

West Virginia's Public Employees Grievance Procedure

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The purpose of this article is to teach you everything you wanted to know, and more, about public employees' grievances and the Grievance Procedure before the West Virginia Public Employees Grievance Board. The Grievance Procedure is significant because it impacts public education employers, like county boards of education, colleges, and universities, and most state agencies, such as DHHR and state-run correctional facilities. Grievances can cost employers top dollar to defend, especially when they are not taken seriously from the very beginning. In addition, grievances can have huge, lasting consequences – operationally, financially, and for the leadership of state agencies, county boards of education, and institutions of higher education. For this reason alone, employers simply cannot afford to let their guard down regarding grievances.

- What is the purpose of the Grievance Procedure?

Historically, this procedure was created by the West Virginia Legislature in 1985, under its former moniker the Education Employees Grievance Board. The purpose of creating the Grievance Procedure was to provide employees and employers a process for resolving problems in the employment relationship. Over time, the board underwent another name change and expanded to include state employees other than education employees.

In 2007, the West Virginia Public Employees Grievance Procedure was codified by West Virginia Code § 6C-2-1 *et seq.*, in effect currently. Its statutory predecessor was West Virginia Code § 18-29-1 *et seq.* The Grievance Procedure was intended to be an efficient, cost-effective, and consistent employment resolution strategy, for the purpose of maintaining good morale and enhancing employee job performance. The Legislature believed the Grievance Procedure would better serve citizens of the state by resolving problems at lowest possible administrative level. Of course, the Grievance Procedure was never intended to prevent informal disposition of complaints by stipulation or settlement.

- What is grievable?

Any claim by an employee alleging a violation, misapplication, misinterpretation of the statutes, policies, rules, or written agreements applicable to the employee is grievable. In short, a grievance envelops any action, policy, or practice that interferes with the effective job performance of the employee or their health and safety. “Reprisal” is also commonly associated with grievances, as it describes the act of retaliation of an employer toward a grievant, witness, representative, or any other participant in the grievance procedure. Some of the most common issues with grievances include reappointment, discharge, compensation, benefits, non-selection, and working conditions. In addition, other grievable issues include favoritism and “discrimination,” the later specifically defined as “any differences in the treatment of similarly situated employees unless the differences are related to the actual job responsibilities of the employees or are agreed to in writing by the employees.”

Conversely, matters that relate to pension, retirement, public employees' insurance, the protected classes set forth in the West Virginia Human Right Act (including discrimination based thereon), or any other matter in which the authority is not vested with the Grievance Board are not grievable.

- Who can grieve?

Grievances can be filed by current and former employees. This means any person hired for permanent employment by an employer for a probationary, full, or part-time position. In the realm of education law, a substitute education employee may grieve matters relating days worked or alleged violations of statute, policies, or written agreements. If there is a group of employees that are similarly situated, then one or more of those employees can file a grievance if they each complete the designated grievance form.

- How are grievances initiated?

A standard grievance form is available on the Grievance Board's website. A written statement of the grievance, the requested relief, and a signature from the grievant are needed to complete a grievance form for Levels One, Two, and Three, according to West Virginia Code § 6C-2-4(a). The form then needs to be filed with the "Chief Administrator" or his or her designee and copied to the Grievance Board. The filing of a grievance must occur within 15 days of either when the event happened, the date when the event became known to the employee, or the most recent occurrence of a continuing practice. Importantly, the "respondent" is always the employer, not a particular employee or officer of the employer.

- How stringent are Grievance Board deadlines?

In a word-extremely! Either party may prevail by default if a required response is not made within the time limits established by the statute. It is immensely important for employers to be aware of the importance of Grievance Board deadlines, to avoid disposition by default.

Given the importance of deadlines in the Grievance Procedure, it is crucial to understand the calculation of "days" under the statute. For purposes of grievance deadlines, "days" means "working days exclusive of Saturday, Sunday, official holidays, and any day in which the employee's workplace is legally closed..."

A final note on Grievance Procedure deadlines – they may be extended by mutual, written agreement of the parties and are automatically extended if there is sickness, accident, death in the family, or any other approved leave from employment.

- How are grievances processed?

At Levels One, Two, and Three

The process of grievance has three levels: Level One, Level Two, and Level Three. As you might imagine, the grievance procedure typically begins at Level One and moves forward

sequentially. However, if the grievant has been discharged, suspended without pay, or demoted resulting in a loss of compensation or benefits (or if the parties agree), the parties may proceed directly to Level Three. Every grievant has the right to select a representative who may attend any step of the grievance procedure.

Level One

At Level One the grievant can choose a Level One conference or Level One hearing; whichever option is elected must be conducted by the chief administrator or designee within 20 days after filing. All parties must receive written notice of the date, time, and location of the hearing or conference. The hearing or conference must occur in a location that is convenient to all parties, during regular working hours, and in accordance with their normal operations.

- Level One Conference, an informal discussion for conflict resolution

If the grievant elects a Level One conference, an informal discussion takes place between the grievant and the chief administrator to exchange information and to attempt to resolve the conflict. In his or her discretion, the chief administrator can allow other employees and witnesses to attend and participate. The Level One conference may be recorded solely for use in issuing a decision, but the recording must be destroyed when a decision is issued. Within 20 days following the conference, the chief administrator must issue a written decision.

