

WEST VIRGINIA LEGISLATURE
Performance Evaluation and Research Division

Building 1, Room W-314
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0610
(304) 347-4890
(304) 347-4939 FAX



John Sylvia
Director

January 11, 2017

The Honorable Craig Blair
Building 1, Room W-217
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305

The Honorable Gary G. Howell
Building 1, Room E-213
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305

Dear Chairmen:

This letter report is in response to your letter dated April 5, 2016, requesting a review of the Division of Personnel's (DOP) role in the public employee grievance process. In that letter, PERD was asked to answer the following questions:

1. What is the role of the DOP as intervener in public employee grievances?
2. What is the nature of intervention by the DOP at each step in the grievance process?
3. For which party and for what specific purposes does the agency initiate intervention in a grievance?
4. What is the frequency of intervention by the DOP on behalf of the employee compared to the DOP on behalf of the employer?
5. What role does the DOP take intervening in grievance settlements and on what authority?

The findings below are divided by subheadings addressing each of question.

What Is the Role of the DOP in Public Employee Grievances?

Joint Committee on Government and Finance

The DOP is not considered an “intervener” in public employee grievances according to state statute. Only another public employee may intervene in an existing public employee grievance. West Virginia Code §6C-2-3(f) states:

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.

However, the DOP and its director may be a “party” to public employee grievances according to state code, W. Va. §6C-2-2(m) which states:

"Party", or the plural, means the grievant, intervener, employer and the Director of the Division of Personnel or his or her designee, for state government employee grievances. The Division of Personnel shall not be a party to grievances involving higher education employees.

The DOP’s role in the public employees grievance procedure is primarily as a source of information, as a party, and to provide testimony pertaining to DOP law, rule, or policy. The Code of State Rules (CSR.) requires that the DOP must be joined as a party when a grievance involves job classification and compensation. CSR §156-1-6.13 states:

*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.** [Emphasis added]*

What Is the Nature of DOP’s Involvement at Each Step of the Grievance Process?

West Virginia’s public employees grievance process has three levels: Level 1, Level 2, and Level 3 (for a more detailed description of these levels, see Appendix A). The nature of DOP’s involvement at each step of the grievance process is as follows:

Level 1 – The DOP is typically not involved in Level 1 conferences or hearings unless it is the respondent (the agency that the grievance has been filed against). In

grievances where the DOP is not the respondent, either party, the grievant or the respondent may contact the DOP for guidance but DOP staff rarely testify at Level 1. If the chief administrator (an agency official designated to handle grievances within the agency) for the agency that the grievance is against at Level 1 lacks the authority to grant the relief sought (e.g., classification or compensation matter), he or she may waive the grievance to Level 2 of the grievance procedure as provided in CSR §156-1-4.3.3, at which time the DOP will be joined as a party as appropriate. The DOP would also review and approve or disapprove any proposed settlement agreement at this level.

Level 2 – The Public Employees Grievance Board’s (Grievance Board) statute provides three options at Level 2: mediation, private mediation, or private arbitration. The DOP may participate at this level as a party. Also, the DOP may file various briefs, motions, or other documents; respond to discovery requests; and offer an interpretation of DOP law, rule, or policy. In classification or compensation matters, the administrative law judge may place the grievance in abeyance to allow the parties to consider a settlement or for the DOP to review or audit the position grievant occupies to issue a classification determination.

Level 3 – The DOP may participate at Level 3 as a party. Also, the DOP may file various briefs, motions, or other documents; respond to discovery requests; and offer an interpretation of DOP law, rule, or policy. In classification and compensation matters, the administrative law judge may place the grievance in abeyance to allow the parties to consider a settlement for the DOP to review or audit the position grievant occupies to issue a classification determination. The DOP, as a party, may appeal an adverse decision to the Kanawha County Circuit Court.

Outside the jurisdiction of the Grievance Board, any Level 3 decision can be appealed by any party involved in the grievance to circuit court and the West Virginia Supreme Court. The nature of the DOP’s involvement at these steps is as follows:

Circuit Court – As a party, the DOP may file a response to a petition for appeal, and other documents as appropriate. At the discretion of the court, the DOP may also make oral arguments.

