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HOUSE BILL NO. 1744

Offered January 14, 2015

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A BILL to amend and reenact §§ 15.2-1507, 22.1-309, 22.1-311, and 22.1-313 of the Code of Virginia, relating to local grievance procedure.

Patrons—Hugo, Albo and Miller

Referred to Committee on Education

Be it enacted by the General Assembly of Virginia:

1. That §§ 15.2-1507, 22.1-309, 22.1-311, and 22.1-313 of the Code of Virginia are amended and reenacted as follows:

§ 15.2-1507. Provision of grievance procedure; training programs.

A. If a local governing body fails to adopt a grievance procedure required by § 15.2-1506 or fails to certify it as provided in this section, the local governing body shall be deemed to have adopted a grievance procedure which is consistent with the provisions of Chapter 30 (§ 2.2-3000 et seq.) of Title 2.2 and any regulations adopted pursuant thereto for so long as the locality remains in noncompliance. The locality shall provide its employees with copies of the applicable grievance procedure upon request. The term "grievance" as used herein shall not be interpreted to mean negotiations of wages, salaries, or fringe benefits.

Each grievance procedure, and each amendment thereto, in order to comply with this section, shall be certified in writing to be in compliance by the city, town or county attorney, and the chief administrative officer of the locality, and such certification filed with the clerk of the circuit court having jurisdiction in the locality in which the procedure is to apply. Local government grievance procedures in effect as of July 1, 1991, shall remain in full force and effect for 90 days thereafter, unless certified and filed as provided above within a shorter time period.

Each grievance procedure shall include the following components and features:

1. 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 actions, including dismissals, disciplinary demotions, and suspensions, provided that dismissals shall be grievable whenever resulting from formal discipline or unsatisfactory job performance; (ii) the application of personnel policies, procedures, rules and regulations, including the application of policies involving matters referred to in *clause (iii) of subdivision 2 (iii) below*; (iii) discrimination on the basis of race, color, creed, religion, political affiliation, age, disability, national origin or sex; and (iv) acts of retaliation as the result of the use of or participation in the grievance procedure or because the employee has complied with any law of the United States or of the Commonwealth, has reported any violation of such law to a governmental authority, has sought any change in law before the Congress of the United States or the General Assembly, or has reported an incidence of fraud, abuse, or gross mismanagement. For the purposes of clause (iv) there shall be a rebuttable presumption that increasing the penalty that is the subject of the grievance at any level of the grievance shall be an act of retaliation.

2. Local government responsibilities. Local governments shall retain the exclusive right to manage the affairs and operations of government. Accordingly, the following complaints are nongrievable: (i) establishment and revision of wages or salaries, position classification or general benefits; (ii) 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 contents of ordinances, statutes or established personnel policies, procedures, rules and regulations; (iv) failure to promote except where the employee can show that established promotional policies or procedures were not followed or applied fairly; (v) the methods, means and personnel by which work activities are to be carried on; (vi) 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 hiring, promotion, transfer, assignment and retention of employees within the local government; and (viii) the relief of employees from duties of the local government in emergencies. In any grievance brought under the exception to clause (vi) of this subdivision, the action shall be upheld upon a showing by the local government 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.

3. Coverage of personnel.

a. Unless otherwise provided by law, all nonprobationary local government permanent full-time and

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59 part-time employees are eligible to file grievances with the following exceptions:

60 (1) Appointees of elected groups or individuals;

61 (2) Officials and employees who by charter or other law serve at the will or pleasure of an
62 appointing authority;

63 (3) Deputies and executive assistants to the chief administrative officer of a locality;

64 (4) Agency heads or chief executive officers of government operations;

65 (5) Employees whose terms of employment are limited by law;

66 (6) Temporary, limited term and seasonal employees;

67 (7) Law-enforcement officers as defined in Chapter 5 (§ 9.1-500 et seq.) of Title 9.1 whose
68 grievance is subject to the provisions of Chapter 10.1 and who have elected to proceed pursuant to those
69 provisions in the resolution of their grievance, or any other employee electing to proceed pursuant to
70 any other existing procedure in the resolution of his grievance.

