



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

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Office of West Virginia
Secretary Of State

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE EXEMPT, INTERPRETIVE OR PROCEDURAL
RULE**

AGENCY: Public Employees Grievance Board TITLE-SERIES: 156-01

RULE TYPE: Procedural Amendment to Existing Rule: Yes Repeal of existing rule: No

RULE NAME: RULES OF PRACTICE AND PROCEDURE OF
THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

CITE STATUTORY AUTHORITY: §6C-3-4

This rule is filed with the Secretary of State. This rule becomes effective on the following date:

August 17, 2018

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

Jennelle H Jones -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

156CSR1

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 -- July 18, 2018.

1.4. Effective Date -- August 17, 2018.

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 website: www.pegb.wv.gov.

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.

§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.

2.1.2. "Conference" is an informal meeting between the grievant and the chief administrator or grievance. The chief administrator may permit 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 1596 Kanawha Boulevard, East, 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 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. Guidelines for conducting Level One hearings can be found on the Board's website.

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 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.

3.1. 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, Forms, and Chief Administrator Authority Generally.

4.1. Forms -- All employers shall use the grievance form issued by the Board at all levels of the procedure. The chief administrator must provide a grievance form to an employee on request. Copies of this form can be obtained at the 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. Copies of the grievance statute and procedural rule can be obtained at the Board's offices and on the Board's website.

4.3. Chief Administrator's Authority

4.3.1. Level One Conference -- At a level one conference, the chief administrator may permit other individuals to attend and participate, as needed, in order to resolve the grievance.

4.3.2. Level One Hearing -- 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 and may reasonably limit the number of relevant witnesses, motions and other procedural matters.

4.3.3. Authority Generally -- 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, 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 by all parties, shall be issued within fifteen days of the conference or hearing 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. All requests to intervene shall be made using the Intervention Form which can be obtained at the Board's offices or on the Board's website. Employees who may be directly affected by a ruling in a particular grievance are encouraged to intervene. An employee who intervenes in a grievance proceeding may make affirmative claims for relief in matters related to the grievance, as well as assert defensive claims, and may appeal to circuit court like any other party.

§156-1-5. Level Two - Mediation or Arbitration.

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. If a specific method is not selected, the parties will automatically be deemed to have agreed to mediation by an administrative law judge. The Mediation Agreement Form may be obtained at the Board's offices or on the Board's website.

5.1.2. If mediation by an administrative law judge is selected, the Board will request dates, and notify the parties of the time and date of the mediation. Within fifteen days of the mediation session, the administrative law judge shall issue an order or report stating whether the mediation was

successful; if unsuccessful, the order/report shall notify the parties of the procedure and the address for appeal to the next level.

5.1.3. If private mediation is selected, the mediator shall file a written report of the mediation with the Board within fifteen days of the mediation session. The report shall state the date and location of the mediation session, the names of those in attendance, and whether the parties were able to reach a resolution of the grievance. The report shall be signed and dated by the mediator. If private mediation is unsuccessful, within ten days of receipt of the report, the administrative law judge shall issue an order notifying the parties of the procedure and the address for appeal to the next level.

5.1.4. If private arbitration is selected, the parties shall file with the Board a written agreement stating their agreement to arbitration; the name and address of the arbitrator; and a statement agreeing to share the cost of the proceeding. Within thirty days of the arbitration, the arbitrator shall render a written decision and shall mail it to all parties and to the Board. In no case shall the written decision be submitted to the Board any later than forty days after the arbitration hearing.

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.

§156-1-6. Level Three and Administrative Law Judge Authority Generally.

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 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 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.

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.

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 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.

6.16. Failure to Appear -- 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.

6.17. Hearings in General -- Administrative law judges have full and complete authority to preside over and control all aspects of a hearing. If, in the determination of the administrative law judge, an individual present at a hearing is engaging in disruptive conduct, the administrative law judge may, in 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 twenty days.

6.18. 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.

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

6.19.1. Decisions on the merits will result in the granting or denying of a grievance, in whole or in part. All decisions are maintained by the Board and are 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.

6.19.2. 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.

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

6.20. 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.

6.21. 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.

6.22. 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. The Employee Organization Registration Form may be obtained at the Board's offices or on the Board's website.

6.23. 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 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.

8.1. 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.