LD5590661

SENATE BILL NO. 694

Offered January 11, 1995

A BILL to amend and reenact § 2.1-114.5:1 of the Code of Virginia, relating to the grievance procedure; whistle blower protection.

Patron—Gartlan

Referred to the Committee on General Laws

Be it enacted by the General Assembly of Virginia:

1. That § 2.1-114.5:1 of the Code of Virginia is amended and reenacted as follows:

§ 2.1-114.5:1. Grievance procedure.

The Department of Employee Relations Counselors shall establish a grievance procedure as part of the Commonwealth's program of employee-management relations. It shall be the policy of the Commonwealth to encourage resolution of employee problems and complaints wherein employees can freely discuss their concerns with immediate supervisors and upper management levels. However, to the extent such concerns cannot be resolved, the grievance procedure shall afford an immediate and fair method for the resolution of disputes which may arise between an agency and its employees. The grievance procedure shall include:

A. Definition of grievance. - A grievance shall be a complaint or dispute by an employee relating to his employment, including but not necessarily limited to ~~(i) disciplinary~~*:*

1. Disciplinary actions, including dismissals, demotions and suspensions, provided that dismissals shall be grievable whenever resulting from formal discipline or unsatisfactory job performance; ~~(ii) the~~

2. The application of personnel policies, procedures, rules and regulations, including the application of policies involving matters referred to in subdivision B ~~(iii)~~ *3* below; ~~(iii) acts of retaliation as the result of utilization of the grievance procedure or of participation in the grievance of another state employee;~~ ~~(iv) complaints~~

3. Complaints of discrimination on the basis of race, color, creed, political affiliation, age, disability, national origin or sex; and ~~(v) acts~~

4. Acts of retaliation because the employee has *(i) used or participated in the grievance procedure; (ii)* complied with any law of the United States or of the Commonwealth, has reported any violation of such law to a governmental authority, or has sought any change in law before the Congress of the United States or the General Assembly*; or (iii) reported an allegation of fraud, waste or abuse to the State Fraud, Waste, and Abuse Hotline*.

B. Management responsibilities. - Management reserves the exclusive right to manage the affairs and operations of state government. Accordingly, the following complaints are nongrievable: ~~(i) establishment~~

1. Establishment and revision of wages or salaries, position classifications or general benefits; ~~(ii) work~~

2. Work activity accepted by the employee as a condition of employment or work activity which may reasonably be expected to be a part of the job content; ~~(iii) the~~

3. The contents of ordinances, statutes or established personnel policies, procedures, rules and regulations; ~~(iv) failure~~

4. Failure to promote except where the employee can show that established promotional policies or procedures were not followed or applied fairly; ~~(v) the~~

5. The methods, means and personnel by which such work activities are to be carried on; ~~(vi) except~~

6. Except where such action affects an employee who has been reinstated within the previous six months as the result of the final determination of a grievance, termination, layoff, demotion or suspension from duties because of lack of work, reduction in work force, or job abolition; ~~(vii) the~~

7. The hiring, promotion, transfer, assignment and retention of employees within the agency; and ~~(viii) the~~

8. The relief of employees from duties of the agency in emergencies. In any grievance brought under the exception to ~~(vi)~~ *subdivision 6* of this subsection, the action shall be upheld upon a showing by the agency that: (i) there was a valid business reason for the action~~,~~ and (ii) the employee was notified of the reason in writing prior to the effective date of the action.

C. Coverage of personnel. - 1. All classified state employees, excluding probationary employees, are eligible to file grievances as provided in this chapter with the following exceptions:

a. Appointees of elected groups or individuals;

b. Agency heads or chief executive officers of government operations and institutions of higher

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education appointed by boards and commissions;

c. Law-enforcement officers as defined in Chapter 10.1 (§ 2.1-116.1 et seq.) of this title whose grievance is subject to the provisions of Chapter 10.1 of this title and who have elected to proceed pursuant to Chapter 10.1 of this title in the resolution of their grievance or any other employee electing to proceed pursuant to any other existing procedure in the resolution of his grievance; and

d. Employees in positions designated in subdivision 16 of § 2.1-116.

