievance, a third copy shall be sent to the Division of Personnel.
- o Chief administrator must hold the conference or hearing within ten (10) days of receipt of written grievance and issue written decision within fifteen (15) days of the chosen proceeding.

**Level two - W. Va. Code § 6C-2-4 (b)(1)**

- o Grievant may appeal the chief administrator decision within ten (10) days of receiving the Level one decision. Indicate which method of alternative dispute resolution is desired.
- o The alternative dispute resolution proceeding is to be scheduled within twenty (20) days and the outcome of this proceedings is to be documented, in writing, in fifteen (15) days.

**Level three - W. Va. Code § 6C-2-4 (c)(1)**

- o Grievant may appeal to the Grievance Board within ten (10) days of the level two decision to request a level three hearing. A copy of this appeal must be sent to the employer.
- o A State 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.
- o The grievant must select whether to request a level three hearing or to submit the case on the level one hearing record.
- o A Level three hearing, if requested, is to be held within a reasonable time following the request. **Note: In practice, hearings are usually held on a date agreed upon by the parties.**
- o The Administrative Law Judge must issue a written decision within thirty (30) days of the hearing. **Note: If the parties agree to file proposed findings of fact and conclusions of law, the Board considers the 30-day deadline to be automatically extended until the agreed date.**

**NOTE: WAIVER TO LEVEL THREE**

Pursuant to W. Va. Code § 6C-2-4(3), a grievant may proceed to level three for 2 reasons: 1) with a written agreement between the grievant and the chief administrator, or 2) when the grievant has been discharged, suspended without pay, or demoted or reclassified resulting in a loss of compensation or benefits.

APPENDIX D

**WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

808 Greenbrier Street, Charleston, WV 25311 (304) 558-3361 Fax (304) 558-1106 Toll-Free (866) 747-6743  
web site: pegboard.state.wv.us

**COST ANALYSIS FORM**

Pursuant to *W. Va. Code* § 6C-3-3(c) (3) & (4) each employer is required to report the estimated and actual costs associated with each grievance. The following form is to assist the employer in identify these costs.

Cost of chief administrator's time:  
(include hearing and conference time, as well as the time required to write the Decision.)

---

Cost of Grievant's time:

---

Cost of Grievant's representative's time, if a public employee:

---

Cost of witnesses' time, if applicable:

---

Cost of preparation time:

---

Cost of additional staff time:  
(Such as secretarial assistance, transcript completion, filing and processing of forms and responses)

---

APPENDIX E

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

808 Greenbrier Street, Charleston, WV 25311 (304) 558-3361 Fax (304) 558-1106 Toll-Free (866) 747-6743  
web site: pegboard.state.wv.us

INTERVENTION FORM

Case Information: (all information is required)

---

Intervenor,

v. Docket No. \_\_\_\_\_

---

Respondent.

Pursuant to *W. Va. Code* § 6C-2-3(e), I request to be made a party in this grievance which may substantially and adversely affect my rights or property. My interest is not adequately represented by the existing parties.

Intervenor's Information: (all information is required)

Intervenor's Title and/or Classification:

Intervenor's Full Name	Agency, Institution, Board, Division	Intervenor's Representative (if applicable)
Intervenor's Home Address	Intervenor's Work Address	Representative's Address
City, State and Zip Code	City, State and Zip Code	City, State and Zip Code
Intervenor's Home Telephone No.	Intervenor's Work Telephone No.	Representative's Telephone No.
Intervenor's Home E-mail Address	Intervenor's Work E-Mail Address	Representative's E-Mail Address

\_\_\_\_\_  
Intervenor's Signature

APPENDIX F

WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

808 Greenbrier Street, Charleston, WV 25311 (304) 558-3361 Fax (304) 558-1106 Toll-Free (866) 747-6743
web site: pegboard.state.wv.us

MEDIATION AGREEMENT FORM

Do not use this form if you intend to use Mediation by Grievance Board.

This form must be submitted before Mediation-Arbitration or Private Mediation will be permitted.

Case Information: (all information is required)

Grievant,

v.

Docket No.

Respondent.

Choice 1 - Mediation-Arbitration: (this service is free): The Parties request this grievance be submitted to Mediation-Arbitration pursuant to the provisions of W. Va. Code § 6C-2-4(b)(1)(C). An administrative law judge of the Grievance Board will be appointed to serve as a mediator/arbitrator.

Grievant's Signature

Employer's Signature

Choice 2 - Private Mediation: (Cost to be paid by parties): The Parties agree this grievance be submitted to mediation by a private mediator pursuant to the provisions of W. Va. Code § 6C-2-4(b)(1)(B).

Private Mediator's Full Name:

Address:

City, State and Zip Code:

Telephone No(s).

E-mail Address:

Costs of private mediator shall be borne by the parties as noted below:

Employee Pays: \$

Employer Pays: \$

Grievant's Signature

Employer's Signature

Private Mediator's Signature

APPENDIX G

**WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

808 Greenbrier Street, Charleston, WV 25311 (304) 558-3361 Fax (304) 558-1106 Toll-Free (866) 747-6743  
web site: pegboard.state.wv.us

**MEDIATION WAIVER FORM**

The parties, after discussion, agree mediation would not be appropriate and/or helpful and request to waive mediation and come to level three. The parties realize the final decision on this issue rests with the administrative law judge assigned to the case.

---

Grievant's Signature

Employer's Signature

Approve \_\_\_\_\_

Deny \_\_\_\_\_

---

Administrative Law Judge



## Chriceous (Cricket) Powell

---

**From:** Steve Fesenmaier [fesenms@wvlc.lib.wv.us]  
**Sent:** Friday, September 21, 2007 3:36 PM  
**To:** WVGB Account  
**Subject:** Comments on new grievance rules

Dear Grievance Board members -

1) Allow the employee grievants to use interdepartmental mail for filing grievances. This can reduce the overall cost to the employee. Ask the grievance board to Note that the grievant should retain a copy of each document filed at each step for their own records. The rule is confusing and at one point says yes and then says no. Clear up the rule and allow interdepartmental mail where appropriate.

2) Require the employer / administrator to inform every employee prior to any predetermination meeting that the employee has the right to have a representative present in the meeting. This is called an affirmative right and should be added to the proposed rule.

3) If a hearing examiner is going to prohibit witnesses, the hearing examiner must state the reason (s) in writing and delivered to the grievant at least three days prior to any scheduled hearing. The rules should also allow a grievant to offer rebuttal testimony to that written denial of witnesses which shall become entered into the official record at any step in the grievance process where witnesses are denied. This is basic due process and should be added to the rule.

Steve Fesenmaier, Research Librarian, West Virginia Library Commission

## **Chrificeous (Cricket) Powell**

---

**From:** unclesteve197@yahoo.com  
**Sent:** Friday, September 21, 2007 4:15 PM  
**To:** WVGB Account  
**Subject:** Comments on grievance proposed rules

Dear Grievance Board members -

- 1) Allow the employee grievants to use interdepartmental mail for filing grievances. This can reduce the overall cost to the employee. Additionally the grievance board should Note in the rule - that the grievant should retain a copy of each document filed at each step for their own records. The rule on interdepartmental mail is confusing and at one point says yes and then says no. Clear up the rule and allow interdepartmental mail where appropriate.
- 2) Require the employer / administrator to inform every employee prior to any predetermination meeting that the employee has the right to have a representative present in the meeting. This provision should be made into an affirmative right and should be added to the proposed rule as an affirmative due process right.
- 3) If a hearing examiner is going to prohibit witnesses, the hearing examiner must state the reason(s) in writing and such denial shall be delivered to the grievant at least three days prior to any scheduled hearing. The rules should also allow a grievant to offer rebuttal testimony either verbally or in writing to all written denial of witnesses and which rebuttals shall become entered into the official record at any step in the grievance process where witnesses are denied. This is basic due process and should be added to the rule.

---

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(304) 285-2500

333 West Vine Street, Suite 1700  
Lexington, Kentucky 40507-1639  
(859) 252-2202

Howard E. Seufer, Jr.  
Telephone — (304) 347-1776  
Facsimile — (304) 347-1746



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Charleston, West Virginia 25301

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September 28, 2007

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(304) 485-8500

RECEIVED

SEP 28 2007

WV Education & State  
Employees Grievance Board  
Address:  
hseufer@bowlesricc.com

Robin B. Perdue, Director  
W. Va. Public Employees Grievance Board  
808 Greenbrier Street  
Charleston, West Virginia 25311

BY EMAIL AND HAND DELIVERY

Re: Comments on Draft Procedural Rules

Dear Director Purdue:

Please thank the Grievance Board for considering the following comments about the draft procedural rules. The comments are offered solely to help ensure that the new rules are unassailable from a legal point of view and succeed in resolving public education employee grievances in a fair, efficient, cost-effective, and consistent manner

The Board is to be commended for modeling the proposed rules so closely after the rules of the "old" Grievance Board. Over the years, the parties to public education grievances grew familiar and comfortable with those rules. For the most part, the old rules worked well. By retaining so many of the provisions of the prior rules, the Public Employee Grievance Board shortens the learning curve for those of us who must now operate under the new procedure.