West Virginia Supreme Court – As a party, the DOP may file an appeal, a response to a petition for appeal, and other documents as appropriate. At the discretion of the court, the DOP may also make oral arguments.

Also, the DOP may be contacted prior to a grievance being filed or at any step in the grievance procedure by the grievant or the respondent pertaining to matters such as: representation; technical questions regarding the procedure; possible resolution or settlement; and interpretation of DOP law, rule, or policy.

Evaluation of DOP's Grievance Intervention Policy

PERD was asked to determine on behalf of which party and for what specific purposes does the DOP initiate intervention. As previously stated, the DOP does not initiate intervention on behalf of either party in public employee grievances. Instead, the agency is joined into all grievances relating to compensation and classification as required by statute. Also, like any other agency, the DOP would be involved in the grievance process if it happens to be the agency that the grievance is against. Also, the DOP does not see itself as representing the interests of either the grievant or the respondent during public employee grievances. The DOP only sees itself representing its own interests in public employee grievances. The specific purposes in which the DOP is statutorily required to be joined as a party into a grievance include matters related to compensation and classification.

Grievances Related Where the DOP Is Joined as a Party Favor the Employer

As stated above, the DOP represents its own interests when joined as a party in a grievance. However, when the DOP is joined into a grievance as a party, the majority of grievance outcomes favor the employer. A breakdown of grievance outcomes from the last four fiscal years can be seen below in Table 1. The different outcomes identified in the table can be grouped according to those favoring the grievant to some extent versus the respondent. At Level 1, only one grievance filed during the last four fiscal years where the DOP was joined as a party was granted. This represents a 0.6 percent success rate for the grievant. At Level 2, 29 grievances were settled, which can be construed as beneficial for the grievant. This represents a 20.4 percent success rate for the grievant. At Level 3, 2 grievances were granted, 1 grievance was granted in part and denied in part, and 13 grievances were settled. This represents a success rate of 21.3 percent.

Table 1
Grievance Outcomes, by Level,
Where the DOP Has Been Joined at Some Level,
Fiscal Years 2013-2016

Level	Outcome	FY13	FY14	FY15	FY16	Total
Level 1	Denied	10	7	11	10	38
	Failure by Grievant to Pursue	1	0	0	0	1
	Granted	0	1	0	0	1
	Lack of Jurisdiction	0	0	2	0	2
	No Activity	0	4	0	0	4
	Remedy Wholly Unavailable	0	4	0	0	4
	Waived to Level 2	25	14	30	37	106
	Waived to Level 3	0	1	0	0	1
	Withdrawn	2	0	0	0	2
Total		38	31	43	47	159
Level 2	Failure by Grievant to Pursue	0	0	0	1	1
	Lack of Jurisdiction	0	0	1	0	1
	Settled	9	3	12	5	29
	Unsuccessful	22	16	18	33	89
	Withdrawn	5	4	10	3	22
Total		36	23	41	42	142
Level 3	Denied	14	5	5	5	29
	Granted	0	0	1	1	2
	Granted in part, Denied in part	0	1	0	0	1
	Lack of Jurisdiction	0	0	1	1	2
	Moot	1	1	2	0	4
	Remedy Wholly Unavailable	0	3	1	0	4
	Settled	1	1	5	6	13
	Untimely	0	0	1	3	4
	Withdrawn	6	3	1	6	16
Total		22	14	17	22	75

Source: West Virginia Public Employees Grievance Board.

The Role DOP Takes in Approving Grievance Settlements and on What Authority

The DOP may be contacted by a respondent agency at any step during the grievance procedure pertaining to an agreement related to compensation and classification issues. The DOP, joined as a party to public employee grievances, reviews all proposed settlements for the purpose

of determining compliance with DOP laws, rules, and policies. If a proposed settlement fails to comply with any of these items, the DOP must reject it. The DOP receives its authority to approve proposed settlements pertaining to classified employees from W. Va. §29-6-12 which states:

All officers and employees of the state shall comply with and aid in all proper ways in carrying out the provisions of this article and the rules and orders thereunder. All officers and employees shall furnish any records or information which the director [the Director of the DOP] may request for any purpose of this article. The director may institute and maintain any action or proceeding at law or in equity that he considers necessary or appropriate to secure compliance with this article and the rules and orders thereunder.

