

<p>PRESTON COUNTY BOARD OF EDUCATION</p> <p>FILE: 8 – PERSONNEL MANAGEMENT</p> <p>File: 8-9 Employee Grievance Procedure</p>	<p>Last Reviewed: 6-28-10</p> <p>Next Review: 7-01-12</p>
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The Preston County Board of Education believes that the resolution of problems which arise between employees and the Board or administrators who represent the Board is necessary in order for good morale to be maintained, for effective job performance to be enhanced, and for the citizens of the community to be better served. To facilitate this, the Board shall follow the grievance procedure for employees as provided in §6C-2-1 thru §6C-2-6 of the W.Va. Code

Nothing in the code and accompanying guidelines prohibits the informal disposition of grievances by stipulation or settlement agreed to in writing by the parties, nor the exercise of any hearing right provided in Chapter 18 or Chapter 18A of the code

The effective day of the Public Employees Grievance Procedure shall be July 1, 2007. Any grievance proceeding which is in process on the effective date of the new procedures will be completed as expeditiously as possible, and all outstanding orders for hearings must be completed by the first day of July, 2007. Parties to grievances for which a hearing has not been held may, by agreement, proceed to either level two or level three.

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R 8-9-1 Definitions as They Apply to the Preston County Board of Education

- ❖ **"Board"** means the West Virginia Public Employees Grievance Board created in WVC § 6C.
- ❖ **"Chief administrator"** means the Superintendent. The Superintendent may appoint a designee who shall have the authority delegated to handle any aspect of the grievance procedure as established by code.
- ❖ **"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 Superintendent owing to weather or other cause provided for by statute, rule, policy or practice.
- ❖ **"Discrimination"** means 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.
- ❖ **"Employee"** means:
 - A person hired for permanent employment by an employer for a probationary, full- or part-time position.
 - A substitute education employee is considered an "employee" only on matters related to days worked or when there is a violation, misapplication or misinterpretation of a statute, policy, rule or written agreement relating to the substitute.
- ❖ **"Employee organization"** means an employee advocacy organization with employee members that has filed with the board the name, address, chief officer and membership criteria of the organization.
- ❖ **"Employer"** means the Preston County Board of Education.

- ❖ **"Favoritism"** means unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of a similarly situated employee unless the treatment is related to the actual job responsibilities of the employee or is agreed to in writing by the employee.
- ❖ **"Grievance"** means a claim by an employee alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules or written agreements applicable to the employee including:
 - Any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination, unless the discrimination is related to the actual job responsibilities of the employee or agreed to in writing by the employee;
 - Any discriminatory or otherwise aggrieved application of unwritten policies or practices of his or her employer;
 - Any specifically identified incident of harassment, including repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the demeanor expected by law, policy and profession, or favoritism, including unfair treatment of an employee as demonstrated by preferential, exceptional or advantageous treatment of another similarly situated employee; or
 - Any action, policy or practice constituting a substantial detriment to or interference with the effective job performance of the employee, or the health and safety of the employee.
- ❖ **"Grievant"** means an employee or group of similarly situated employees filing a grievance.
- ❖ **"Harassment"** means repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy and profession.
- ❖ **"Party" and "parties"** mean the grievant and employer.
- ❖ **"Representative"** means any employee organization, fellow employee, legal counselor or other person designated by the grievant as the grievant's representative and may not include a supervisor who evaluates the grievant.
- ❖ **"Reprisal"** means the retaliation of an employer toward a grievant, witness, representative or any other participant in the grievance procedure either for an alleged injury itself or any lawful attempt to redress it.
(WVC §6C-2-2)

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R 8-9-2 Grievance Procedure Generally

The procedures set forth in the following pages are very specific and clearly define the manner in which employee grievances must be reviewed and resolved.

Time Limits:

- ❖ An employee shall file a grievance within the time limits specified in the code.

- ❖ The specified time limits may be extended to a date certain by mutual written agreement, and shall be extended whenever a grievant is not working because of accident, sickness, death in the immediate family or other cause for which the grievant has approved leave from his/ her employment.