Each of the following comments is prefaced by the section of the proposed new rules to which it relates.

A. **Section 2.1.8.** This section defines the word "conference." However, in the draft rules, "2.1.8" is struck through at the beginning of the paragraph and not replaced with another number. Surely this is unintentional, as the elimination of "2.1.8" would result in the policy jumping from "2.1.7" to "2.1.9." It can be corrected by simply restoring "2.1.8" at the beginning of the paragraph.

B. **Section 2.1.8.** After referring to the Level One conference between the grievant and the chief administrator or designee, 2.1.8 states that "[o]ther individuals may attend this meeting, as needed, to reach a resolution." Although technically correct, the wording may leave the

Robin B. Perdue, Director  
September 28, 2007  
Page 2

impression that the parties will determine which witnesses and others will attend a Level One conference.

On this point, the statute, W. Va. Code § 6C-2-3(k)(4), makes clear that the chief administrator has the discretion to decide which witnesses will appear:

At level one, the chief administrator may call witnesses and may allow parties to call witnesses during a conference or hearing upon request.

To set realistic expectations, draft section 2.1.8 could be amended to reflect that rule. For example, it could state "The chief administrator may call upon other individuals to attend this meeting, as needed, to reach a resolution."

C. **Section 3.3.** Section 3.3 states that "[c]hief administrators may issue subpoenas for witnesses and documents if a hearing is requested." However, the Legislature, in enacting the new Public Employees Grievance Procedure, appears to have withheld the subpoena power from chief administrators. [This is in contrast to the statutes that governed the old education employees grievance process. They expressly authorized chief administrators to issue subpoenas in education employee grievances at levels One and Two. *See* W. Va. Code § 18-29-4(b).]

Given the legal gravity of subpoenas, it seems doubtful that the Public Employees Grievance Board can lawfully vest chief administrators with the subpoena power when the Legislature did not. Indeed, the very section of the Administrative Procedure Act cited in proposed section 3.3, W. Va. Code § 29A-5-1, seems clearly to recognize that only the Legislature can empower an agency to issue subpoenas:

For the purpose of conducting a hearing in any contested case, any agency which now has or may be hereafter *expressly granted by statute* the power to issue subpoenas or subpoenas duces tecum or any member of the body which comprises such agency may exercise such power in the name of the agency. Any such agency or any member of the body which comprises any such agency may exercise such power in the name of the agency for any party upon request. Under no circumstances shall this chapter be construed as granting the power to issue subpoenas or subpoenas duces tecum to any agency or to any member of the body of any agency which does not now *by statute expressly have such power*.

W. Va. Code § 29A-5-1(b) (italics supplied).

It thus appears advisable to strike from the draft rules any reference to the issuance of subpoenas by chief administrators. [In contrast, the new W. Va. Code § 6C-2-3(k)(4) expressly

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authorizes the Grievance Board's administrative law judges to issue witness subpoenas, and thus provisions like section 5.5 of the proposed rules are justified.]

D. **Section 3.4.** The new grievance legislation provides, in W. Va. Code § 6C-2-4(a)(2), that the chief administrator, at Level One, shall "*issue* a written decision within fifteen days of the conference or hearing." The corresponding section of the draft procedural rules, section 3.4., requires that the written level one decision be "*transmitted* within the time prescribed."

The terms "issue" and "transmit" are not necessarily the same. "Issue" may be understood to require the chief administrator to send the written decision to the grievant within 15 days, whereas "transmit" may be understood to require the chief administrator to send, *and the grievant to receive*, the written decision within 15 days.

The differences in meaning would be trite and insignificant were it not for the fact that under the new grievance procedure, a grievant prevails by default "if a required response is not made by the employer within the time limits established in this article." Thus, the outcome of a grievance may rest on whether the chief administrator decided a Level One grievance in a timely fashion.

To avoid ambiguity in such a situation, consider using in section 3.4 the same term ("issue") that appears in the statute enacted by the Legislature. Also, it would be helpful to explain in section 3.4 what it means to "issue" a decision. For example, is placing the written decision in the U.S. mail sufficient?

This is an opportunity to eliminate a controversy that might otherwise come before the Grievance Board's administrative law judges in default proceedings under proposed section 6.1.

E. **Section 4.1.2.** This section of the rules allows the parties to agree to seek permission to waive mediation at Level Two. However, the proposed rule does not allow the parties to make the ultimate decision to waive. Instead, the draft rule states that an administrative law judge will make the final decision on whether mediation should be waived.

In that respect, the proposed rule may conflict with the legislation establishing the new grievance procedure.

W. Va. Code § 6C-2-4(a)(2) requires the chief administrator to issue a written Level One decision within fifteen days after the conference or hearing. The very next sentence of the statute, W. Va. Code § 6C-2-4(a), then states that "an employee may proceed directly to level three upon the agreement of the employee and the chief administrator." The statute leaves the decision to the parties and does not appear to allow the administrative law judge to veto a mutual agreement to skip mediation at Level Two.

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September 28, 2007  
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F. **Section 4.2.** As part of voluntary mediation services under the “old” grievance procedure, 156 C.S.R. 6-3.1 provided that

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

The draft procedural rules contain no comparable prohibition in the section 4.2 provisions for mediation (and mediation-arbitration).

Because the success of alternative dispute resolution may well hinge on the parties’ openness with the ALJ-mediator, consideration should be given to encouraging openness by amending the proposed rules to provide that

an administrative law judge involved in an alternative dispute resolution process at Level Two shall not hear the grievance at Level Three nor be consulted at Level Three regarding the merits of the grievance.

G. **Section 5.1.** Section 5.1 of the draft rules requires employers, at Level Three, to submit the complete record of any Level One hearing, including a transcript.

Under the “old” grievance procedure, education employers were required to bear the expense of providing a transcript of all hearings held at Levels Two and Three. W. Va. Code § 18-29-6 stated, in pertinent part, that

[t]he 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 institution shall be responsible for all costs relating to preparation and duplication of the transcript.*

The “institution” was defined in W. Va. Code § 18-29-2(e) as “any state institution of higher education, the governing boards of higher education, 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.”

In contrast, the new grievance procedure legislation contains no such provision requiring employers to bear the cost of transcripts. Instead, in the provisions covering conferences and hearings at all levels, the legislation appears to shift the costs of all hearing transcripts to the Public Employees Grievance Board:

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All the testimony and evidence at a hearing shall be recorded by mechanical means, and a copy of the recording provided to any party upon request. *The board is responsible for paying for and promptly providing a certified transcript of a hearing to a requesting party or the court for a mandamus or appellate proceeding.*

W. Va. Code § 6C-2-3(k)(8). The “board” is defined in W. Va. Code § 6C-2-2(a) as “the West Virginia Public Employees Grievance Board created in article three of this chapter.”

Consider amending the proposed procedural rules to specify any procedures or limitations that employers should follow to conserve costs on the Grievance Board’s behalf when Level One hearings must be transcribed

**H. Section 6.1.** In addressing claims for relief by default, Section 6.1 requires chief administrators to file hearing requests “within five working days.” In doing so, it raises what may become a controversy in grievances involving public school employees under the new grievance procedure: what is a “working day”?

The Legislature used the same phrase, “working day,” in defining the word “days” for purposes of all the deadlines and time lines of the new grievance procedure:

(c) "Days" means *working days* exclusive of Saturday, Sunday, official holidays and any day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice.

The term “working days” is not defined in the statute or the regulations. Nor was it used in the “old” grievance procedure statute governing public school grievances.

I have already been party to one discussion about the new grievance procedure in which it was contended that, as to grievants who are county board of education employees, “working days” are days when the *grievant* is working. In other words, it has been contended that the statute’s reference to “working days” means that the time lines for filing and appealing grievances do not include days outside of an education employee’s 200-day, 210-day, 220-day, 230-day, or 240-day contract, since days outside the contract are not “working days” for those grievants. (Would the time limits for action by chief administrators and administrative law judges be measured based upon *their* working days?)