71 b. Notwithstanding the exceptions set forth in subdivision 3 a ~~above~~, local governments, at their sole
72 discretion, may voluntarily include employees in any of the excepted categories within the coverage of
73 their grievance procedures.

74 c. The chief administrative officer of each local government, or his designee, shall determine the
75 officers and employees excluded from the grievance procedure, and shall be responsible for maintaining
76 an up-to-date list of the affected positions.

77 4. Grievance procedure availability and coverage for employees of community services boards,
78 redevelopment and housing authorities, and regional housing authorities. Employees of community
79 services boards, redevelopment and housing authorities created pursuant to § 36-4, and regional housing
80 authorities created pursuant to § 36-40 shall be included in (i) a local governing body's grievance
81 procedure or personnel system, if agreed to by the department, board, or authority and the locality or (ii)
82 a grievance procedure established and administered by the department, board or authority which is
83 consistent with the provisions of Chapter 30 (§ 2.2-3000 et seq.) of Title 2.2 and any regulations
84 promulgated pursuant thereto. If a department, board or authority fails to establish a grievance procedure
85 pursuant to clause (i) or (ii), it shall be deemed to have adopted a grievance procedure which is
86 consistent with the provisions of Chapter 30 (§ 2.2-3000 et seq.) of Title 2.2 and any regulations
87 adopted pursuant thereto for so long as it remains in noncompliance.

88 5. General requirements for procedures.

89 a. Each grievance procedure shall include not more than four steps for airing complaints at
90 successively higher levels of local government management, and a final step, *as selected by the*
91 *aggrieved employee*, providing for a panel hearing or a hearing before an administrative hearing officer
92 *upon the agreement of both parties*.

93 b. Grievance procedures shall prescribe reasonable and specific time limitations for the grievant to
94 submit an initial complaint and to appeal each decision through the steps of the grievance procedure.

95 c. Nothing contained in this section shall prohibit a local government from granting its employees
96 rights greater than those contained herein, provided such grant does not exceed or violate the general
97 law or public policy of the Commonwealth.

98 6. Time periods.

99 a. It is intended that speedy attention to employee grievances be promoted, consistent with the ability
100 of the parties to prepare for a fair consideration of the issues of concern.

101 b. The time for submitting an initial complaint shall not be less than 20 calendar days after the event
102 giving rise to the grievance, but local governments may, at their option, allow a longer time period.

103 c. Limits for steps after initial presentation of grievance shall be the same or greater for the grievant
104 than the time which is allowed for local government response in each comparable situation.

105 d. Time frames may be extended by mutual agreement of the local government and the grievant.

106 7. Compliance.

107 a. After the initial filing of a written grievance, failure of either party to comply with all substantial
108 procedural requirements of the grievance procedure, including the panel or administrative hearing,
109 without just cause shall result in a decision in favor of the other party on any grievable issue, provided
110 the party not in compliance fails to correct the noncompliance within five workdays of receipt of written
111 notification by the other party of the compliance violation. Such written notification by the grievant shall
112 be made to the chief administrative officer, or his designee.

113 b. The chief administrative officer, or his designee, at his option, may require a clear written
114 explanation of the basis for just cause extensions or exceptions. The chief administrative officer, or his
115 designee, shall determine compliance issues. Compliance determinations made by the chief
116 administrative officer shall be subject to judicial review by filing petition with the circuit court within
117 30 days of the compliance determination.

118 8. Management steps.

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

b. Management steps shall provide for a review with higher levels of local government authority following the employee's reduction to writing of the grievance and the relief requested on forms supplied by the local government. Personal face-to-face meetings are required at all of these steps.

c. With the exception of the final management step, the only persons who may normally be present in the management step meetings are the grievant, the appropriate local government official at the level at which the grievance is being heard, and appropriate witnesses for each side. Witnesses shall be present only while actually providing testimony. 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, local government likewise has the option of being represented by counsel.

