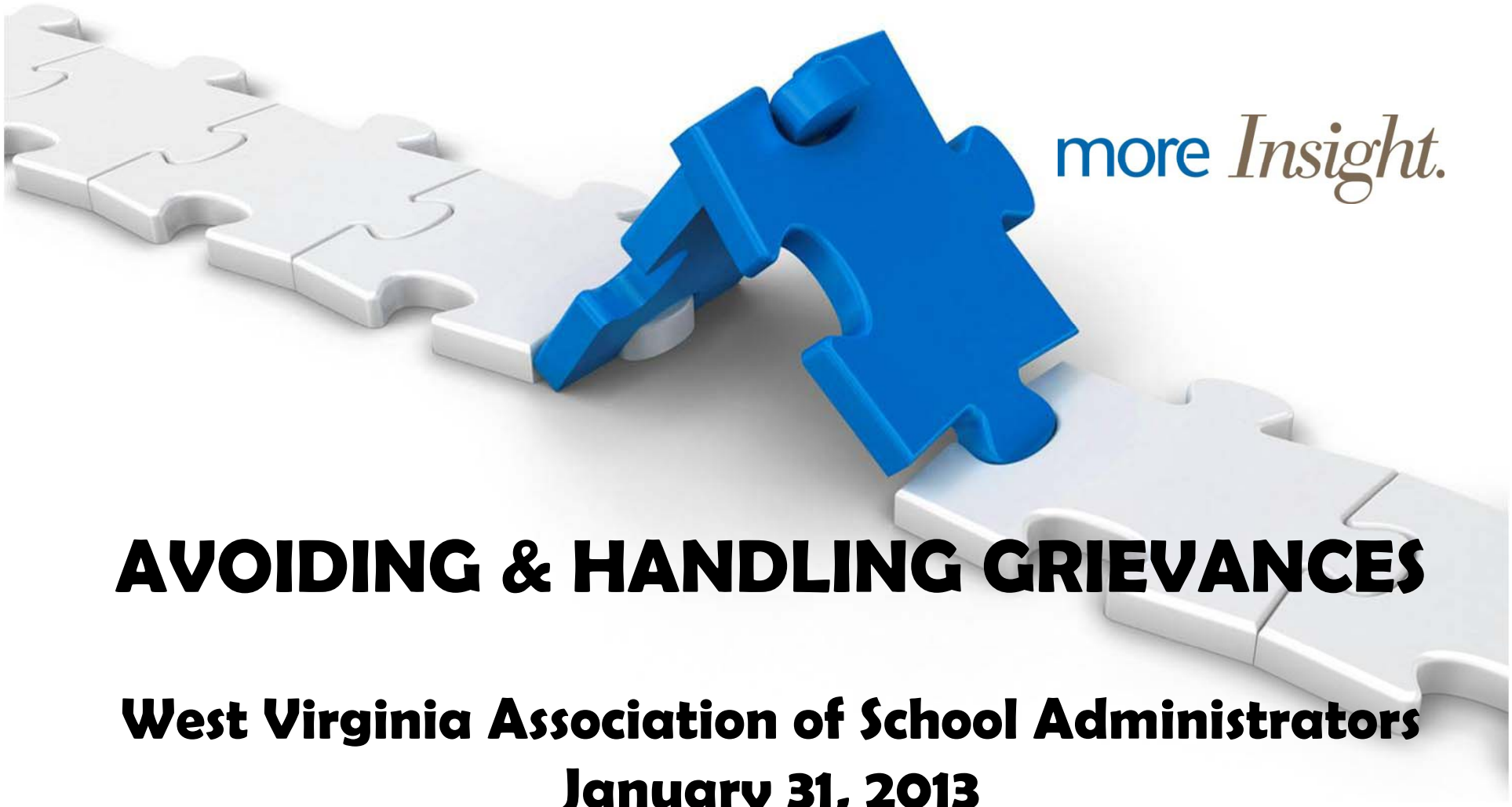

AVOIDING & HANDLING GRIEVANCES

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AVOIDING GRIEVANCES

Tip # 1:

Educate and Communicate with employees through trainings, in-service sessions, and meaningful discussion of employee concerns. School personnel law is complex and difficult – many grievances are filed due to employees' misunderstanding of the law.