The inconsistencies and delays inherent in such an understanding of “working days” could slow the grievance process to a crawl and present chief administrators and administrative law judges with procedural dilemmas. Time lines would cease running over the long summer months for most public school teachers and service employees, but not for all. Deadlines in grievances brought on behalf of multiple employees could be different for different employees. When an

Robin B. Perdue, Director  
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intervenor is involved, the intervenor could have a different annual contract term that the actual grievant, with the result that the intervenor could be entitled to a hearing and a decision before the deadlines arrive for hearing and deciding the grievant's decision. How would substitutes be handled?

The new procedural rules offer a way to bring some sense to the discussion, perhaps by including in the definitions section (Section 2) the legislative definition of the term "days" and a reasonable definition of the term "working days." This would be a constructive way to address legislative draftsmanship that was either unintentionally ambiguous or based upon the assumption that all employees covered by the new grievance procedure work year-round.

**I. Appendix E.** The intervention provision of the new grievance procedure states that

[u]pon a timely request, any employee may intervene and become a party to a grievance at any level *when the employee demonstrates that the disposition of the action may substantially and adversely affect his or her rights or property and that his or her interest is not adequately represented by the existing parties.*

W. Va. Code § 6C-2-3(f) (italics supplied). Accordingly, an employee seeking to intervene must show that the disposition of the case will substantially and adversely affect his or her rights or property, and that his or her interest is not adequately protected by the other parties to the case. *See also* Section 3.5 of the proposed procedural rules.

If experience with intervention under the "old" grievance procedure is any indication, intervention requests will be filed in advance of grievance hearings and often granted or denied based solely upon the paperwork. In other instances, the request to intervene will be litigated at the outset of a grievance hearing.

It might be helpful to all concerned if the form that an employee fills out to request intervention (Appendix E to the draft rules) includes a place for the employee to state how the disposition of the grievance could substantially and adversely affect his or her rights or property. In appropriate cases, this would facilitate pre-hearing consideration of intervention requests. Even where the ruling on an intervention request is postponed until an actual grievance hearing, the information entered on the form would help the existing parties prepare to support or resist the request.

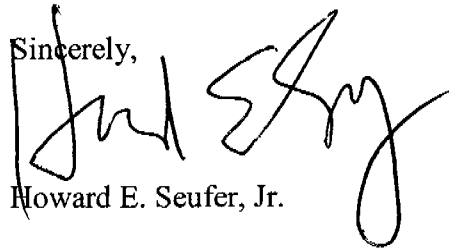
**A Suggestion About the Draft Rules in General:** Beginning in sections 2.1.2 and 2.1.3, respectively, the proposed rules sometimes refer to "his" and "he," and not "hers" and "she." In places the rules use the term "he/she" (e.g., Section 3.3) "his/her" (e.g., Section 4.1.4), and "him/her," (e.g., Section 5.2), but this practice is not uniform.

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Although these inconsistencies do not affect the substance of the proposed rules, they could be eliminated by using gender-neutral terminology throughout. Many women participate in the grievance procedure as grievants, grievants' representatives, legal counsel, chief administrators, and administrative law judges. Better terminology would reflect that reality and the modern practice in the wording of administrative regulations.

Thank you for taking these suggestions into consideration as the procedural regulations are finalized.

Sincerely,

A handwritten signature in black ink, appearing to read "Howard E. Seufer, Jr.", written in a cursive style.

Howard E. Seufer, Jr.

HES/hes

**Chriceous (Cricket) Powell**

---

**From:** Bruce Walker [walkerb@HEPC.WVNET.EDU]  
**Sent:** Friday, September 28, 2007 9:24 AM  
**To:** WVGB Account  
**Subject:** Comments  
**Attachments:** COMMENTS REGARDING GRIEVANCE BOARD PROPOSED.doc

Please find attached comments I have regarding the GB proposed rule.

Bruce Ray Walker  
General Counsel  
West Virginia Higher Education  
Policy Commission  
Suite 700  
1018 Kanawha Blvd., East  
Charleston, WV 25301  
304-558-0695  
304-558-4820(fax)

COMMENTS REGARDING GRIEVANCE BOARD PROPOSED  
PROCEDURAL RULE

1. Careful consideration should be given as to whether the rule should be proposed as a "legislative" rule rather than as a "procedural" rule. Only "legislative" rules have been deemed to have the force of law. W.Va. Code 29A-1-2(d) defines legislative rules as any rule which "is determinative on any issue affecting private rights, privileges or interests". Procedural rules merely fix rules of procedure for proceedings before an agency. Since parts of this proposed rule establish procedures and rights before agencies other than the Grievance Board, it is likely that someone might argue that they are not subject to the rule at Level 1 unless it is promulgated as a legislative rule.
2. Sec. 2.1.1 provides that grievance forms may not be filed through interdepartmental mail, but then Sec. 2.1.2 and 2.1.3 allows service through interdepartmental mail. Is there an inconsistency? Also in that section it states that "If it is a state employee grievance, a third copy shall be sent to the Division of Personnel". Higher education is exempted from DOP oversight by the statute so after "grievance" in that section you need the words "other than in higher education".
3. Sec. 2.1.4 and 3.3 presume to give chief administrators the authority to issue subpoenas under W.Va. Code 29A-5-1. That code section states "Under no circumstances shall this chapter be construed as granting the power to issue subpoenas or subpoenas duces tecum to any agency or to any member of the body of any agency which does not now by statute expressly have such power". Though the repealed grievance statute gave chief administrators subpoena power, the new W.Va. Code 6C-2-3(k)(4) just gives subpoena power to ALJs. Unless this is promulgated as a legislative rule persons would be able to argue that subpoenas by chief administrators are not valid as they are not expressly authorized by statute.
4. Sec. 2.1.8 states that other individuals may attend a conference "as needed". Can this be clarified to point out who decides what individuals are "needed"?
5. Sec. 3.4 states that a Level 1 decision shall include the "name and address" of the individual to whom an appeal is made. That should just list the Grievance Board and its address since that is the only place an appeal from Level 1 can go.
6. Sec. 4.1.1. This section requires the parties agree on the alternative dispute resolution mechanism. Could it be changed to indicate that mediation before the GB is the default----in case the parties do not agree?
7. Sec. 4.1.4 requires the grievant to notify the GB of the outcome of a private mediation. It would be more proper to require both parties to notify the GB----either jointly or individually, or the mediator----so there are no misunderstandings as to the result.
8. Sec. 4.2.2. For grammatical purposes it is suggested that the word "either" be deleted in the first line and the "," after "representative" be deleted.
9. Sec. 4.2.3. Same as comment for 4.2.2.

10. Sec. 5.1.3. Clarify that last sentence does not include higher education employees.
11. Sec. 5.1.7 seems to state that an ALJ can only hold level 2 or 3 proceedings at a location other than GB Offices if one of the parties makes a motion to do so. ALJ should have authority to make such a decision without a motion.
12. Sec. 5.22 only state employee organizations "should" register. Change "should" to "shall".
13. Sec. 6.1. Add the word "alleged" before the last word in the first sentence.
14. Appendix C. Change the language on second page under Level one to indicate that higher education grievance copies need not go to DOP.
15. Appendix D. How are the costs of employees' time to be calculated? Perhaps the easiest way is to calculate an hourly rate based on yearly salary. It would be best to standardize this by GB including a formula for calculation. Also, "Cost of Grievant's time" is listed. Are Grievants supposed to calculate this for Employer? How is it to be calculated? Are only work hours included? Also, are the costs of witnesses' time and preparation time including only costs to employer or to Grievant as well? Is "preparation" time the time for the chief administrator only or all individuals presenting employer's case?
16. The repealed statute gave chief administrators the authority to issue oaths but the new statute does not. Can the GB give this authority to chief administrators by making this a legislative rule?
17. Has the GB considered more clearly defining the language in W.Va. Code 6C-2-(c)(2) regarding backpay? The language is confusing and it is unclear what the effect of the "tolling" is.

September 5, 2007

Transmitted herewith are my comments with regard to the proposed Procedural Rules of the PEG Board. I transmit them in hopes of raising issues for thought that will aid the Board in producing the best document possible to guide and assist the typical employee in understanding and following the procedure in its final form. I request that the document be written for the general understanding of all State workers from the groundskeeper to the medical doctor.

While some comments are more specific than others with regard to format or sentence construction, I hope that all will be considered in light of the overall goal of producing a system that is beneficial to all and improves the work climate of State government.

Sincerely,

Susan Evans, Department of Administration  
15 Meadow Creek Road  
Barboursville, WV 25504

## West Virginia Public Employees Grievance Board Procedural Rule

W. VA. CODE R. § 156-1, et seq. (Proposed)

Fix throughout the proposed rule W. Va. Code to W. VA. CODE

156-1-2. Put the definitions in alphabetical order.