9. Qualification for panel or administrative hearing.

a. Decisions regarding grievability and access to the procedure shall be made by the chief administrative officer of the local government, or his designee, at any time prior to the panel hearing, at the request of the local government or grievant, within 10 calendar days of the request. No city, town, or county attorney, or attorney for the Commonwealth, shall be authorized to decide the question of grievability. A copy of the ruling shall be sent to the grievant. Decisions of the chief administrative officer of the local government, or his designee, 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 chief administrative officer or his designee shall be instituted by the grievant by filing a notice of appeal with the chief administrative officer within 10 calendar days from the date of receipt of the decision and giving a copy thereof to all other parties. Within 10 calendar days thereafter, the chief administrative officer or his designee shall transmit to the clerk of the court to which the appeal is taken: a copy of the decision of the 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 chief administrative officer or his designee to transmit the record shall not prejudice the rights of the grievant. The court, on motion of the grievant, may issue a writ of certiorari requiring the chief administrative officer to transmit the record on or before a certain date.

b. Within 30 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 chief administrative officer or his designee 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 decision of the chief administrative officer or his designee, 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.

10. Final hearings.

a. Qualifying grievances shall advance to either a *an impartial* panel hearing or a hearing before an administrative hearing officer *as selected by the aggrieved employee*, as set forth in the locality's grievance procedure, as described below:

(1) ~~If the grievance procedure adopted by the local governing body provides that the final step shall be aggrieved employee selects an impartial panel hearing as the final step in the grievance procedure, the panel may, with the exception of those local governments covered by subdivision a (2) of this subsection, shall consist 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, descendants 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.~~

(2) ~~If the grievance procedure adopted by the local governing body provides for the final step to be an impartial panel hearing, local governments may retain the panel composition method previously approved by the Department of Human Resource Management and in effect as of the enactment of this statute. Modifications to the panel composition method shall be permitted with regard to the size of the panel and the terms of office for panel members, so long as the basic integrity and independence of panels are maintained. As used in this section, the term "panel" shall include all bodies designated and authorized to make final and binding decisions.~~

(3) ~~When a local government elects to use If the aggrieved employee selects an administrative hearing officer rather than a three-person panel for the final step in the grievance procedure, the~~

administrative hearing officer shall be appointed by the Executive Secretary of the Supreme Court of Virginia. The appointment shall be made from the list of administrative hearing officers maintained by the Executive Secretary pursuant to § 2.2-4024 and shall be made from the appropriate geographical region on a rotating basis. In the alternative, the local government aggrieved employee may request the appointment of an administrative hearing officer from the Department of Human Resource Management. If a local government the aggrieved employee elects to use an administrative hearing officer, ~~it~~ the aggrieved employee shall bear the expense of such officer's services.

~~(4) When~~ (3) If the local government uses a aggrieved employee selects a panel ~~in~~ as the final step of the procedure, there shall be a chairperson of the panel and, when panels are composed of three persons (one each selected by the respective parties and the third from an impartial source), the third member shall be the chairperson.

~~(5)~~ (4) Both the grievant and the respondent may call upon appropriate witnesses and be represented by legal counsel or other representatives at the hearing. Such representatives may examine, cross-examine, question and present evidence on behalf of the grievant or respondent before the panel or hearing officer without being in violation of the provisions of § 54.1-3904.

~~(6)~~ (5) The decision of the panel or hearing officer shall be final and binding and shall be consistent with provisions of law and written policy.

~~(7)~~ (6) The question of whether the relief granted by a panel or hearing officer is consistent with written policy shall be determined by the chief administrative officer of the local government, or his designee, unless such person has a direct personal involvement with the event or events giving rise to 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.

b. Rules for panel and administrative hearings.