2. Employees of the entities listed below shall be subject to the following provisions:

a. Employees of local social service departments and local social service boards, including local superintendents and directors of the local boards and departments, shall be included within the coverage of a grievance procedure. These employees may be accepted in a local governing body's grievance procedure if agreed to by the local governing body and the department or board but shall be excluded from the locality's personnel system, or they shall be covered by the state grievance procedure. The Director of the Department of Employee Relations Counselors may allow modifications to the management steps of the state grievance procedure for local social service departments and local social service boards.

b. Employees of community services boards shall be included within the coverage of a grievance procedure. These employees may be accepted in the grievance procedure of the local governing body that established the community services board or in the grievance procedure of any participating locality in the case of joint community services boards, if agreed to by the local governing body and the community services board, or they shall be covered by the state grievance procedure. The Director of the Department of Employee Relations Counselors may allow modifications to the management steps of the state grievance procedure for community services boards.

c. Constitutional officers' employees shall not be required to be covered by a grievance procedure; however, these employees may be accepted in a local governing body's grievance procedure if agreed to by both the constitutional officer and the local governing body but shall be excluded from the locality's personnel system unless their inclusion in the local personnel system is agreed to by both the constitutional officer and the locality.

d. Redevelopment and housing authorities created pursuant to § 36-4 and regional housing authorities created pursuant to § 36-40 shall promulgate and administer a grievance procedure which is consistent with the provisions of the state grievance procedure, including the definition of a grievance. Employees of authorities created pursuant to § 36-4 may be accepted in a local governing body's grievance procedure if agreed to by both the authority and the locality. Employees of authorities created pursuant to § 36-40 may be accepted in the grievance procedure of a local governing body that contributes financially to the operation of the authority if agreed to by both the authority and the locality. The state grievance procedure shall apply if a housing authority does not promulgate an approved grievance procedure or if its employees are not accepted in a local governing body's grievance procedure; the housing authority shall provide its employees copies of the state grievance procedure upon request.

e. A housing authority that promulgates its own grievance procedure shall submit the procedure to the Director of the Department of Employee Relations Counselors for approval. The Director may allow modifications to the management steps of the procedure. The grievance procedure shall provide for a panel hearing. A housing authority shall not be required to have an administrative hearing officer in employee termination cases, as provided in the state grievance procedure, but may do so at its option. When a housing authority elects to use an administrative hearing officer as the third panel member in employee termination cases, the administrative hearing officer shall be appointed by the Executive Secretary of the Supreme Court. The appointment shall be made from the list of administrative hearing officers maintained by the Executive Secretary pursuant to § 9-6.14:14.1 and shall be made from the appropriate geographical region on a rotating basis. The housing authority shall bear the per diem expenses and other costs of the administrative hearing officer. Panel decisions shall be final and binding.

f. Employees of local social service departments and local social service boards, community services boards, housing authorities and local governing bodies who are covered by the state grievance procedure shall have issues of grievability, including questions of access to the procedure, determined by the Director of the Department of Employee Relations Counselors; those employees who have been accepted into a local governing body's grievance procedure shall have such determinations made pursuant to the locality's procedure. For a housing authority that promulgates its own grievance procedure, the commissioners of the housing authority or their designee shall determine issues of qualification for a panel hearing, subject to judicial review pursuant to subsection E of this section.

g. Notwithstanding those exempt from this chapter, every legislative and judicial agency shall promulgate and administer a grievance procedure.

D. Grievance procedure steps. - The Department of Employee Relations Counselors shall develop a grievance procedure in compliance with the foregoing which shall include not more than four steps for airing complaints at successively higher levels of management and a final step providing for a panel hearing.