2.1.9. Hearing - It is not a trial of law, should consult Black's 8th definition #2 regarding Administrative Law.

2.X. Define Mediation

2.X. Define Mediation/Arbitration

2.X. Define Days

2.X. Define Intervenor

2.X. Define Conference

2.X. Define Employee Representative

3.1. Chief Administrator or designee. (Chief Administrators are busy people - they don't need requests for forms.)

3.2. What is the grievance procedure? Is it the Administrative Rule or another document to be developed? Can this be done without killing all the trees in the State – for instance, electronic access when available acceptable to meet this requirement?

3.3. Is comprised of two separate issues: 1) subpoenas and 2) consolidation and waiving grievances. Separate into two subparts.

3.3. All Classification and Compensation grievances shall be waived to Level Three. Eliminate the administrative loop regarding waiver to level three and requiring a review by a judge for decision in these situations. It only delays the proceeding, increases potential cost, and burdens the staff calendars. Classification and Compensation issues must be decided uniformly and with subject matter expertise that is not routinely present with agency-level staff. If not waived to level three, then specific training and expertise (specify credentials) must be required for hearing evaluators prior to reviewing a grievance on the issues of Classification and Compensation. The goal should be efficient decision making at the level fully qualified to review the issue at hand and make a reasonable/just and unbiased determination. That is not likely by staff lacking theoretical knowledge and practical application experience in the subject-matter. Maybe a test of relevant knowledge would be appropriate for Level 1 adjudicators prior to hearing issues requiring specific technical knowledge on specified issues such as Classification. There may be a history of other issues that should be advanced immediately to level three and if there are obvious ones based on the past record, then they must be specified in the rule, such as matters pertaining to retirement and insurance law, promulgated rules, etc.

3.3. Reference the Guidelines in Appendix B or the reader doesn't know that they exist.

3.4. DOP does not get a copy of the Level One decision?

3.5. What is a "timely" request? Quantify it! Either require employers to give notice or not - "encouraged" carries no weight and has no value or point in a promulgated rule.

What if an employee does not intervene after being "encouraged?" What recourse does he or she have in the future when not happy with the outcome? If the result is ongoing - at what point are intervention rights irretrievably gone, if ever? Should be specified in the rule.

What about the employee who was not notified until too late? Or never notified? How does this serve fairness in employment practices?

4.1.1. Identify the three types of alternative dispute resolution methods by name in the rule, e.g. Basic Mediation, Private Mediation, Mediation-Arbitration, etc. The parties grievant shall indicate on the grievance form which method is selected being requested. (Per Subpart 4.1.2. - the ALJ decides.) How is the grievant notified of the process decided by the ALJ?

4.1.4. If private mediation - shouldn't the mediator be the one to notify the board of the outcome, not the grievant or the agency or the intervener. What outcome is to be reported - the actual actions to be taken by the agency or grievant, the overall decision such as affirmed or denied or modified, a copy of the settlement agreement if resolved, or simply that the issue was resolved? Should be specified in the rule.

How will the private decisions be tracked with regard to statistical monitoring of the success/failure of the new system and any bias of the system for or against the grievant or the agency or any intervener?

If a Level three hearing is required after private mediation what records proceed from the private mediation into the official record for presentation to the Level 3 hearing? Same as for Basic Mediation or different? If the grievance is not resolved at Level 2 - is it treated as if Level 2 never happened, except that additional animosity has probably occurred? Need to stipulate as to the status of Level 2 processes and advancing to Level 3.

4.15. RE: "Standard rules and procedure governing mediation and arbitration" Will there be another Administrative or Procedural rule regarding standard procedures? Or is this reference to some external "industry standard" or to PEG Board established guidelines / procedure or? Will these documents be available to the grievant, agency and intervener?

4.2.1. Does this include release of resolution information, decision content, settlement agreements, or statistics regarding Private Mediation to the PEG Board?

4.2.2. and 4.2.3. Where is the intervener in the mediation and mediation-arbitration process?

5.1. What about the mediation records from Private Mediation? The employer does not have those records . . .

5.1.1. Record developed “below” . . . (Does this mean developed at Level 1 and 2 or later in the rule?)

5.1.1. & 5.4.1. Improper outlining format – Subpart 1 with no Subpart 2.

5.5. . . . at least five days before ~~to~~ the scheduled hearing as required by . . .

Is this to be home address or work address or where the subpoena can be delivered? Home Addresses are personal information with disclosure protection. What if the address of a witness is unknown? Is the agency required to provide it to a grievant or prohibited from doing so under § 5A-8-21?

Are witness fees to be paid even if the witness is a State employee? Are employees required to file leave in order to receive a witness fee? Are agency’s expected to put staff on paid hearing leave and then pay them a witness fee?

If no subpoena, then how is a witness excused to attend (if a State employee) and how is the witness compensated?

5.5.2(2). Can you make this clearer, it seems to be missing a reason/basis for the conditional denial? The point is unclear . . . Is it intended to be enabling language or restricting language?

(2) condition denial of the motion (upon the advance payment by the person in whose behalf the subpoena duces tecum is issued) of the reasonable cost of producing the books, papers, documents, or tangible things.

Or

(2) condition denial of the motion upon the advance payment by the person in whose behalf the subpoena duces tecum is issued (of the reasonable cost of producing the books, papers, documents, or tangible things.)

Or ???

5.6. Define “reasonable time.”

5.6.1. If any party desires a hearing on a motion, he or she shall make a request. The Administrative Law Judge may, in his or her discretion

Does a written motion result in a written order/decision?

5.7. So all parties may agree to a continuance and the ALJ may still deny?

5.8. Remand and Transfer are undefined terms. What is the difference/distinction? If it means “return to a lower level of the grievance procedure” – put the definition in Section 2 and use one term not two. If Remand is different from Transfer – so say.

5.9. . . . in accordance with ~~Rule 4.7~~ Subsection 5.6

5.9.1. Improper outlining format - subpart .1 with no subpart 2.

. . . in accordance with ~~Rule~~ Subsection 4.7. Change to 5.6?

5.10. What appeal period of a final decision?

5.12. What about the intervener?

5.13. ~~Rule~~ Subsection 4.7 Change to 5.6?

5.16. ~~should~~ shall be no greater than thirty days

5.17. ~~Rule 4.7.~~ Subsection 5.6

5.18.2. ~~Rule~~ Subsection 5.15

5.20. Burden of Proof – Move to 5.17 - Has to do with Hearings Generally not Final Disposition. Explain meaning of “Affirmative Defense” to the uninitiated.

5.21. Advisory Opinions – Move earlier in the document, has nothing to do with Final Disposition, maybe 5.2. Authority of ALJ’s.

5.23. Interpreter Appointment. Person may also be speech impaired and need the assistance of an interpreter. Other disabilities may also require accommodation for the employee or witnesses. Scope of “hearing impaired” is too narrow to comply with ADA.

6.1. Is “notice of intent to proceed to the next level” AND “or to enforce the default” two different things? How so?

6.1. upon receipt of ~~of~~ the chief administrator’s objection

6.1 “bifurcated” – use common language when possible.

If the employee decides to continue with hearings or mediation, then the default should be moot. It is wasteful of State resources to continue in the process when a default decision may be issued. It should be a choice of one or the other, but not both.

6.1. Improper outlining format - subpart 6.1 with no subpart 6.2 .

7. Representation - Employees are entitled to representation at any step of the procedure, ~~including meetings held with employees to discuss disciplinary action.~~

Proposed, potential, or occurring disciplinary action is not part of the grievance procedure. This rule does not apply until such disciplinary action is grieved. It will not be found by the employee and supervisor until long after the occurrence. If it is a desired requirement or standard – it belongs elsewhere, not in the Grievance Rule.

Should specify that representation can only be provided by those who have registered with the Board to do so.

FOR ALL APPENDICES:

By incorporating forms and instructions in the actual rule, the opportunity to make necessary amendments or clarification are limited and complicated. Should consider not incorporating procedure and forms into the promulgated rule.

It should be the responsibility of the grievant to notify his or her representative of the status of the proceedings not the agency’s or the Board’s. Simplify all forms and hold the employee/grievant accountable. This will have the beneficial effect of reducing the clerical burden on the agency and the board and improving communication between the grievant and his or her representative and will ensure that the grievant stays abreast of the status of his or her grievance.

APPENDIX A. Certificate of Service and Mailing

Include lines for listing the names and addresses the document was transmitted to.

#### APPENDIX B. Level I Hearing Guidelines

The level one hearing designee may not have access or authority to salary information to complete the ~~Cost Report~~ Cost Analysis Form (use consistent terminology throughout the document).