Unless otherwise provided by law, local governments shall adopt rules for the conduct of panel or administrative hearings as a part of their grievance procedures, or shall adopt separate rules for such hearings. Rules which are promulgated shall include, but need not be limited to the following provisions:

(1) That neither the panels nor the hearing officer have authority to formulate policies or procedures or to alter existing policies or procedures;

(2) That panels and the hearing officer have the discretion to determine the propriety of attendance at the hearing of persons not having a direct interest in the hearing, and, at the request of either party, the hearing shall be private;

(3) That the local government provide the panel or hearing officer with copies of the grievance record prior to the hearing, and provide the grievant with a list of the documents furnished to the panel or hearing officer, and the grievant and his attorney, at least 10 days prior to the scheduled hearing, shall be allowed access to and copies of all relevant files intended to be used in the grievance proceeding;

(4) That panels and hearing officers have the authority to determine the admissibility of evidence without regard to the burden of proof, or the order of presentation of evidence, so long as a full and equal opportunity is afforded to all parties for the presentation of their evidence;

(5) That all evidence be presented in the presence of the panel or hearing officer and the parties, except by mutual consent of the parties;

(6) That documents, exhibits and lists of witnesses be exchanged between the parties or hearing officer in advance of the hearing;

(7) That the majority decision of the panel or the decision of the hearing officer, acting within the scope of its or his authority, be final, subject to existing policies, procedures and law;

(8) That the panel or hearing officer's decision be provided within a specified time to all parties; and

(9) Such other provisions as may facilitate fair and expeditious hearings, with the understanding that the hearings are not intended to be conducted like proceedings in courts, and that rules of evidence do not necessarily apply.

11. Implementation of final hearing decisions.

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 hearing decision.

B. Notwithstanding the contrary provisions of this section, a final hearing decision rendered under the provisions of this section which would result in the reinstatement of any employee of a sheriff's office, who has been terminated for cause may be reviewed by the circuit court for the locality upon the petition of the locality. The review of the circuit court shall be limited to the question of whether the decision of the panel or hearing officer was consistent with provisions of law and written policy.

§ 22.1-309. Notice to teacher of recommendation of dismissal; school board not to consider merits during notice; superintendent required to provide reasons for recommendation upon request.

In the event a division superintendent determines to recommend dismissal of any teacher, written

notice shall be sent to the teacher notifying him of the proposed dismissal and informing him that within 10 business days after receiving the notice the teacher may request a hearing before the school board or, at the option of the local school board, a hearing officer appointed by the school board *or a three-member fact-finding panel* as provided in § 22.1-311. During such 10-business-day period and thereafter until a hearing is held in accordance with the provisions of this section, if one is requested by the teacher, the merits of the recommendation of the division superintendent shall not be considered, discussed or acted upon by the school board except as provided for in this section. At the request of the teacher, the division superintendent shall provide the reasons for the recommendation in writing or, if the teacher prefers, in a personal interview. In the event a teacher requests a hearing pursuant to § 22.1-311, the division superintendent shall provide, within 10 days of the request, the teacher or his representative with the opportunity to inspect and copy his personnel file and all other documents relied upon in reaching the decision to recommend dismissal. Within 10 days of the request of the division superintendent, the teacher or his representative shall provide the division superintendent with the opportunity to inspect and copy the documents to be offered in rebuttal to the decision to recommend dismissal. The division superintendent and the teacher or his representative shall be under a continuing duty to disclose and produce any additional documents identified later which may be used in the respective parties' cases-in-chief. The cost of copying such documents shall be paid by the requesting party.

For the purposes of this section, "personnel file" means any and all memoranda, entries, or other documents included in the teacher's file as maintained in the central school administration office or in any file on the teacher maintained within a school in which the teacher serves.

§ 22.1-311. Hearing before school board, hearing officer, or fact-finding panel.

A. Upon a timely request for a hearing pursuant to § 22.1-309, the school board or, at the option of the school board, a hearing officer appointed by the school board *or a three-member fact-finding panel* shall set a hearing within 15 days of the request and the teacher shall be given at least five days' written notice of the time and the place. The hearing shall be private unless the teacher requests the hearing to be public. At the hearing the teacher may appear with or without a representative and be heard, presenting testimony of witnesses and other evidence. The school board may hear a recommendation for dismissal and make a determination whether to make a recommendation to the Board of Education regarding the teacher's license at the same hearing or hold a separate hearing for each action.