The DOP's authority to approve agreements is further substantiated in rules by CSR §143-1-1 *et seq.*, provides:

21.1. Duties of State Officers. – Pursuant to W. Va. Code §29-6-12, all agencies' officers and employees of the state shall comply with and aid in all proper ways in carrying out the provisions of W. Va. Code §29-6-1 et seq., and the rules and orders promulgated thereunder. All officers and employees shall furnish any records or information which the Director or the Board [the Director of the DOP] may request for any purpose of W. Va. Code §29-6-1 et seq. All officers and employees shall comply with all rules policies and orders of the Director or the Board and shall not increase nor diminish any benefits afforded and classified employee by the rules or order. All officers and employees shall furnish any agreement and any records or information which the Director or Board may require in regard to any proposed agreement between an agency and an individual who is a current or former employee regarding such agreement must be certified by the Director as being in compliance with W. Va. Code §29-6-1 et seq. or with and order of a court of competent jurisdiction before it can be effective.

I hope this report answers you questions concerning the Division of Personnel's role in the public employee grievance process. If you have any additional questions, please do not hesitate to contact me.

Sincerely,



John Sylvia

Appendix A

W.Va. Code §6C-2-4. Grievance procedural levels.

(a) *Level one: Chief administrator.* --

(1) Within fifteen days following the occurrence of the event upon which the grievance is based, or within fifteen days of the date upon which the event became known to the employee, or within fifteen 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. State government employees shall further file a copy of the grievance with the Director of the Division of Personnel.

(2) *Conference.* -- The chief administrator shall hold a conference within ten 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 fifteen days of the conference.

(3) *Level one hearing.* -- The chief administrator shall hold a level one hearing within fifteen 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 chief administrator. The chief administrator shall issue a written decision within fifteen 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.* --

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

(2) *Mediation.* -- The board shall schedule the mediation between the parties within twenty 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. The report of the mediation shall be documented in writing within fifteen days. Agreements are binding and enforceable in this state by a writ of mandamus.

(3) *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 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 days. Agreements are binding and enforceable in this state by a writ of mandamus.

(4) *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 twenty 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 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 ten days.

(c) Level three hearing. --

(1) Within ten 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. State government employees shall further file a copy of the grievance with the Director of the Division of Personnel.

(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 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.

(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 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.



West Virginia Division of Personnel

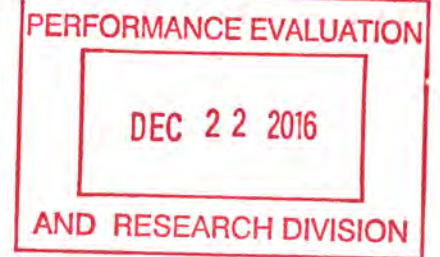
An agency under the Department of Administration

Joe F. Thomas, Acting Director

Earl Ray Tomblin, Governor

Mary Jane Pickens, Acting Cabinet Secretary

December 21, 2016



Noah Browning, Acting Research Manager
West Virginia Legislature
Performance Evaluation and Research Division
Building 1, Room W-314
1900 Kanawha Blvd., East
Charleston, WV 25305-0610

Dear Mr. Browning:

I am writing in response to your enclosed letter of December 15, 2016, regarding the upcoming report of the Performance Evaluation and Research Division (PERD) to the Joint Committee on Government Organization regarding the Division of Personnel's (DOP) role regarding intervention in public employee grievances. I appreciate the opportunity to provide DOP's response to the report as follows:

1. The report states that the "DOP does not see itself as representing the interests of either the grievant or the respondent" and that the "DOP only sees itself representing its own interest". The DOP would like to clarify that its role in grievances is to maintain the integrity of the merit system by ensuring classification and compensation principles are applied uniformly across the classified service. Specifically, W. Va. Code § 29-6-10 requires the DOP to administer and maintain a classification plan for all positions in the classified service and a position classification plan for all positions in the classified-exempt service, so that the same qualifications may reasonably be required for and the same schedule of pay may be equitably applied to all positions in the same class. The DOP sees our role in grievances as representing the interests of all employees and the DOP covered agencies for whom they work.
2. The DOP is only joined when it is an indispensable party and its statute, rule or policy is at issue either directly or through a determination it has made (which would typically be a classification determination).
3. The report states that, at Level 1 of the grievance procedure, only one grievance filed during the last four fiscal years where the DOP was joined as a party was granted. Please note that the DOP is rarely joined as a party at Level 1 of the procedure and in most grievances where the DOP is eventually joined as a party, the appointing authority either waives the grievance to Level 2 or denies the grievance because it lacks the authority to grant relief in matters that fall under the DOP statutory mandates.