#### APPENDIX C. Grievance Form for Levels 1, 2, and 3

Are there other levels?

Specify that grievant is to attach copies of grievance statement and relief sought. No way a complete statement of the issues and resolution proposed or desired can be placed on the one line provided.

Submit Decide or Review on Level 1 Hearing Record

The second page of APPENDIX C needs a title. Is it intended to be process explanation or instructions or what?

Use "Shall" not "must." Use "Shall" not "is to be."

Waiver to Level Three – see previous notes regarding issues that agency level staff lack and possibly paid Mediators expertise to decide at Level I. Private sector mediators would be expected to have limited knowledge of governmental operational rules and procedures such as merit system standards and classification theory.

Consider a flow chart that puts the time line in graphic form for visual learners.

#### APPENDIX D. Cost Analysis Form

What is "preparation time?" Is it not included in the work time already reported for each?

More costs to add:

Cost of Witness Time (if State employees).

Cost of Witness Fees.

Cost of Intervener Time.

Cost of Supplies, Postage, etc.

Cost of Document production in response to a subpoena duces tecum.

#### APPENDIX E. Intervention Form

TITLE – Is this not a "Request to Intervene" Form? Subject to review and approval by someone?

Shouldn't the Intervener have to provide the basis for the request – right or benefit at risk?

Shouldn't the name of the Grievant be provided?

Who is the respondent, the grievant or the agency?

How is the intervener notified of the results of the request and also the original grievant(s)?

Does a successful request – change/delay timeframes already established and how so?

#### APPENDIX F Mediation Agreement Form

Isn't this a "Request for Mediation Agreement" Form?

"This form must be submitted before Mediation-Arbitration or Private Mediation will be permitted."

There is no where on the form indicating that this is a "request" form or that "approval" is granted.

The parties agree this grievance \_\_\_\_\_ be submitted to mediation by a private mediator . . . Missing word?

Intervener role/opportunity/voice ? Involvement in cost assignment?

Cost could be assigned by percent also or by winner / loser / compromise theory.

APPENDIX G. Mediation Waiver Form

Isn't this a "Request for Mediation Waiver" Form?

If so, shouldn't it be signed by all parties, including any intervenor?

APPENDIX H. Registration of Employee Organization Form

Request Legal Status of the Organization

Is there any legal criteria that defines what represents an "employer organization?" Registration with the Secretary of States office, legal business license, IRS tax status, membership fees, etc.? Or can anyone become an "Employee Organization?"

## Chriceous (Cricket) Powell

---

**From:** MR Brandt [MRBrandt@mail.wvu.edu]  
**Sent:** Friday, September 28, 2007 12:57 PM  
**To:** WVGB Account  
**Cc:** C. B. Wilson; James Morris  
**Subject:** 156 CSR 1 comments

1) section 2.1.1 Higher Education employees are State employees, but they are not subject to the Division of personnel. Therefore, you need to define education employees to cover state employees who work in higher education or you need to state: "If it is a non-higher education state employee grievance, a third copy shall be sent to the division of personnel"

Can a grievance be filed or appealed via a letter? The Board should REQUIRE the use of the grievance forms ONLY;

2) section 2.1.2 Requiring a "Certificate of Service" is too legalistic.

3) section 2.1.4 Chief Administrators don't need to issue subpoenas, they are in charge of the agency and can direct their employees to attend a conference/hearing at Level 1.

4) section 2.1.9 A "hearing" is a proceeding of relative formality. The statute implies an informal hearing in an attempt to "sit down and try to work things out" between the parties. The grievant still gets a formal hearing at Level III if the matter hasn't been resolved by then.

5) section 3.3, the Chief Administrator is the head of the agency or his/her designee, there is no need for this person to issue subpoenas for witnesses or documents. Also Chief Admin. for non-higher education state employees are subject to the Division of Personnel, higher education state employees have no need of Division of Personnel documents. The Statute does not permit consolidation of grievances by the Chief Administrator, specifically states that there must be an agreement by the parties or the ALJ may consolidate.

6) section 5.13, modify statement to read: " The Division of Personnel must be joined and made a party in any non-higher education state employee grievance involving classification and compensation matters."

7) section 6.1, 3rd sentence, delete the second "of"

8) on Appendix C, second page: Please note that Higher education employees are also "STATE EMPLOYEES", under Level One, line 4, add "non-higher education" before "state employee grievance, a third copy shall be sent to the Division of Personnel." Also add "non-higher education" after "A" and before "State grievant" under the second bullet of Level three.

9) According to your section 3.3 The Chief Admin. can also waive grievances to Level 3 when CA does not have the authority to decide at Level 3, so should this not be included on Appendix C, second page in the NOTE at the bottom?

Thank you for the opportunity to respond to these rules.

Mary Roberta Brandt, J.D.  
Associate General Counsel  
West Virginia University  
Office of the General Counsel

105. Stewart Hall  
P.O. Box 6201  
Morgantown, WV 26506-6201  
304.293.5841, fax 304.293.2326  
mrbrandt@mail.wvu.edu

**Chriceous (Cricket) Powell**

---

**From:** Amy Pitzer [pitzer@concord.edu]  
**Sent:** Saturday, September 08, 2007 7:43 PM  
**To:** WVGB Account  
**Subject:** Comments on DRAFT rules for the grievance procedure

Please accept the following comments relative to the grievance procedure draft rule:

**Section 3.2:** *I suggest the addition of the following sentence at the end of this section:* The employer will notify all employees whenever changes to the rule, forms or procedure are made by the grievance board or the legislature.

**Section 3.3:** *The first sentence concerns me in that it states that Chief Administrators MAY issue subpoenas for witnesses and documents if a hearing is requested.* Under what circumstances can the chief administrator refuse to issue subpoenas? From my experience, if the chief administrator is hearing the grievance against his/her school, then MAY might not be a strong enough word. I understand the need to limit witnesses in some cases, but with this language an institutional chief administrator can disallow witnesses altogether if he/she so chooses. I am more concerned that the chief administrator may disallow information requests of the grievant FORCING the employee to go to a much higher level to gain access to the information requested.

**Section 3.4:** *If a grievant is denied the relief sought, the decision should not only include the name and address of the individual where the appeal at the next level should be made, but also the timeline should be included since the procedure is so new to everyone at this point.*

**Section 4.2.3:** *The first sentence is not a complete sentence. Should the word "through" be "send" a representative who has the authority to resolve the grievance??*

**Section 5.2:** *References should be to his/her and not just one gender.*

**Section 5.3:** *What type of mediation is recorded? Sounds like a hearing that just takes place in different rooms!*

**Representation:**

*Sometimes employees are intimidated by supervisors or administrators and even threatened if they file a grievance. I believe that an employee should be entitled to have representation with them if at any point the employee feels intimidated or threatened in any manner. Not just after they are in the grievance process.*

*There have been many times where I have been present with employees and been able to avoid such treatment of the employee and have even avoided the*

*filing of a grievance at times.*

*Many thanks!*

--

Amy M. Pitzer  
Classified Employee Representative  
Concord University  
Campus Box D-123  
PO Box 1000  
Athens, West Virginia 24712

VOICE: 1-304-384-5211  
FAX: 1-304-384-6017  
EMAIL: [pitzer@concord.edu](mailto:pitzer@concord.edu)

## Chriceous (Cricket) Powell

---

**From:** Council77@aol.com  
**Sent:** Thursday, September 27, 2007 10:31 PM  
**To:** WVGB Account; Chriceous (Cricket) Powell  
**Cc:** ajk792000@yahoo.com; Cn77Attorney@aol.com  
**Subject:** Recommended changes to the currently proposed Procedural Rules

Below are two recommended changes to the currently proposed Procedural Rules for the West Virginia Public Employee Grievance Board submitted by Ed Hartman of AFSCME and Andy Katz, Katz Working Families Law Firm. Please note that deleted language is in brackets.

2.1.1. "File" or "filing" means to place an appropriate grievance form or letter evidencing an intent to appeal in an official depository of the United States Postal Service, postage prepaid, and addressed to: 1) the Board's main offices at 808 Greenbrier Street, Charleston, West Virginia 25311, and 2) the agency's chief administrator. If it is a state employee grievance, a third copy shall be sent to the Division of Personnel. A grievance may also be filed by hand-delivery or by facsimile transmission to the appropriate office. A hard copy of any grievance filed by facsimile must be mailed to the (Board's main) appropriate offices (or by facsimile transmission to that office. A hard copy of any grievance filed by facsimile must be mailed to the main office) within a reasonable time following the facsimile transmission, and (should) shall be identified as a duplicate. All grievance forms shall be date stamped when received. No grievance forms may be filed by interdepartmental mail. The key to assessing whether a grievance is properly filed is substantial compliance with the statute and rules. Substantial compliance will be construed consistently with the liberal and remedial nature of the grievance process. Substantial compliance with the statute and rules in filing a grievance will be met if a grievant makes a timely filing with the Board's main office. However the time to respond to such grievance will not begin to run against either the agency or the Division of Personnel until they are properly served pursuant to this section. Within two days of receipt, the Grievance Board will e-mail the grievance docket number to the chief administrator.

