

Preparing a Grievance: A Shop Steward's Guide

Who supplies the paper and equipment to file a grievance?

"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." *West Virginia Code §6C-2-3(p)(3)*.

How much paid preparation time is allowed?

"In addition to actual time spent attending grievance proceedings, 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." *West Virginia Code §6C-2-3(p)(2)*.

Who has the burden of proof?

Generally, if a grievance is about discipline, then the agency has to present its case first and prove that the discipline was justified.

If the grievance does not involve discipline, it is the worker who must go first in a proceeding and show proof for the grievance.

The burden of proof is defined in public employee grievance law as the preponderance of the evidence, which means one side or the other has to present evidence that is more likely true than not. So, for example, reliance on hearsay would not be much good in proving a case.

There are some exceptions to the normal way of assigning the burden of proof:

Some agencies regard anything below a verbal reprimand to be non-disciplinary. A good rule of thumb, however, is that any charge of misconduct ought to be proved by the employer rather than disproved by the worker. The law, in fact, does not require a worker who challenges an allegation of misconduct to testify. *West Virginia Code §6C-2-3(g)(2)*.

Also, a recently hired worker still in probationary status may be fired for not meeting work performance standards and must go first and prove that they did in fact meet those standards. Nevertheless, if there are allegations of misconduct against a probationary worker stated in the dismissal letter, then the agency must prove those allegations first.

How can the shop steward meet the burden of proof?

Two things are important: involve and interview the grievant and other shop members, when possible, and — most of all — investigate.

Investigation and interviewing means determining relevant facts, especially when the grievance involves an allegation or event:
Who was present as a witness or has knowledge of the relevant facts?
When did an alleged incident or incidents occur?
What actually happened?
Where did it happen?
Why did it happen and why is this a grievance?

How does the steward get needed documents from the agency?

Agencies are required by law to supply whatever relevant material are requested in writing. Whenever an attorney gives notice as the representative of the agency, address all communications, including any discovery requests, to that attorney.

"The parties are entitled to copies of all material submitted to the chief administrator or the administrative law judge by any party." *West Virginia Code* 6C-2-3(k).

"All parties must produce, prior to any hearing on the merits, *any documents requested in writing by the grievant that are relevant and are not privileged*. Further, if a party intends to assert the application of any statute, policy, rule, regulation, or written agreement or submits any written response to the filed grievance at any level, *a copy is to be forwarded to the grievant and any representative of the grievant named in the grievance.*" *Procedural Rules of the West Virginia Public Employees Grievance Board*, 156 CSR1 §6.12 (2008).

What if the agency refuses or ignores a written discovery request?

The steward may file a Motion to Compel Discovery with the grievance board. The judge may make a determination of bad faith and, in extreme instances, allocate the cost of a 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 Code* §6C-2-4(6). In one case, the judge found the agency acted in bad faith by failing to fully and timely answer Grievants' discovery requests. Therefore, the costs of the hearing were assessed against Respondent. *Ferrell, et al., v. Regional Jail and Correctional Facility Authority*, Docket No. 2013-1005-CONS (June 4, 2013).

How does a steward research past case law?

There is a great deal of case law relevant to grievances, but the single best source is the grievance board database of past decisions, on the Web at <https://apps.wv.gov/sharepointsearch/pegb>. This search field allows access to previous and controlling decisions. Particularly useful are the fields for 'keyword' and 'outcome' searches.