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4340 - GRIEVANCE PROCEDURE

The purpose of this policy is to provide a procedure for employees of _____Mingo County Schools and ~~(-)~~ ~~_____ multi-county vocational centers and~~ their employer or agents of the employer to reach solutions to problems ~~which~~ that arise between them within the scope of their respective employment relationships to the end that good morale may be maintained, effective job performance may be enhanced and the citizens of the community may be better served.

This policy is intended to provide a simple, expeditious and fair process for resolving problems at the lowest possible administrative level and shall be construed to effectuate this purpose. A grievance may be resolved informally by stipulation or settlement agreed to in writing by the parties. Nothing in this policy shall prohibit the exercise of any hearing right provided in WV Chapters 18 and 18A. Parties to grievances shall at all times act in good faith and make every possible effort to resolve disputes at the lowest level of the grievance procedure.

Definitions

For the purpose of this policy:

- A. **Board** means the West Virginia Public Employees Grievance Board.
- B. **Chief Administrator** means, in the appropriate context, the State Superintendent, the ~~District~~ ~~County~~ District Superintendent, the executive director of a regional educational service agency or the director of a multi-county vocational center who is vested with the authority to resolve a grievance. A chief administrator includes a designee, with the authority delegated by the chief administrator, appointed to handle any aspect of this 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.
- D. **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.

- E. **Employee** means any 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.

- F. **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.

- G. **Employer** means a county board of education, regional educational service agency or multi-county vocational center, or agent thereof, using the services of an employee as defined in this policy.

- H. **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.

- I. **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:

1. any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination;
2. any discriminatory or otherwise aggrieved application of unwritten policies or practices of his/her employer;
3. any specifically identified incident of harassment;
4. any specifically identified incident of favoritism; or
5. 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.

Grievance does not mean:

1. any pension matter or other issue relating to public employees insurance in accordance with Article Sixteen, WV Chapter Five, retirement or any other matter in which the authority to act is not vested with the employer.
2. any matter relating to the protected classes set forth in 5-11-1 et seq. of this code.

- J. **Grievance Proceeding, Proceeding** or the plural means a conference, level one hearing, mediation, private mediation, private arbitration or level three hearing, or any combination unless the context clearly indicates otherwise.

- K. **Grievant** means an employee or group of similarly situated employees filing a grievance.

- L. **Harassment** means repeated or continual disturbance, irritation or annoyance of an employee that is contrary to the behavior expected by law, policy, and profession.

- M. **Party** and **Parties** mean the grievant, intervenor, and employer and the Director of the Division of Personnel or his/her designee, for most State government employee grievances.

- N. **Representative** means any employee organization, fellow employee, attorney or other person designated by the grievant or intervenor as his/her representative and may not include a supervisor who evaluates the grievant.

- O. **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.

Grievance Procedure Generally

Time Limits:

- A. Each grievant shall file a grievance form, signed by the grievant, within the time limits specified in this article. If more than one grievant is a party to the grievance, they may submit one (1) signed form initiating the grievance. Grievant representatives who file on behalf of one or more grievants shall provide, as part of the grievance form, the name of each grievant being represented and his or her work location. Failure to properly sign the form shall result in immediate dismissal of a grievance, without prejudice. If the initial grievance was timely filed and then dismissed without prejudice, the grievant has five days from receipt of the order of dismissal to refile the grievance. The refiled grievance must meet the requirements of this article and applicable rules of procedure.
- B. The specified time limits may be extended to a date certain by mutual written agreement or the grievance evaluator, mediator, or administrative law judge at the request of any party. The specified time limits shall be extended for cause whenever an agency representative, intervenor, or a grievant is not working because of accident, sickness, death in the immediate family or other cause for which the agency representative or grievant has approved leave from employment.

Default:

- A. The grievant or the employer prevails by default if a required response is not made by the grievant or the employer representative within the time limits established in this policy unless the employer representative or grievant 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.
- B. Within ten (10) days of the default, the grievant or employer may file with the chief administrator a written notice of intent to proceed directly to the next level or to enforce the default. If the chief administrator objects to the default, then the chief administrator may, within five (5) days of the filing of the notice of intent, request a hearing before an administrative law judge for the purpose of stating a defense to the default. The chief administrator may assert s/he was 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, or showing that the remedy requested by the prevailing grievant is contrary to law or contrary to proper and available remedies. The administrative law judge shall determine whether the remedy is proper, available and not contrary to law.
- C. If the administrative law judge finds that the grievant or the employer has a defense to the default as permitted above, or that the remedy is contrary to law or not proper or available at law, the administrative law judge may deny the default, or modify the remedy to be granted to comply with the law or otherwise make the grievant or employer whole.