The concern above is that these changes have made filing a grievance more complicated. Since virtually all grievants are not represented by counsel at this point, there is a real likelihood that not all of these steps will be followed. While this regulation does use the phrase "substantial compliance" to provide some leeway for improper service, this part of the regulations need to be tightened up. No grievant should lose his or her opportunity to protect their rights given under the grievance procedure because of an error in the manner of service.

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We also want to amend Appendix B 'Level One Hearing Guidelines' to include Conference Guidelines for Level One. Once developed, this will reduce to writing a complete understanding of the Level One Process, as well as ensure that it will be carried out fairly and consistently.

Andrew J. Katz  
Katz Working Families Law Firm  
1321 Virginia Street, E  
Charleston, WV 25301  
304-342-5579  
[ajk792000@yahoo.com](mailto:ajk792000@yahoo.com)

Ed Hartman

Executive Director  
AFSCME Council 77, AFL-CIO  
501 Leon Sullivan Way  
Charleston, WV 25301  
304-342-2114  
[Council77@aol.com](mailto:Council77@aol.com)

---

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**Robin B. Perdue**

---

**From:** Chriceous (Cricket) Powell  
**Sent:** Thursday, September 06, 2007 3:45 PM  
**To:** Robin B. Perdue  
**Subject:** FW: Idea \* Procedural Rules

Cricket Powell  
(304) 558-3361  
Direct line (304) 957-2502 ext. 52153

-----Original Message-----

**From:** Mary L. McFarland On Behalf OF WVGB Account  
**Sent:** Thursday, September 06, 2007 3:24 PM  
**To:** Chriceous (Cricket) Powell; Janis I. Reynolds  
**Subject:** FW: Idea \* Procedural Rules

FYI

-----Original Message-----

**From:** Chris Amos [mailto:chrisamos@wvdhhr.org]  
**Sent:** Thursday, September 06, 2007 2:56 PM  
**To:** WVGB Account  
**Subject:** Idea \* Procedural Rules

Might consider defining "conference" as you defined "hearing." When Harriett Fitzgerald and I met with Earl Maxwell a couple of months ago, he told us that the Chief Administrator (at Level 1), after holding a conference, can later contact any person he/she needs to, in order to get the employer's side and make a decision.

That sounds like ex parte communication. I noticed ex parte is addressed, but for ALJs. So the question I think a lot of us have is, can a Chief Administrator contact supervisors, etc., after having a conference with the grievant? Is it ex parte, or permissible ex parte because a conference is less formal.

Thank you,  
Chris Amos

The information contained in this electronic message is legally privileged and confidential under applicable law and is intended for the use of the individual or entity named above. If you have received this communication in error, please notify the DHHR Grievance Unit at (304) 558-8040, and purge this communication immediately without making any copy or distribution.

Christopher Amos, Esq.  
Manager, DHHR Grievance Unit  
State Capitol Complex  
Building 3, Room 201  
Charleston, WV 25305  
304-558-7048  
304-558-6051(fax)

**Robin B. Perdue**

---

**From:** Chriceous (Cricket) Powell on behalf of WVGB Account  
**Sent:** Thursday, September 06, 2007 3:40 PM  
**To:** Robin B. Perdue; Bob Brown; drpolk@mountainstate.edu; Marc Harmon; teachwvkids; Denise Spatafore (Denise.M.Spatafore@wv.gov); Denise Spatafore (dmspata4@yahoo.com); Janis Reynolds (Janis.I.Reynolds@wv.gov); Janis Reynolds (jireynolds@suddenlink.net); Landon R. Brown (Landon.R.Brown@wv.gov); Sue Keller (Sue.I.Keller@wv.gov); Sue Keller (SueIKeller@comcast.net); Thomas J. Gillooly (Thomas.J.Gillooly@wv.gov)  
**Subject:** FW: Ex Parte

Cricket Powell  
(304) 558-3361  
Direct line (304) 957-2502 ext. 52153

-----Original Message-----

**From:** Chris Amos [mailto:chrisamos@wvdhhr.org]  
**Sent:** Thursday, September 06, 2007 3:36 PM  
**To:** WVGB Account  
**Subject:** Ex Parte

Sorry, I didn't notice that "conference" was defined on page 3, because the whole number 2.1.8 is struck through, looking like the word "conference" didn't have a subsection assigned to it. So I assume that "conference" is assigned subsection 2.1.8 (even though it's struck through)?

Also, the ex parte thing vis-a-vis conferences is something we're still wondering about.

Thanks!

The information contained in this electronic message is legally privileged and confidential under applicable law and is intended for the use of the individual or entity named above. If you have received this communication in error, please notify the DHHR Grievance Unit at (304) 558-8040, and purge this communication immediately without making any copy or distribution.

Christopher Amos, Esq.  
Manager, DHHR Grievance Unit  
State Capitol Complex  
Building 3, Room 201  
Charleston, WV 25305  
304-558-7048  
304-558-6051 (fax)

SEP-28-2007 FRI 02:47 PM WV DNR

FAX NO. 304 558 2768



**DIVISION OF NATURAL RESOURCES**  
1900 Kanawha Boulevard East  
Building 3, Room 669  
Charleston WV 25305-0668  
Telephone (304) 558-2754  
Fax (304) 558-2768  
TDD (304) 558-1439  
TDD 1-800-354-6087

Frank Jezioro  
Director

Joe Manchin III  
Governor

September 28, 2007

**VIA FAX: (304) 558-1106**

Ms. Chriceous Powell, Secretary  
West Virginia Grievance Board  
808 Greenbrier Street  
Charleston, WV 25311

Re: *Comments to Draft Procedural Rules 156 W.Va. CSR 1.*

Dear Ms. Powell:

Please accept the following comments for consideration by the Grievance Board relative to the above-referenced draft procedural rules:

I. Level I; hearing vs. conference.

W.Va. Code § 6C-2-2(k)(4) grants the chief administrator discretion to limit the number of witnesses at a Level I conference or hearing. However, the section states further that the parties have the right to call, examine and cross-examine witnesses during any hearing. Said hearing or conference must be held within 10 working days. Proposed Rule 2.1.9 defines "hearing" as a procedure of relative formality, in which "witnesses and parties are entitled to be heard...." Finally, Proposed Rule 3.3 grants the chief administrator the authority to issue subpoenas if a hearing is requested.

First, the chief administrator authority to limit the number of witnesses should be more clearly established. In a worst case scenario, a grievant could ask that an entire section be subpoenaed to a hearing. Although Proposed Rule 3.3 permits the chief administrator to limit the number of relevant witnesses at a hearing, all conflicts must be decided by the Board, thus making compliance with the 10-day time frame difficult or impossible. The Rules should include a provision for waiver of the time frame in the event of a conflict and should set forth guidelines for refusal to permit witnesses.

Ms. Chriceous Powell, Secretary  
Page Two  
September 28, 2007

Second, the Proposed Rules do not address agencies that do not have inherent subpoena power. A procedural rule cannot grant an agency the authority to issue and enforce subpoenas. W.Va. Code § 29A-5-1(b) does not grant subpoena power to an agency lacking statutory authority for the same, and the language granting subpoena powers in grievance matters generally contained in W.Va. Code § 29-6A-6(c), repealed, was not inserted into the new grievance Code. Thus, strict compliance with a rule that mandates witness subpoenas by an agency without authority to issue the same would be difficult.

Third, the intent of the new legislation was, at the Level I stage, to bring the grievant together with an official within his or her agency who has the authority to address the underlying issue in an attempt to informally resolve the same. The formal, adversarial atmosphere of a hearing at Level I vitiates that purpose and tends not to lead to a resolution.

## II. Representation.

156 W.Va. CSR 1 § 7 sets forth that employees are entitled to representation at any step of the procedure, including meetings to discuss disciplinary action. The breadth of this rule should be more clearly defined. On its face, the Proposed Rule would include all employee meetings from the most informal to a predetermination meeting contemplating suspension or dismissal. The potential delays caused by a strict interpretation of this Rule would render the resolution of simple disciplinary issues impossible.

