

Representation: A Shop Steward's Guide

West Virginia state employees are guaranteed a right to representation under state law. The members and shop stewards of UE Local 170, the West Virginia Public Workers Union, are committed to understanding, using and defending the right of union members to represent their fellow workers and to be represented by their fellow workers.

Who can be a representative?

Local 170 is committed to the continuing education and preparation of union stewards at the shop, chapter and local levels to ensure the protection, benefit and mutual aid of our members through collective action.

The law itself makes only one single restriction as to who it is that any employee may designate as a representative: "a supervisor who evaluates" that employee may not act as a representative. This means, importantly, that the boss is not allowed to pick an employee's representative; that is the decision of the employee.

"Representative" means any employee organization, fellow employee, attorney or other person designated by the grievant as his or her representative and may not include a supervisor who evaluates the grievant." *West Virginia Code §6C-2-2(n)*.

Who has the right to representation?

All state employees have the right to representation, however, there is no legal requirement that the employee be given notice of this right. *You have to invoke the right in order to use it.*

"An employee may designate a representative who may be present at any step of the (grievance) procedure as well as at any meeting that is held with the employee for the purpose of discussing or considering disciplinary action." *West Virginia Code §6C-2-3(g)(1)*.

What is a meeting held with the employee for the purpose of discussing or considering discipline?

Public agencies are required by law to afford state employees with some measure of due process before imposing disciplinary action. This usually takes the form of a predetermination meeting (PDM) between management and the employee the agency intends to discipline in order to give notice that the agency intends to take disciplinary action.

Tenured state employees have a property interest in continued paid employment: "When an individual is deprived of this interest, certain procedural safeguards are merited. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985)." *Jones v. Nicholas County Board of Education*, Docket No. 92-34-305 (July 28, 1993);

affirmed Nos. 93-AA-213, 94-AA-76, Kanawha County Court (April 5, 1995).

What kind of information does the employer have to provide at the time of the PDM?

The information given in the PDM, as well as in the disciplinary notice itself, must be specific about the allegations made and the evidentiary basis for those allegations, as well as making reference to what laws, rules or policies are alleged to have been violated.

Without that, the employee and the employee's representative would have insufficient notice, as well as insufficient opportunity to respond to any charges that are false or without basis.

Where an act of misconduct is asserted in a notice of discipline, it should be identified by date, specific or approximate, unless the characteristics are so singular that there is no reasonable doubt when it was alleged to have occurred. If an act of misconduct involves persons or property, these must be identified to the extent that the accused employee will have no reasonable doubt as to their identity. Syllabus Point 2, *Clarke v. West Virginia Board of Regents*, 279 S.E.2d 169 (1981); Syllabus Points 4 and 5, *Snyder v. West Virginia Civil Service Commission*, 238 S.E.2d 842 (1977).

What if the boss says the meeting is simply investigatory and not 'disciplinary'?

"If the individual who conducts the investigatory interview or questioning is also the one who could decide or recommend disciplinary action, the employee has the right to representation during this conference or interview.....The label given the meeting does not matter. If the topic of the meeting is conduct of the employee that could lead to discipline, the employee has a statutory right to have a representative present, if she makes such a request." *Koblinsky v. Putnam County Health Department*, Docket No. 2010-1306-CONS (November 8, 2010).

What if the investigation is conducted by someone who cannot recommend or decide discipline?

"A representative is permitted at any time a meeting could lead to disciplinary action, regardless of whether the person in the meeting has the authority to issue the discipline. Accordingly, employees have a right to representation during investigatory meetings that are not *per se* discipline, but where discipline could result." *Beaton, et al., v. West Virginia Department of Health and Human Resources*, Docket No. 2013-0496-CONS (December 20, 2013).

What if an agency violates an employee's right to representation?

Disciplinary actions that are taken without the due process recognition of the right to representation will be reversed as invalid. An employee, for example, dismissed without benefit of attending an investigatory interview with her representative demonstrated that the agency's policy stating that its employees do not have the right to have a representative present at investigatory meetings is void as contrary to law. *Deyerle v. West Virginia Department of Health and Human Resources*, Docket No. 2013-2231-CONS (July 15, 2014). Her dismissal from employment was consequently found to be illegal. DHHR was "further ordered, in any meeting with an employee, where the topic is conduct of the employee that could lead to discipline, to allow the employee to have a representative present, if requested." *Deyerle, supra*.

The West Virginia Constitution's Due Process Clause requires some presentation of charges and some opportunity for the employee to respond to them before the imposition of a discipline which deprives the employee of wages or salary. *Hammer v. Greenbrier County Board of Education*, Docket No. 2008-0302-GreED (May 21, 2008) (citing Syllabus Point 7, *Waite v. West Virginia Civil Service Commission*, 161 W.Va. 154, 241 S.E.2d 164 (1977); *Clarke v. West Virginia Board of Regents*, 166 W.Va. 702, 279 S.E.2d 169, 175 (1981) and *Knauff v. Kanawha County Board of Education*, Docket No. 20-88-095 (January 10, 1989)). In passing *West Virginia Code* §6C-2-3(g)(1), the Legislature also established that the right to a representative at such meetings is included in those due process protections.

Is an agency required to respond to an employee representative's request for information (discovery)?

State agencies are required to produce, prior to any hearing on the merits of a grievance, any and all documents requested in writing by the Grievant's representative that are relevant and are not privileged. Further, if the agency 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).

Is an employee required to testify in the course of a disciplinary matter?

An employee may not be compelled to testify against himself or herself. *West Virginia Code* §6C-2-3(g)(2).

Is an employee's representative required to testify regarding a grievance proceeding?

“(a)n 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.” *West Virginia Code 6C-2-8(a)*.