Defenses and Limitations:

- A. Timeliness. - A grievance must be filed within the time frames established in §6C-2-4 of this code. If the level one evaluator determines that the grievance was not timely filed, an order dismissing the grievance shall be issued. In no event shall a motion to dismiss be held in abeyance while other proceedings take place. This decision may be appealed to level three, and an administrative law judge shall review the order. If the dismissal is upheld an order shall be issued and the grievance shall be removed from the grievance board's docket. If the dismissal is overturned an order shall be entered stating with particularity the facts and the law found to be in error in the order below. The grievance shall be returned to level one for disposition. An administrative law judge shall decide an appeal of a dismissal for untimeliness within 30 days. If the grievant proceeds directly to level three, the administrative law judge shall make a determination on timeliness prior to scheduling the level three hearing.
- B. Motion to dismiss - Any party may, at any time, file a motion to dismiss asserting that the board lacks jurisdiction under 6C-2-2(i) of this code, that the grievant has otherwise failed to state a claim under this article upon which relief may be granted, or that the grievance was not timely filed. Upon filing of such a motion, the chief administrator or administrative law judge shall immediately hold in abeyance all other proceedings, and within ten (10) days of receipt of filing, issue a ruling on the motion or schedule the motion for a hearing.

- C. Back Pay – When it is a proper remedy, back pay may only be granted for one (1) 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 given rise to the claim for back pay, in which case an eighteen (18) month limitation on back pay applies
- D. Statutory Defense - If a party 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 all parties.
- E. Withdrawal and Reinstatement of Grievance - An employee may withdraw a grievance at any time by filing a written notice of withdrawal with the chief administrator or administrative law judge. The grievance may not be reinstated by the grievant unless reinstatement is granted by the chief administrator or the administrative law judge. If more than one (1) employee is named as a grievant, the withdrawal of one (1) employee does not prejudice the rights of any other employee named in the grievance.
- F. Consolidation and Groups of Similarly Situated Employees:
 - 1. Grievances may be consolidated at any level by agreement of all parties, or at the discretion of the chief administrator or administrative law judge. Provided, that a grievance that has been dismissed under the provisions of subdivisions (1) or (2) of this subsection may not be revived or consolidated with another grievance.
 - 2. Class actions are not permitted. However, a grievance may be filed by one (1) or more employees on behalf of a group of similarly situated employees. Any similarly situated employee shall complete a grievance form stating his/her intent to join the group of similarly situated employees. Only one (1) employee filing a grievance on behalf of similarly situated employees shall be required to participate in the conference or level one hearing.
- G. 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/her rights or property and that his/her interest is not adequately represented by the existing parties.
- H. Representation and disciplinary action - An employee may designate and shall provide the name and contact information for the individual or organization of the 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/herself in a disciplinary grievance hearing.
- I. Reprisal - No reprisal or retaliation of any kind may be taken by an employer against a grievant or any other participant in a grievance proceeding by reason of his/her participation. Reprisal or retaliation constitutes a grievance, and any person held responsible is subject to disciplinary action for insubordination.
- J. Improper classification – A supervisor or administrator responsible for a willful act of bad faith toward an employee or who intentionally works an employee out of classification may be subject to disciplinary action, including demotion or discharge.
- K. Forms – The Board shall create the forms for filing grievances, giving notice, taking appeals, making reports and recommendations, and all other necessary documents and provide them to the Grievance Board's website to be downloaded for completion and submission and for chief administrators to make available to any employee upon request.
- L. Discovery – The parties are entitled to copies of all material submitted to the chief administrator or the administrative law judge by any party.
- M. Notice – Reasonable notice of a proceeding shall be sent at least five (5) days prior to the proceeding to all parties and their representatives and shall include the date, time and place of the proceeding. If an employer causes a proceeding 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.

N. Record – Conferences may be recorded, at the discretion of the chief administrator for the sole use of aiding in issuing a decision or report. The recording shall not be transcribed, nor shall the recording be shared with the parties, or made part of the record. The recording shall be destroyed promptly after the decision has been issued. All documents admitted and the decision, agreement or report become part of the record. All the testimony at a level one and level three hearing shall be recorded by mechanical means, and a copy of the recording or transcript shall be provided to any party upon request. The Board is responsible for paying for and promptly providing a certified transcript of a level three hearing to the court for a mandamus or appellate proceeding.