Thank you for your time and consideration in this matter.

Sincerely,



Frank Jezioro  
Director

FJ:wh

# JANE MORAN LAW OFFICE

JANE MORAN, ESQ.

CINDERELLA BUILDING  
POST OFFICE DRAWER 221  
WILLIAMSON, WV 25661  
TELEPHONE: (304) 235-3509  
FACSIMILE: (304) 235-3509

September 7, 2007

RECEIVED

SEP 10 2007

WV Public Employees Grievance Board  
808 Greenbrier Street  
Charleston, WV 25311

WV Education & State  
Employees Grievance Board

RE: Proposed Public Employee Grievance Board Procedural Rules

To Whom It May Concern

I would like to make the following comments after reviewing the Proposed Public Employee Grievance Board Procedural Rules.

1. Rule 4.1.3 and 4.1.5 – are somewhat redundant. I mention this only to avoid having to choose between two substantially similar rules, which may benefit my case.
2. Rule 5.18.1 – I encourage you to provide for appeal to the Circuit Court in the county of residence of the grievant and of his place of employment. This presents a more realistic chance of appeal for a pro se grievant. Moreover, the trier of fact has a better understanding of the context in which the grievance arose.
3. Rule 6.1 – Default provisions have always been a source of misunderstanding for grievants and for their counsel. It usually appears to grievants that any excuse by an employer for failure to respond in a timely fashion has been accepted. The same standard has not been applied to grievants in many cases.

I do not understand the section of the rule providing, “The issues to be decided may include whether a default has occurred... and/or whether the relief sought is... contrary to popular and available remedies.” This seems to open the door to almost any argument to support the employer’s right not to be punished for breaking the rules. What equally equitable balance is provided for a grievant?

4. Rule 6.1.7 – The employees right to representation will be misunderstood unless it is made clear the representation is at their expense.

Finally, I am concerned regarding the purpose and anticipated use of the Cost Analysis Form. (Appendix D). Could you explain why this is being included?

Sincerely,

A handwritten signature in cursive script that reads "Jane Moran". The signature is written in black ink and is positioned above the typed name.

Jane Moran  
Attorney at Law

JM/dg

## Chriceous (Cricket) Powell

---

**From:** John Roush [jroush@wvsspa.org]  
**Sent:** Friday, September 28, 2007 3:32 PM  
**To:** WVGB Account  
**Cc:** klevy@wvsspa.org; bbrown@wvsspa.org  
**Subject:** comment on draft procedural rules

To WVPEGB:

On behalf of the WVSSPA, we wish to offer the following comments on the proposed procedural regulations:

- We believe that it would be helpful to address the questions raised by W.Va. Code 6C-2-4(c)(2) concerning the awarding of costs against a party proceeding in bad faith. As a starting point we would suggest the addition of the following language at the appropriate point in the regulations: "A finding of bad faith on the part of a party and the award of costs against such a party will be made only in extreme cases where it is clear that the position taken by a party in the grievance is unrelated to the merits or reasonable resolution of the grievance and instead is solely designed as a means of irritation or annoyance of the opposing party." This suggested language is vague and likely is capable of improvement. However, we believe a start at defining the circumstances in which costs would be awarded would be helpful. Otherwise, the threat of an award of costs would weigh more heavily on persons who would be personally responsible for paying costs (grievants) than it would on those who would have an award of costs paid from public funds (employers).
- 156-1-2; 2.1.2. & 2.1.3. We believe that "fax and follow-up with a hard copy" language, similar to what is found in 2.1.1. should be inserted in these two sections as well.
- 156-1-2; 2.1.8. We believe that the right of grievant's representative to attend the conference should be spelled out by addition of "grievant's representative" between grievant and chief administrator in the first line of the underscored language.
- 156-1-3; 3.1. We suggest the addition of the following after the second sentence: "Employers are encouraged to provide copies of these forms at each work site."
- 156-1-3; 3.3. We suggest that the power of the chief administrator to limit witnesses be restricted to situations in which the testimony of the witnesses would be repetitive or redundant. We also suggest that the chief administrator be required to issue all subpoenas that the grievant requests, with the proviso that if he/she thinks that the request is unreasonable, then the chief administrator be permitted to request an exemption from issuance of the subpoenas from the chief administrative law judge.
- 156-1-3; 3.5 Although the language in this provision is faithful to the statutory language, it conflicts with case law, i.e. Hale v. Mingo County Bd. of Educ., 199 W. Va. 387, 484 S.E.2d 640 (1997). Compliance with Hale would most easily be accomplished by substituting "or" for "and" in lines 4 and 6 between "substantially" and "adversely".
- 156-1-4; 4.1.2. The possibility of a mutually agreed waiver of level II appears to make sense, but we question whether this complies with the legislative intent of the statute to mandate mediation.
- 156-1-5; 5.1 We suggest the addition of the following language to the end of the first sentence: "...to the Board and to the grievant or the grievant's representative".
- 156-1-5; 5.9.1 We suggest insertion of language making it clear that the emergency meeting may be conducted by telephonic conference at the discretion of the chairperson of the Board.
- 156-1-7 We suggest addition of the following language at the end of this section: "An employee who acts as representative to a fellow employee in a grievance or any meeting or conference held with an employee in which disciplinary action may be the potential outcome may do so without loss of wages and/or benefits and shall be excused from work to attend any scheduled conference, hearing or mediation session."

Thank you for your consideration of these comments.

Kimberly Levy & John Roush  
Legal Services  
WVSSPA

**Chriceous (Cricket) Powell**

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**From:** darnett@zoominternet.net  
**Sent:** Thursday, September 27, 2007 5:34 PM  
**To:** WVGB Account  
**Subject:** [Fwd:Help is on the way]

- 1) Allow the employee grievants to use
  - >interdepartmental mail for grievances. This can
  - >reduce the overall cost to the employee. Ask the
  - >grievance board to Note that the grievant should
  - >retain a copy of each document filed at each step for
  - >their own records. The rule is confusing and at one
  - >point says yes and then says no. Clear the rule
  - >and allow interdepartmental mail where appropriate.
  - >
  - >2) Require the employer / administrator to inform
  - >every employee prior to any predetermination meeting
  - >that the employee has the right to have a
  - >representative present in the meeting. This is called
  - >an affirmative right and should be added to the
  - >proposed rule.
  - >
  - >And,
  - >
  - >3) If a hearing examiner is going to prohibit
  - >witnesses, the hearing examiner must state the reason(s)

>in writing and delivered to the grievant at least  
>three days prior to any scheduled hearing. The rules  
>should also allow a grievant to offer rebuttal  
>testimony to that written denial of witnesses which  
>shall become entered into the official record at any  
>step in the grievance process where witnesses are  
>denied. This is basic due process and should be added  
>to the rule.

CARBONE & BLAYDES, P.L.L.C.

Attorneys at Law

2442 KANAWHA BOULEVARD, EAST  
CHARLESTON, WEST VIRGINIA 25311

MARK W. CARBONE  
JEFFREY G. BLAYDES

(304) 342-3650 PHONE  
(304) 342-3651 FAX  
wvjustice@aol.com

September 28, 2007

**VIA FACSIMILE (304) 558-1106**  
**AND HAND DELIVERY**

Hon. Robin Perdue, Director  
West Virginia Public  
Employees Grievance Board  
808 Greenbrier Street  
Charleston, WV 25311

Re: Comment with Regard to Proposed Procedural Rules, Title 156

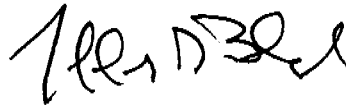
Dear Director Perdue:

Enclosed for the Board's consideration, please find Elaine Harris, the Communications Workers of America, Jeffrey G. Blaydes and Carbone & Blaydes, P.L.L.C.'s Comment concerning the Proposed Procedural Rules, Title 156.

Thank you for your attention to this matter.

Sincerely,

CARBONE & BLAYDES, P.L.L.C.



Jeffrey G. Blaydes

JGB:pam

Enclosure

cc(w/encl.): Elaine Harris, Representative (via facsimile & regular mail)  
Communications Workers of America

## MEMORANDUM

TO: WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD

FROM: ELAINE HARRIS, COMMUNICATIONS WORKERS OF AMERICA,  
JEFFREY G. BLAYDES, CARBONE & BLAYDES, P.L.L.C.

RE: COMMENT WITH REGARD TO PROPOSED PROCEDURAL RULES, TITLE  
156

DATE: SEPTEMBER 28, 2007

Having reviewed the proposed Procedural Rules for the West Virginia Public Employees Grievance Board, 156 C.S.R. 1, Elaine Harris and the Communications Workers of America (“CWA”) now present the following comment with regard to this Rule.