Default:

- ❖ The grievant prevails by default if a required response is not made by the employer within the time limits established in the code, unless the employer is prevented from doing so directly as a result of injury, illness or a justified delay not caused by negligence or intent to delay the grievance process.
- ❖ Within 10 days of the default, the grievant may file with the Superintendent or designee a written notice of intent to proceed directly to the next level or to enforce the default. If the Superintendent objects to the default, then s/he may request a hearing before an administrative law judge for the purpose of stating a defense to the default or showing that the remedy requested by the prevailing grievant is contrary to law or contrary to proper and available remedies
- ❖ If the administrative law judge finds that the employer has a defense to the default as permitted by the code, or that the remedy is contrary to law or not proper or available at law, he/she may deny the default, or modify the remedy to be granted to comply with the law or otherwise make the grievant whole.

Defenses and limitations:

- ❖ **Untimeliness** -- Any assertion by any party that the filing of the grievance at level one was untimely shall be made at or before level two.
- ❖ **Back Pay** -- When it is a proper remedy, back pay may only be granted for one year prior to the filing of a grievance, unless the grievant shows, by a preponderance of the evidence, that the employer acted in bad faith in concealing the facts giving rise to the claim for back pay, in which case an eighteen-month limitation on back pay applies.
- ❖ **Statutory defense** -- If the employer intends to assert the application of any statute, policy, rule or written agreement as a defense at any level, then a copy of the materials shall be forwarded to the grievant and his or her representative.

Withdrawal and Reinstatement of grievance:

An employee may withdraw a grievance at any time by filing a written notice of withdrawal with the Superintendent or the board. The grievance may not be reinstated by the grievant unless reinstatement is granted by the Superintendent or the "Board". If more than one employee is named as a grievant, the withdrawal of one employee does not prejudice the rights of any other employee named in the grievance.

Consolidation and Groups of Similarly Situated Employees:

- ❖ Grievances may be consolidated at any level by agreement of all parties, or at the discretion of the administrative law judge.

- ❖ Class actions are not permitted. However, a grievance may be filed by one or more employees on behalf of a group of similarly situated employees, but any similarly situated employee shall indicate in writing his/her intent to join the group of similarly situated employees. Only one employee filing a grievance on behalf of similarly situated employees shall be required to participate in the level one hearing.

Intervention:

Upon 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.

Representation in a Disciplinary Grievance:

An employee may designate a representative who may be present at any step of the procedure as well as at any meeting that is held with the employee for the purpose of discussing or considering disciplinary action.

An employee may not be compelled to testify against himself or herself in a disciplinary grievance hearing.

Reprisal:

No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in the grievance procedure by reason of his or her participation. Reprisal or retaliation constitutes a grievance, and any person held responsible is subject to disciplinary action for insubordination.

Forms:

The "Board" shall create the forms for filing grievances, giving notice, taking appeals, making reports and recommendations, and all other necessary documents provide them to the Superintendent to make available to any employee upon request

Discovery:

The parties are entitled to copies of all material submitted to the Superintendent or designee or the administrative law judge by any party. All documents submitted become part of the record

Conferences and Hearings:

- ❖ **Impartiality** – The administrative law judge shall conduct all level three hearings in an impartial manner and shall ensure that all parties are accorded procedural and substantive due process.
- ❖ **Closed Conferences and Hearings.** -- All conferences and hearings shall be conducted in private. Hearings may be public at level three at the discretion of the administrative law judge.

- ❖ **Evidence** -- All parties may present supportive or corroborative evidence and argument with respect to the grievance at a conference or hearing. Formal rules of evidence do not apply, but parties are bound by the rules of privilege recognized by law, and the rules and procedures established by the board.
- ❖ **Witnesses** – At level one, the Superintendent may call witnesses and may allow parties to call witnesses during a conference or hearing upon request. The parties have the right to call, examine and cross-examine witnesses during any hearing. Administrative law judges may issue subpoenas for witnesses, limit witnesses, administer oaths and may exercise other powers granted by rule or law. No employee may be compelled to testify against himself or herself in a grievance hearing.
- ❖ **Notice** -- Reasonable notice of a conference or hearing shall be sent at least five days prior to the hearing to all parties and their representatives and shall include the date, time and place of the hearing. If an employer causes a conference or hearing to be postponed without adequate notice to employees who are scheduled to appear during their normal work day, the employees may not suffer any loss in pay for work time lost.
- ❖ **Scheduling** – All proceedings shall be scheduled during regular work hours in a convenient location accessible to all parties in accommodation to the parties' normal operations and work schedules. By agreement of the parties, a proceeding may be scheduled at any time or any place. Disagreements shall be decided by the administrative law judge.
- ❖ **Record** – Conferences are not required to be recorded, but all evidence submitted and the decision become part of the record. 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.