O. Grievance Decisions and reports:

1. Any party may propose findings of fact and conclusions of law within twenty (20) days of an arbitration or a level three hearing.
2. A decision, agreement or report shall be dated, in writing, setting forth the reasons for the decision, or outcome and transmitted to the parties and, in a private arbitration, to the Board, within the time limits prescribed. If the grievance is not resolved, the written decision or report shall include the address and procedure to appeal to the next level.

P. 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 chief administrator or administrative law judge presiding in the case.

Q. Attendance and Preparation:

1. The grievant, witnesses and an employee representative shall be granted reasonable and necessary time off during working hours to attend grievance proceedings without loss of pay and without charge to annual or compensatory leave credits. A grievant or an intervenor may not be on any type of leave time or worker compensation at the time of the conference, mediation, hearing, or other proceeding. The proceedings shall be held in abeyance until the grievant returns to work: Provided, That, where the grievant has been determined to be unable to return to work, and the grievant's inability to return to work does not render the grievance moot, the grievance proceedings shall be resumed and the grievance resolved upon its merits.
2. In addition to actual time attending proceedings, the grievant and an employee representative shall be granted time off during working hours, not to exceed four (4) 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 as determined by the employer. An employee may be the representative in no more than five grievances per year. Time spent in preparing for and attending grievance proceedings shall be accounted for on leave request forms by stating the amount of time expended in such activities. Each employee representative shall request annual leave for any time in excess of four hours per grievance spent in grievance preparation.
3. 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.
4. Disagreements regarding preparation time shall be decided by the chief administrator or administrative law judge presiding in the case.

R. Grievance Files:

1. All grievance forms, decisions, agreements, 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.
2. The grievant may file a written request to have the grievant's identity removed from any files kept by the employer one (1) year following the conclusion of the grievance.

- S. 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.
- T. Procedures and rules. - The board shall prescribe rules and procedures in compliance with this article, article three of this chapter and the state Administrative Procedures Act under chapter 29A of this code for all proceedings relating to the level three grievance procedure. Chief administrators may adopt procedural rules to govern level one proceedings. Chief administrators and administrative law judges are governed by the West Virginia Ethics Commission's legislative Code of Conduct for Administrative Law Judges, rule 158 CSR 13.

Grievance Procedural Levels

A. Level One: Chief Administrator

1. Within fifteen (15) days following the occurrence of the event upon which the grievance is based, or within fifteen (15) days of the date upon which the event became known to the employee, or within fifteen (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 chief administrator 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.
2. Conference – Upon timely request by the grievant, the chief administrator shall hold the conference within twenty (20) days of receiving the grievance. A conference is a private, informal meeting between the grievant and the chief administrator to discuss the issues raised by the grievance, exchange information and attempt to resolve the grievance. The chief administrator may permit other employees and witnesses to attend and participate in a conference to reach a resolution. The chief administrator shall issue a written decision within twenty (20) days of the conference.
3. Level One Hearing – Upon timely request by the grievant, the chief administrator shall hold a level one hearing within twenty (20) 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 form 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 chief administrator. The chief administrator shall issue a written decision within twenty (20) days of the level one hearing.
4. An employee may proceed directly to level three upon the agreement of the parties or when the grievant has been discharged, suspended without pay or demoted or reclassified resulting in a loss of compensation or benefits. Level one and level two proceedings are waived in these matters.

B. Level Two: Alternative Dispute Resolution

Within fifteen (15) days of receiving an adverse written decision at level one, the grievant shall file a written request for mediation, private mediation or mediation or private-arbitration.

1. Mediation - The Board shall schedule the mediation between the parties within twenty (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 the representative shall have the authority to resolve the dispute. The report of the mediation shall be documented in writing within twenty (20) days. Agreements are binding and enforceable in this state by a writ of mandamus.
2. 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 twenty (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. The report of the mediation shall be documented in writing within fifteen (15) days. Agreements are binding and enforceable in this State by a writ of mandamus.

3. Private-Arbitration – The parties may agree in writing, to retain their choice of a private arbitrator and share the cost. The arbitrator shall schedule for arbitration within twenty (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 thirty (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 fifteen (15) days.

C. Level Three Hearing:

1. Within ten (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.
2. 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.
3. The administrative law judge shall schedule the level three hearing, and any other proceedings or deadlines, within thirty (30) days of receipt of the appeal from a lower-level decision 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. Hearings may be rescheduled at the request of either party for good cause shown or by the administrative law judge.
4. The administrative law judge may issue subpoenas for witnesses, limit witnesses, administer oaths and exercise other powers granted by rule or law.
5. Within thirty (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.
6. 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.