B. Each school board may appoint an impartial hearing officer from outside the school division to conduct hearings pursuant to this section. A hearing officer shall not have been involved in the recommendation of dismissal as a witness or a representative. A hearing officer shall possess some knowledge and expertise in public education and education law and be capable of presiding over an administrative hearing. The hearing officer shall schedule and preside over such hearings and shall create a record or recording of such proceedings. The hearing officer shall make a written recommendation to the school board, a copy of which shall be provided to the teacher. The hearing officer shall transmit the recommendation and the record or recording of the hearing to the school board as soon as practicable ~~and~~ *but in no case more than 10 business days after the hearing*. In the event of a hearing before a hearing officer, the school board may make its decision upon the record or recording of such hearing, pursuant to § 22.1-313, or the school board may elect to conduct a further hearing to receive additional evidence by giving written notice of the time and place to the teacher and the division superintendent within 10 business days after the board receives the record or recording of the initial hearing. Such notice shall also specify each matter to be inquired into by the school board.

C. *Each school board may elect that a three-member fact-finding panel conduct hearings pursuant to this section. The teacher and the division superintendent shall each select one panel member from among employees of the school division, and the two panel members so selected shall select a third impartial panel member. The fact-finding panel shall schedule and preside over such hearings and shall create a record or recording of such proceedings. The fact-finding panel shall make a written recommendation to the school board, a copy of which shall be provided to the teacher. The fact-finding panel shall transmit the recommendation and the record or recording of the hearing to the school board as soon as practicable but in no case more than 10 business days after the hearing. In the event of a hearing before a fact-finding panel, the school board may make its decision upon the record or recording of such hearing, pursuant to § 22.1-313, or the school board may elect to conduct a further hearing to receive additional evidence by giving written notice of the time and place of the hearing to the teacher and the division superintendent within 10 business days after the board receives the record or recording of the initial hearing. Such notice shall also specify each matter to be inquired into by the school board.*

D. A record or recording of any hearing conducted pursuant to this section shall be made. The parties shall share the cost of the recording equally. In proceedings concerning grievances not related to dismissal, the recording may be dispensed with entirely by mutual consent of the parties. In such

proceedings, if the recording is not dispensed with, the two parties shall share the cost of the recording equally; if either party requests a transcript, that party shall bear the expense of its preparation. In cases of dismissal, the record or recording shall be preserved for a period of six months. If the school board requests that a transcript be made at any time prior to expiration of the six-month period, it shall be made and copies shall be furnished to both parties. The school board shall bear the cost of the transcription.

~~D.~~ *E.* Witnesses who are employees of the school board shall be granted release time if the hearing is held during the school day. The hearing shall be held at the school in which most witnesses work, if feasible.

§ 22.1-313. Decision of school board; generally.

A. The school board shall retain its exclusive final authority over matters concerning employment and supervision of its personnel, including dismissals and suspensions.

B. In the case of a hearing before the school board, the school board shall give the teacher its written decision as soon as practicable ~~and~~ *but in no case* more than 30 days after the hearing.

C. In the case of a hearing before a hearing officer appointed by the school board *or a three-member fact-finding panel*, the school board shall give the teacher its written decision as soon as practicable ~~and~~ *but in no case* more than 30 days after receiving the record or recording of the hearing; however, should there be a further hearing before the school board, such decision shall be furnished *to* the teacher as soon as practicable ~~and~~ *but in no case* more than 30 days after such further hearing.

D. A teacher may be dismissed or suspended by a majority of a quorum of the school board.

E. The school board's attorney, assistants, or representative, if he or they represented a participant in the prior proceedings, the grievant, the grievant's attorney or representative, and notwithstanding the provisions of § 22.1-69, the superintendent shall be excluded from any executive session of the school board which has as its purpose reaching a decision on a grievance. However, immediately after a decision has been made and publicly announced, as in favor of or not in favor of the grievant, the school board's attorney or representative and the superintendent may join the school board in executive session to assist in the writing of the decision.

F. In those instances when licensed personnel are dismissed or resign due to a conviction of any felony, any offense involving the sexual molestation, physical or sexual abuse or rape of a child, any offense involving drugs, or due to having become the subject of a founded case of child abuse or neglect, the local school board shall notify the Board of Education within 10 business days of such dismissal or the acceptance of such resignation.