Grievance decisions:

- ❖ Any party may propose findings of fact and conclusions of law within twenty days of an arbitration or a level three hearing.
- ❖ Decisions rendered at all levels of the grievance procedure shall be dated, in writing, setting forth the decision or decisions and the reasons for the decision, and transmitted to the “Board”, the employer and the grievant within the time limits prescribed. If the grievant is denied the relief sought, the decision shall include the procedure for the next level of appeal for the grievant.

Preparation time

- ❖ The grievance shall be processed during regular working hours with minimal interference with the normal operations of the employer and schedule of the employee.
- ❖ The grievant, witnesses and an employee representative shall be granted reasonable and necessary time off during working hours for grievance proceedings without loss of pay and without charge to annual or compensatory leave credits.

- ❖ In addition to actual time spent in grievance conferences and hearings, the grievant and an employee representative shall be granted time off during working hours, not to exceed four hours per grievance, for the preparation of the grievance without loss of pay and without charge to annual or compensatory leave credits. However, the first responsibility of any employee is the work assigned to the employee. An employee may not allow grievance preparation and representation activities to seriously affect the overall productivity of the employee.
- ❖ The grievant and an employee representative shall have access to the employer's equipment for purposes of preparing grievance documents subject to the reasonable rules of the employer governing the use of the equipment for non-work purposes.
- ❖ Disagreements regarding preparation time shall be decided by the "Board" or the presiding administrative law judge.

Grievance files:

- ❖ All grievance forms and reports shall be kept in a file separate from the personnel file of the employee and may not become a part of the personnel file, but shall remain confidential except by mutual written agreement of the parties
- ❖ The grievant may file a written request to have the grievant's identity removed from any files kept by the employer one year following the conclusion of the grievance.

Number of Grievances:

The number of grievances filed against an employer by an employee is not, per se, an indication of the employer's or the employee's job performance.
(WVC §6C-2-3)

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R 8-9-3 Grievance Procedural Levels

Level one: Superintendent or Designee:

- ❖ Within 15 days following the occurrence of the event upon which the grievance is based, or within 15 days of the date upon which the event became known to the employee, or within 15 days of the most recent occurrence of a continuing practice giving rise to a grievance, an employee may file a written grievance with the Superintendent or designee stating the nature of the grievance and the relief requested and request either a conference or a hearing. The employee shall also file a copy of the grievance with the "Board".
- ❖ If requested by the grievant, the Superintendent or designee shall hold the conference, as requested by the grievant, within 10 days of receiving the grievance. A conference is a private, informal meeting between the grievant and the Superintendent/designee to discuss the issues raised by the grievance, exchange information and attempt to resolve the grievance. The Superintendent/designee may permit other employees and witnesses to attend and participate in the conference. The Superintendent/designee shall issue a written decision within 15 days of the conference.

- ❖ If requested by the grievant, the Superintendent or designee shall hold the conference, as requested by the grievant, within 10 days of receiving the grievance. A conference is a private, informal meeting between the grievant and the Superintendent/designee to discuss the issues raised by the grievance, exchange information and attempt to resolve the grievance. The Superintendent/designee may permit other employees and witnesses to attend and participate in the conference.
The Superintendent/designee shall issue a written decision within 15 days of the conference.
- ❖ If requested by the grievant, the Superintendent or designee shall hold a level one hearing within 15 days of receiving the grievance. A level one hearing is a recorded proceeding conducted in private in which the grievant is entitled to be heard and to present evidence. The formal rules of evidence and procedure do not apply, but the parties are bound by the rules of privilege recognized by law. The parties may present and cross-examine witnesses and produce documents, but the number of witnesses, motions and other procedural matters may be limited by the Superintendent/designee. The Superintendent or designee shall issue a written decision within fifteen days of the level one hearing.
- ❖ An employee may proceed directly to level three upon the agreement of the employee and the Superintendent or designee or when discharged, suspended without pay or demoted or reclassified resulting in a loss of compensation or benefits.