4. The report states that 29 grievances were settled at Level 2 of the grievance procedure, which can be construed as beneficial for the grievant, equating to a 20.4 percent success rate. The DOP does not consider a settlement as a representation of success or failure but rather a compromise of disputed matters not necessarily meant to be beneficial to either party. For example, the employee may have been reallocated to a higher classification but grieved because he or she felt they should have been in an even higher classification. The grievant may decide at Level 2 that, after the DOP is joined as a party in the matter and has had an opportunity to offer an explanation to the Grievant, the classification determination was appropriate and a settlement is executed in order to initiate back wages.

This same logic would apply to the 21.3 percent success rate at Level 3 as reflected in the report. From the DOP's perspective, if resolution of a classification matter is possible, it will occur before Level 3 of the grievance procedure. The DOP will have reviewed a position description form for the position, considered any appeal and in the majority of cases has conducted a job audit if necessary before the matter reaches Level 3.

5. The review standard for an Administrative Law Judge (ALJ) at the Public Employees Grievance Board in classification grievances is "arbitrary & capricious" action on the part of DOP. An ALJ is not actually making classification determinations; rather, they are making a determination as to whether or not the classification determination made by the DOP was done in an arbitrary and capricious manner. The legal burden is high on the employees (preponderance of the evidence) as it should be as they are not in the business of classifying positions.
6. The DOP remains concerned about the time and costs associated with classification grievances and continues to recommend legislation to exempt classification from the grievance procedure. In a 2006 survey conducted among state government with 46 responding, 78% had classification appeal decisions resting with the Personnel Division, Personnel Director, a State Personnel Board, or a classification panel and not with a grievance board or other quasi-judicial panel. Exemption from the grievance procedure and/or private cause of action is found in several other sections of West Virginia code, including, but not limited to, W. Va. Code §§ 5-5-4, 5-5-5, 6C-2-2(i)(2), 9-7-6a, 17A-4A-11, 23-2C-11, 33-11-4A, 33-12-25, 61-3-52, 62-1A-10.

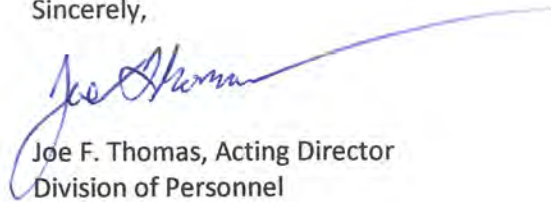
Based on the West Virginia Public Employees Grievance Board Fiscal Year 2016 Annual Report, 528 of the 1,237 grievances filed by State employees (excluding Higher Education) were regarding classification or compensation. Only 18 of the 344 classification and compensation grievances resolved during fiscal year 2016 were granted and 9 were granted in part and denied in part. Ninety-two percent of the classification and compensation grievances are not granted as they are denied, settled, withdrawn or dismissed. The average Level 3 grievance costs \$5,326.86 based on the West Virginia Public Employees Grievance Board Fiscal Year 2016 Annual Report. These are soft figures as agencies do not typically accurately capture and report costs associated with grievances.



The DOP strongly feels that employees are seeking increases in compensation by filing classification grievances due to the lack of pay increases over the past decade. The DOP would like to once again propose that classification matters be exempted from the grievance procedure.

A representative from DOP will be in attendance at the interim meetings to respond to the report and answer any questions. I trust you will find this response sufficient. Should you have any further questions regarding this matter, please feel free to contact me at 304-558-3950, extension 57290.

Sincerely,

A handwritten signature in blue ink, appearing to read "Joe Thomas", with a long, sweeping underline that extends to the right.

Joe F. Thomas, Acting Director
Division of Personnel

JFT/dg

Enclosure