1. The first step shall provide for an informal, initial processing of employee complaints by the immediate supervisor through a nonwritten, discussion format.

2. Management steps shall provide for a review with higher levels of management following the employee's reduction to writing of the grievance and the relief requested on forms supplied by the agency or the Department of Employee Relations Counselors. Personal face-to-face meetings are required at these steps.

3. With the exception of the final management step, the only persons who may be present in the management step meetings are the grievant, the appropriate manager at the level at which the grievance is being heard, and appropriate witnesses for each side. At the final management step, the grievant, at his option, may have present a representative of his choice. If the grievant is represented by legal counsel, management likewise has the option of being represented by counsel.

4. Qualifying grievances shall advance to the final step as described below:

a. Employees of the Department of Mental Health, Mental Retardation and Substance Abuse Services who are terminated on the grounds of patient abuse, and employees of the Department of Corrections who work in institutions or have client or inmate contact, and employees of the Department of Youth and Family Services who work in learning centers or have client or resident contact and who are terminated on the grounds of client or inmate abuse, or a criminal conviction, or are terminated as a result of being placed on probation under the provisions of § 18.2-251, may appeal their termination through the grievance procedure only through the management steps. If resolution is not forthcoming by the conclusion of the last management step, the employee may advance the grievance to the circuit court of the jurisdiction in which the grievance occurred for a de novo hearing on the merits in lieu of a panel hearing. In its discretion, the court may refer the matter to a commissioner in chancery to take such evidence as may be proper and to make a report to the court. Both the grievant and the respondent may call upon appropriate witnesses and be represented by legal counsel or other representatives before the court or the commissioner in chancery. Such representatives may examine, cross-examine, question and present evidence on behalf of the grievant or respondent before the court or commissioner in chancery without being in violation of the provisions of § 54.1-3904. A termination shall be upheld unless shown to have been unwarranted by the facts or contrary to law or written policy. The decision of the court shall be final and binding.

b. For employees who are not grieving termination or retaliation under subdivision A ~~(v)~~ *4 (ii)* of this section, the final step shall provide for a hearing before an impartial panel, consisting of one member appointed by the grievant, one member appointed by the agency head and a third member selected by the first two. In the event that agreement cannot be reached as to the final panel member, the chief judge of the circuit court of the jurisdiction wherein the dispute arose shall select the third panel member. The panel shall not be composed of any persons having direct involvement with the grievance being heard by the panel, or with the complaint or dispute giving rise to the grievance. Managers who are in a direct line of supervision of a grievant, persons residing in the same household as the grievant and the following relatives of a participant in the grievance process or a participant's spouse are prohibited from serving as panel members: spouse, parent, child, descendents of a child, sibling, niece, nephew and first cousin. No attorney having direct involvement with the subject matter of the grievance, nor a partner, associate, employee or co-employee of the attorney shall serve as a panel member.

The panel, in rendering a decision for the employee in a grievance brought pursuant to subdivision A 4 (iii) of this section, may order reinstatement, back pay, full reinstatement of fringe benefits and seniority rights, any other combination of these remedies, or any other relief available under the grievance procedure.

c. For employees grieving termination or retaliation under subdivision A ~~(v)~~ *4 (ii)* of this section, the third panel member shall not be selected in the manner described above, but shall be appointed by the Director of the Department of Employee Relations Counselors. The appointment shall be made from the list of administrative hearing officers maintained by the Supreme Court of Virginia pursuant to § 9-6.14:14.1 and shall be made from the appropriate geographical region on a rotating basis, as established by the Director of the Department of Employee Relations Counselors. In cases of termination of employees of local social service departments and local social service boards, community services boards, redevelopment and housing authorities and regional housing authorities who are covered by the state grievance procedure, the third panel member shall be appointed by the Executive Secretary of the Supreme Court. The appointment shall be made from the list of administrative hearing officers maintained by the Executive Secretary pursuant to § 9-6.14:14.1 and shall be made from the appropriate geographical region on a rotating basis. The employing agency of the grievant shall bear the per diem expenses and other costs of the administrative hearing officer. Local governments that have their own grievance procedure shall not be required to have an administrative hearing officer in employee termination cases, but may do so at their option.