### **§156-1-2: Definitions**

With regard to this Section, the CWA generally recommends that the definitions be alphabetized for ease of reference.

**§2.1.8:** With regard to the definition of “conference” the CWA suggests that the chief administrator should be required to participate in this proceeding. West Virginia Code § 6C-2-4 indicates that the “chief administrator shall hold the conference.” This statutory provision requires the participation of the chief administrator. Should the chief administrator require that others in his or her office participate in a given grievance, he or she may consult with those individuals. If, however, the chief administrator is not involved, the statutory mandate is frustrated and the initial conference is now akin to a Level I or II hearing under the old grievance procedure, rather than the Level I as anticipated by the current statute.

It also appears that the enumeration for §2.1.8 has been inadvertently stricken out.

**2.1.1:** The Rule defines “file” or “filing” as follows:

... to place an appropriate grievance from or letter evidencing an intent to appeal in

an official depository of the United States Postal Service, postage prepaid, and addressed to: 1) the Board's main offices at 808 Greenbrier Street, Charleston, West Virginia 25311, and 2) the agency's chief administrator. If it is a state employee grievance, a third copy shall be sent to the Division of Personnel. A grievance may also be filed by hand-delivery or by facsimile transmission to the appropriate office. A hard copy of any grievance filed by facsimile must be mailed to the Board's main appropriate offices or by facsimile transmission to that office. A hard copy of any grievance filed by facsimile must be mailed to the main office within a reasonable time following the facsimile transmission, and should shall be identified as a duplicate. All grievance forms shall be date stamped when received. No grievance forms may be filed by interdepartmental mail. The key to assessing whether a grievance is properly filed is substantial compliance with the statute and rules. Withing two days of receipt, the Grievance Board will e-mail the grievance docket number to the chief administrator.

It appears that the method for filing a grievance has become more complex. Although the language "substantial compliance" would appear to provide some protection to grievants, it appears that further development of the concept of "substantial compliance" is necessary in order to fully protect the rights of the grievant. It appears that "substantial compliance" would mean that technical violations of this filing provision would not necessarily result in the dismissal of a grievance. Perhaps this rule should set forth that technical violations of this particular rule will not result in a dismissal; but, instead, the process shall remain simple and expeditious and contemplates that lay representatives and grievants without representation will be availing themselves of this process.

#### **§156-1-4: Level ~~Four~~ Two-Mediation**

§4.2.3: A review and further development of the mediation-arbitration section may be needed. §4.2.3 may include the ability of the parties to give additional information that they wish to have presented or to make additional arguments or statements on their behalf, prior to the case being ripe for decision by the mediator who is now turned arbitrator.

#### **§156-1-6: Claims for Relief by Default**

In light of the change in the statutory language for default proceedings, this section should

include language indicating that once default has been granted to a grievant, the matter will not be heard on the merits in any subsequent proceeding.

September 25, 2007

West Virginia Public Employees Grievance Board  
808 Greenbrier Street  
Charleston WV 25311

RECEIVED


SEP 26 2007

WV Education & State  
Employees Grievance Board

The following comments and suggestions are offered with respect to the proposed Procedural Rules for implementing the new grievance statute:

1. As they stand, the proposed rules are inconsistent in whether or not interdepartmental mail is allowed as a means for filing grievances, proposed findings, and other relevant documents to parties concerned. Making interdepartmental mail an acceptable means of utilizing the grievance process would be beneficial to many parties and reduce the cost of the process.
2. Suggested revision for Level 1 hearings: "If a hearing examiner has cause to prohibit witnesses at a Level 1 hearing, those reasons shall be put forth to the grievant and the grievant's representative in writing at least three (3) days prior to any scheduled hearing. Such a refusal shall become part of the record of the grievance, along with any rebuttal by the grievant or the grievant's representative."
3. Suggested revision for the statement of due process at the end of the proposed procedural rules: "An administrator considering any disciplinary action shall hold a predetermination conference with the employee prior to that action. The employee shall be informed, prior to and at the outset of such a conference, of the right of that employee to have a representative present."

Respectfully,

  
Gordon Simmons  
Chief Steward, UE Local 170  
West Virginia Public Workers Union  
1532 Quarrier Street  
Charleston WV 25311

## Chriceous (Cricket) Powell

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**From:** Chris Amos [chrisamos@wvdhhr.org]  
**Sent:** Thursday, September 06, 2007 3:36 PM  
**To:** WVGB Account  
**Subject:** Ex Parte

Sorry, I didn't notice that "conference" was defined on page 3, because the whole number 2.1.8 is struck through, looking like the word "conference" didn't have a subsection assigned to it. So I assume that "conference" is assigned subsection 2.1.8 (even though it's struck through)?

Also, the ex parte thing vis-a-vis conferences is something we're still wondering about.

Thanks!

The information contained in this electronic message is legally privileged and confidential under applicable law and is intended for the use of the individual or entity named above. If you have received this communication in error, please notify the DHHR Grievance Unit at (304) 558-8040, and purge this communication immediately without making any copy or distribution.

Christopher Amos, Esq.  
Manager, DHHR Grievance Unit  
State Capitol Complex  
Building 3, Room 201  
Charleston, WV 25305  
304-558-7048  
304-558-6051 (fax)

**Chriceous (Cricket) Powell**

---

**From:** Krista Duncan [KDuncan@dot.state.wv.us]  
**Sent:** Thursday, September 27, 2007 4:15 PM  
**To:** WVGB Account  
**Cc:** Paul Mattox; Tony Halkias; Drema Smith; Jeff Black; Jennifer Alkire; Barbara Baxter; Carrie Dysart; Julia Vande Linde  
**Subject:** DOH Comments to Proposed Administrative Rule  
**Contacts:** Grievance Board  
**Attachments:** PEG Board Procedural Rules (official draft) with Appendices-DOH.rtf

Please find attached the Division of Highways' comments to the Grievance Board's proposed administrative rule. I apologize for sending our comments so close to the deadline, but coordinating the thoughts of the relevant directors, the grievance attorneys who handle our grievances under the new statute, and our Level 1 grievance evaluators was not a simple matter.

Some changes that require no explanation are indicated in redline/strikeout. Comments are provided in the margins on issues of concern or on suggested changes that do require explanation. If you cannot display this information correctly or completely, please let me know. Likewise, if you require additional information or explanation, please let me know.

Krista

**Krista L. Duncan, Esq.**  
West Virginia Department of Transportation  
Division of Highways  
Building 5, Room 109-110  
1900 Kanawha Boulevard East  
Charleston, West Virginia 25305  
Work (304) 558-7454  
Fax (304) 558-1004

[kduncan@dot.state.wv.us](mailto:kduncan@dot.state.wv.us)

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12/4/2007

## Chriceous (Cricket) Powell

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**From:** Krista Duncan [KDuncan@dot.state.wv.us]  
**Sent:** Friday, September 28, 2007 12:07 PM  
**To:** WVGB Account  
**Cc:** Paul Mattox; Tony Halkias; Drema Smith; Jeff Black; Jennifer Alkire; Barbara Baxter; Carrie Dysart; Julia Vande Linde  
**Subject:** Additional DOH Comment on Proposed Rule

§ 3.3 This section purports to allow an interlocutory appeal to the Grievance Board on procedural matters, leading to unnecessary delays on issues that should legally be dealt with on *de novo* appeal on the merits to the Board.

Krista

**Krista L. Duncan, Esq.**  
West Virginia Department of Transportation  
Division of Highways  
Building 5, Room 109-110  
1900 Kanawha Boulevard East  
Charleston, West Virginia 25305  
Work (304) 558-7454  
Fax (304) 558-1004

[kduncan@dot.state.wv.us](mailto:kduncan@dot.state.wv.us)

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## Chriceous (Cricket) Powell

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**From:** missy [omanda@zoominternet.net]  
**Sent:** Wednesday, September 26, 2007 7:17 PM  
**To:** WVGB Account  
**Subject:** Draft Procedural Rules

Regarding the draft procedural rules, It is in my opinion,

1. Employees filing grievances be allow to use interdepartmental mail  
the rule as written is unclear and at one point says yes and then says no.
2. Require the employer/ administrator to inform every employee prior to any predetermination meeting that the employee has the right to have a representative present in the meeting. {affirmative right and should be add to the proposed rule}
3. If a hearing examiner is going to prohibit witnesses, the hearing examiner must state the reason in writing and delivere to the grievant at ;east three days prior to any scheduled hearing.  
The rules should also allow a grievant to offer rebuttal testimony to that written denial of witnesses are denied.  
This is basic due process and should be add to the rule.