Enforcement and Appeal

- A. The decision of the administrative law judge is final upon the parties and is enforceable in the circuit court of Kanawha County.
- B. A party may appeal the decision of the administrative law judge on the grounds that the decision:
 1. is contrary to law or a lawfully adopted rule or written policy of the employer
 2. exceeds the administrative law judge's statutory authority;
 3. is the result of fraud or deceit;
 4. is clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
 5. is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
- C. A party shall file the appeal in the circuit court of Kanawha County within thirty (30) 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.
- D. 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.

Allocation of Expenses and Attorney's Fees

- A. Any expense incurred relative to the grievance procedure at levels one, two or three shall be borne by the party incurring the expenses.
- B. In the event a grievant or employer appeals an adverse level three decision to the Intermediate Court of Appeals, or an adverse Intermediate Court of Appeals decision to the Supreme Court of Appeals of West Virginia, and the appellant substantially prevails upon the appeal, the appellant may recover court costs and reasonable attorney's fees for the appeal to be set by the court: Provided, that the provisions of this subsection shall only allow the discretionary recovery of court costs and reasonable attorney's fees from a grievant if s/he has not substantially prevailed at any level of the grievance process or in any appeal to the Intermediate Court of Appeals or the Supreme Court of Appeals of West Virginia.

Mandamus Proceeding

Any employer failing to comply with the provisions of this policy 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.

Data Collection and Reporting Requirements

Each employer involved in a grievance matter shall maintain the forms and all records created in the grievance process, and shall provide this information to the Board in the form and manner prescribed by the Board.

Communication or Information the Labor Organization or Agent Received or Acquired in Confidence from an Employee

Except as otherwise provided by WV Code 6C-2-8, an employee organization or an agent of an employee organization may not be compelled to disclose any communication or information the employee organization or agent received or acquired in confidence from a public employee, while the employee organization or agent was acting in a representative capacity concerning a public employee grievance or an investigation of a potential public employee grievance, regardless of whether the public employee is a member of the employee organization provided that the confidentiality established by WV Code 6C-2-8 does not apply to written communications between the employee and the employee organization.

The confidentiality applies only to the extent that the communication or information is germane to a grievance or potential grievance of the employee.

The confidentiality continues after termination of:

- A. The employee's employment; or
- B. The representative relationship of the employee organization or its agent with the public employee.

The confidentiality established in WV Code 6C-2-8 protects the communication or information received or acquired by the employee organization or its agent, but does not protect the employee from being compelled to disclose, to the extent provided by law, the facts underlying the communication or information.

The protection for confidential communications established in WV Code 6C-2-8 only extends to proceedings under the public employees grievance procedure. Nothing established in WV Code 6C-2-8 may be construed to extend the confidentiality to circuit court proceedings outside of the public employees' grievance procedure.

An employee organization or its agent shall disclose to the employer, as soon as possible, a communication or information, otherwise confidential as established in WV Code 6C-2-8, ~~to the extent the employee organization or its agent reasonably~~ to the extent the employee organization or its agent reasonably believes:

- A. it is necessary to prevent certain death or substantial bodily harm;

- B. it is necessary to prevent the employee from committing a crime, fraud, or any act that is reasonably certain to result in substantial injury to the financial interests or property of another or to rectify or mitigate any such action after it has occurred;
- C. the communication or information constitutes an admission that the employee has committed a crime; or
- D. it is necessary to comply with a court order or other law.

An employee organization or its agent may disclose a communication or information in order to:

- A. secure legal advice about the compliance of the employee organization or its agent with a court order or other law;
- B. establish a claim or defense on behalf of the employee organization or its agent in a controversy between the employee and the employee organization or its agent;
- C. establish a defense to a criminal charge or civil claim against the employee organization or its agent based on conduct in which the employee was involved;
- D. respond to allegations in any proceeding concerning the performance of professional duties by the employee organization or its agent on behalf of the employee; or
- E. an employee organization or its agent may disclose an otherwise confidential communication or information, as established in WV Code 6C- 28-8, without regard to whether the disclosure is made within the public employees' grievance procedure, in the following circumstances:
 - 1. The employee organization has obtained the express written or oral consent of the employee.
 - 2. The employee has, by other act or conduct, waived the confidentiality of the communication or information.
 - 3. The employee is deceased or has been adjudicated incompetent by a court of competent jurisdiction and the employee organization has obtained the written or oral consent of the personal representative of the employee's estate or of the employee's guardian.

If there is a conflict between the application of WV Code 6C-2 and any Federal or State labor law, the provisions of the Federal or other State law shall control.

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Legal

WV Code 6C-2-1 through 8, 6C-3-1 et seq.