Level two: Alternative Dispute Resolution:

- ❖ Within 10 days of receiving an adverse written decision at level one, the grievant shall file a written request for mediation, private mediation or private arbitration with the “Board” if the grievant desires to continue the grievance process.
 - **Mediation** – The “Board” shall schedule the mediation between the parties within 20 days of the request. Mediation shall be conducted by an administrative law judge pursuant to standard mediation practices and “Board” procedures at no cost to the parties. Parties may be represented and shall have the authority to resolve the dispute. Agreements reached through mediation shall be documented in writing within 15 days. Agreements are binding and enforceable in this state by a writ of mandamus.
 - **Private Mediation** – The parties may agree in writing to retain their choice of a private mediator and share the cost. The mediator shall schedule the mediation within 20 days of the written request and shall follow standard mediation practices and any applicable “Board” procedures. Parties may be represented and shall have the authority to resolve the dispute. Agreements reached through mediation shall be documented in writing within 15 days. Agreements are binding and enforceable by a writ of mandamus.
 - **Private Arbitration** -- The parties may agree, in writing, to retain their choice of a private arbitrator and share the cost. The arbitrator shall schedule the arbitration within 20 days of the written request and shall follow standard arbitration practices and any applicable board procedures. The arbitrator shall render a decision in writing to all parties, setting forth findings of fact and conclusions of law on the issues submitted within 30 days following the arbitration. An arbitration decision is binding and enforceable in this state by a writ of mandamus. The arbitrator shall inform the board, in writing, of the decision within 10 days.

Level three: Adjudication:

- ❖ Within 10 days of receiving a written report stating that level two was unsuccessful, the grievant may file a written appeal with the employer and the board requesting a level three hearing on the grievance.
- ❖ The administrative law judge shall conduct all proceedings in an impartial manner and shall ensure that all parties are accorded procedural and substantive due process.
- ❖ The administrative law judge shall schedule the level three hearing and any other proceedings or deadlines within a reasonable time in consultation with the parties. The location of the hearing and whether the hearing is to be made public are at the discretion of the administrative law judge.
- ❖ The administrative law judge may issue subpoenas for witnesses, limit witnesses, administer oaths and exercise other powers granted by rule or law.
- ❖ Within 30 days following the hearing or the receipt of the proposed findings of fact and conclusions of law, the administrative law judge shall render a decision in writing to all parties setting forth findings of fact and conclusions of law on the issues submitted.
- ❖ The administrative law judge may make a determination of bad faith and, in extreme instances, allocate the cost of the hearing to the party found to be acting in bad faith. The allocation of costs shall be based on the relative ability of the party to pay the costs
(WVC §6C-2-4)

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R 8-9-4 Enforcement and Appeal

As under the former grievance process, any party may appeal to Circuit Court within 30 days of receiving an Administrative Law Judge's decision, but all such appeals must now be made to the Circuit Court of Kanawha County.

- ❖ The decision of the administrative law judge is final upon the parties and is enforceable in the circuit court of Kanawha County.
- ❖ A party may appeal the decision of the administrative law judge on the grounds that the decision:
 - Is contrary to law or a lawfully adopted rule or written policy of the employer;
 - Exceeds the administrative law judge's statutory authority;
 - Is the result of fraud or deceit;
 - Is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
 - Is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

- ❖ A party shall file the appeal in the circuit court of Kanawha County within thirty days of receipt of the administrative law judge's decision. The decision of the administrative law judge is not automatically stayed upon the filing of an appeal, but a stay may be granted by the circuit court upon a separate motion for a stay.
- ❖ The court shall review the entire record that was before the administrative law judge, and the court may hear oral arguments and require written briefs. The court may reverse, vacate or modify the decision of the administrative law judge, or may remand the grievance to the administrative law judge or the chief administrator for further proceedings.
(WVC §6C-5)

R 8-9-5 Allocation of Expenses and Attorney's Fees

Any expenses incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expenses.

In the event a grievant or employer appeals an adverse Level Three decision to the Circuit court of Kanawha County, or an adverse circuit court decision to the Supreme Court of Appeals of West Virginia, and the grievant substantially prevails upon the appeal, the grievant may recover from the employer court costs and reasonable attorney's fees for the appeal to be set by the court.
(WVC §6C-2-6)

R 8-9-6 Mandamus Proceeding

If the Preston County Board of Education fails to comply with the provisions of the code relating to employee grievance procedures it may be compelled to do so by a mandamus proceeding and may be liable to a prevailing party for court costs and reasonable attorney's fees to be set by the court.
(WVC §6C-2-7)

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