d. In all cases the third panel member shall be chairperson of the panel. The decision of the panel shall be final and binding and shall be consistent with provisions of law and written policy. In grievances filed by classified state employees, the question of whether the relief granted by a panel is consistent with written policy shall be determined by the Director of the Department of Personnel and Training. In the case of other employees covered by the state grievance procedure or employees covered by local government grievance procedures, the question of whether the relief granted by a panel is consistent with written policy shall be determined by the chief administrative officer of the governmental agency which promulgated the policy or his designee unless such person has a direct involvement with the grievance, in which case the decision shall be made by the attorney for the Commonwealth of the jurisdiction in which the grievance is pending. Both the grievant and the respondent may call upon appropriate witnesses and be represented by legal counsel or other representatives at the panel hearing. Such representatives may examine, cross-examine, question and present evidence on behalf of the grievant or respondent before the panel without being in violation of the provisions of § 54.1-3904.

5. The grievance procedure shall prescribe reasonable and specific time limitations for the grievant to submit an initial complaint and to appeal each decision through the steps of the grievance procedure. Such limits shall be equivalent to the time which is allowed the response in each comparable situation.

6. After the initial filing of a written grievance, failure of either party to comply with all substantial procedural requirements of the grievance procedure without just cause shall result in a decision in favor of the other party on any grievable issue, provided the party not in compliance fails to correct the noncompliance within five work days of receipt of written notification by the other party of the compliance violation. Such written notification by the grievant shall be made to the agency head or chief administrative officer. Failure of either party without just cause to comply with all substantial procedural requirements at the panel hearing shall result in a decision in favor of the other party. For employees covered by the state grievance procedure, compliance determinations shall be made by the Director of the Department of Employee Relations Counselors. The commissioners of the housing authority shall make compliance determinations for employees of housing authorities that have their own procedures. Compliance determinations made by the commissioners of the housing authority shall be subject to judicial review.

E. Determining issues qualifying for a panel hearing. - Decisions regarding whether a matter qualifies for a panel hearing shall be made by the agency head or chief administrative officer at the request of the agency or grievant within five work days of the request. A copy of the ruling shall be sent to the grievant. Decisions of the agency head or chief administrative officer may be appealed to the circuit court having jurisdiction in the locality in which the grievant is employed for a hearing on the issue of whether the grievance qualifies for a panel hearing. Proceedings for review of the decision of the agency head or chief administrative officer shall be instituted by filing a notice of appeal with the agency head or chief administrative officer within five work days from the date of receipt of the decision and giving a copy thereof to all other parties. Within five work days thereafter, the agency head or chief administrative officer shall transmit to the clerk of the court to which the appeal is taken: a copy of the decision of the agency head or chief administrative officer, a copy of the notice of appeal, and the exhibits. A list of the evidence furnished to the court shall also be furnished to the grievant. The failure of the agency head or chief administrative officer to transmit the record within the time allowed shall not prejudice the rights of the grievant. The court, on motion of the grievant, may issue a writ of certiorari requiring the agency head or chief administrative officer to transmit the record on or before a certain date. Within thirty days of receipt of such records by the clerk, the court, sitting without a jury, shall hear the appeal on the record transmitted by the agency head or chief administrative officer and such additional evidence as may be necessary to resolve any controversy as to the correctness of the record. The court, in its discretion, may receive such other evidence as the ends of justice require. The court may affirm the decisions of the agency head or chief administrative officer or may reverse or modify the decision. The decision of the court shall be rendered no later than the fifteenth day from the date of the conclusion of the hearing. The decision of the court is final and is not appealable.

F. Either party may petition the circuit court having jurisdiction in the locality in which the grievant is employed for an order requiring implementation of the panel decision.