- Level One Hearing, a more formal, recorded proceeding

A Level One hearing is also private, although slightly more formal. A Level One hearing must be recorded, and a copy of the recording (or transcript) must be provided to any party, upon request. Although the parties of the Level One hearing may present and cross-examine witnesses and documents, the Rules of Evidence do not apply. The chief administrator may limit the number of witnesses, motions, and other procedural matters. Following a Level One hearing, the chief administrator must issue a written decision within 20 days. The decision itself must be dated and must set forth the reasons for the outcome, typically in the form of Findings of Fact and Conclusions of Law. The written decision must be transmitted to the parties. Within 15 days of receiving an adverse Level One decision, the grievant may appeal.

Level Two: Three types of alternate dispute resolution

At Level Two there are three options of alternate dispute resolution: (1) mediation by a Grievance Board judge, (2) private mediation, and (3) private arbitration. At Level Two, grievances are typically mediated by a Grievance Board judge. However, upon the grievant's request and the employer's consent, private mediation or private arbitration may be used. Whatever type of alternate dispute resolution is used, the process must be scheduled within 20 days of the grievant's request. Mediation agreements and arbitration decisions are binding and enforceable.

- Mediation

There is no fee charged by the Grievance Board for mediation by a Grievance Board judge. For this reason, mediation by a Grievance Board judge is far and away the most popular choice made by grievants at Level Two. Mediations must be scheduled within 20 days of the request. Importantly, an individual authorized to resolve the dispute must be in attendance for each party. Following the mediation, a report is due within 20 days.

- Private Mediation

Private mediation is also an available option, similar to mediation by a Grievance Board judge. Private mediation can only occur when the parties agree in writing upon a choice of mediator *and* to share the cost. Again, following the mediation, a report is due within 20 days.

- Private Arbitration

Similar to private mediation, private arbitration is only available if the parties agree in writing to the choice of a private arbitrator and to share the cost. Someone authorized to resolve the dispute must attend for each party. Arbitration is distinct from mediation because it involves a neutral, trained arbitrator who serves as a judge and is responsible for resolving the dispute. Within 30 days of arbitration, the arbitrator's written decision must be issued with Findings of Fact and Conclusions of Law.

Level Three

Within 10 days of receiving a written report of unsuccessful Level Two mediation, the grievant, in writing, may file with the employer and Grievance Board a request for a Level Three hearing on the grievance. Typically, these hearings occur in Charleston or Westover (in Morgantown) at the offices of the Grievance Board. Within 30 days, one of the Grievance Board's administrative law judges ("ALJ") who did not mediate during Level Two will schedule the Level Three hearing. The decisions of the ALJ at Level Three are enforceable in the circuit court of the judicial district in which the grievant is employed.

The procedure of a Level Three hearing is more formal. The ALJ may issue subpoenas for witnesses at the request of a party. Testimony is given by witnesses. The parties put on evidence and present their case before the ALJ. The Level Three hearing is recorded. Similar to Level One, the recording or a transcript must be provided to the parties, upon request. Both parties submit proposed Findings of Fact and Conclusions of Law to the ALJ. Within 30 days of the Level Three hearing, the ALJ issues a written decision. The Level Three decision of the ALJ is binding unless it is appealed and reversed.

In extreme cases and upon a determination of bad faith, the ALJ may allocate the cost of the hearing to the party acting in bad faith. In practice, however, this rarely occurs. Generally, the parties bear their respective costs and fees associated with the grievance procedure.

- Appeal

Any party may appeal the ALJ's decision at Level Three on the grounds that the decision is contrary to law, a lawfully adopted rule, or written policy of the employer. Level Three decisions may also be appealed on multiple other grounds, including when a party contend the Level Three decision is clearly wrong, arbitrary or capricious, or the result of fraud or deceit.

Appeals of Level Three decisions proceed to the West Virginia Intermediate Court of Appeals ("ICA"). The ICA does not hear new witnesses or take new evidence. The court will base its decision on the record from Level Three and will issue a written opinion that affirms or reverses the Level Three decision. In appropriate cases, the ICA may remand the case to the Grievance Board.

Appeals of ICA decisions escalate to the West Virginia Supreme Court of Appeals ("WVSCA"). The WVSCA will also base its review on the record of the prior proceedings in the grievance, briefs, and, sometimes, oral arguments.

- Who pays?

This question is frequently heard by attorneys involved in the Grievance Procedure. As mentioned above, the Grievance Procedure requires that any expenses that are incurred by the parties at Levels One, Two and Three be borne by the party incurring the expense. Similar to the "American rule" of civil litigation, each side is responsible for its legal fees.

If either the grievant or the employer ultimately, substantially prevails in an appeal to the courts, then, the court, in its discretion, may award court costs and reasonable attorney's fees. However, an employer's ability to recover is conditioned on the requirement that the grievant has not substantially prevailed at any level of the grievance process or appeal. Therefore, the Grievance Procedure and any appeal must be completed before this remedy becomes available.

Resources for those who would like to know more about the West Virginia Public Employees Grievance Board and the Grievance Procedure:

W. Va. Code § 6C-2-1 et seq.

West Virginia Public Employees Grievance Board website: <https://pegb.wv.gov/>