AVOIDING GRIEVANCES

Tip # 2:

Once a grievance is filed, have a conversation with the employee. If a clear mistake was made, it can be corrected. If the employee is misinformed or does not understand why something was done, an open and honest discussion may change his/her mind about pursuing the grievance.

HANDLING GRIEVANCES EFFICIENTLY

- Know the grievance procedure, including timelines for holding conferences/hearings and for issuing decisions.
- Use the Procedural Rules to your advantage
- Know when to opt for a conference or hearing at level one and when to obtain an agreement to go directly to Level Three

Initial Considerations with New Grievances

- Was this a mistake that can be corrected? If so, offer a settlement and get the grievance withdrawn. ONLY the grievant can withdraw, in writing, prompting a Dismissal Order from the GB.

- Is this a "grievable event"? Section 6.11 of the Procedural Rules says "Failure to State a Claim -- A grievance may be dismissed, in the discretion of the administrative law judge, if no claim on which relief can be granted is stated or a remedy wholly unavailable to the grievant is requested." (Example: *Plati v. Hampshire*, Docket No. 2010-0954-HamED)

More Considerations . . .

- Would it make sense to go straight to a Level Three hearing? W. Va. Code 6C-2-4(a): "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."

- Level One – hearing or conference? Conferences must be held within 10 days, hearings within 15 days. Hearings are more costly; conferences are informal, but do not establish a record.

Level One

- For hearings, recording is required, and a court reporter is recommended. Utilize the Hearing Guidelines on the Grievance Board's website.
- Notice of all proceedings must be sent 5 days in advance
- All scheduling agreements should be in writing – ask the grievant to waive statutory timelines
- Do your homework, utilizing the Grievance Board database for research: Grievance Board Database Search Form

General Considerations

- Timeliness Defenses must be asserted *at or before* level two of the grievance process

- "Days" for grievance purposes is *working* days, not including weekends, holidays, etc. W. VA. CODE § 6C-2-2(c) "'[d]ays means working days exclusive of Saturday, Sunday, official holidays and [a]ny day in which the employee's workplace is legally closed under the authority of the chief administrator due to weather or other cause provided for by statute, rule, policy or practice."

- Complete the Cost Reporting Form after completion of each grievance level

Representation

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

- Evaluations and improvement plans are *not* disciplinary in nature, the goal being to correct performance and behavior. Therefore, there is *no right to representation during an evaluation conference. Turner v. Kanawha County Board of Educ.* Docket No. 00-20-300

Rights & Obligations

- Grievant, witnesses, and employee reps are to be given "reasonable time off" to attend grievance proceedings *without loss of pay or charge to leave*
- Grievant and rep are entitled to *four hours per grievance* for preparation during work hours, without loss of pay or charge to leave
- Each party bears their own expenses at all levels (such as travel expenses and attorney fees). Attorney fees are only awarded to a *grievant* after successful appeal of an adverse decision. The Grievance Board does not award attorney fees.
- Upon appeal, an ALJ's decision is NOT automatically stayed; a separate motion requesting a stay is required.

Burden of Proof

Non-disciplinary: Grievant must prove his/her case

- Defenses may include:
  - Timeliness
  - Standing
  - Res Judicata or Failure to State a Claim

Disciplinary Cases:

- Employer (BOE) bears the burden of proof
- Standard is preponderance of the evidence
- Possible defenses from employee:
  - Due Process violations – prior to suspension/termination, employee receives notice, explanation of the evidence, & opportunity to respond
  - Mitigation considerations

Preponderance of the Evidence

- "The generally accepted meaning of preponderance of the evidence is 'more likely than not.'" *Jackson v. State Farm Mut. Auto. Ins. Co., 215 W. Va. 634, 640, 600 S.E.2d 346,* 352 (2004). A preponderance of the evidence is evidence of greater weight, or evidence which is more convincing than that offered in opposition to it. *Hunt v. W. Va. Bureau of Empl. Programs, Docket No. 97-BEP-412 (Dec. 31, 1997); Browning v. Logan County Bd.of Educ., Docket No. 2008-0567-LogED (Oct. 24, 2008).*

Timeliness

- If proven, an untimely filing will defeat a grievance and the merits of the grievance need not be addressed. *Lynch v. W. Va. Dep't of Transp.,* Docket No. 97-DOH- 060 (July 16, 1997).

- If the respondent meets this burden, the grievant may then attempt to demonstrate that he should be excused from filing within the statutory time lines. *Kessler v. W. Va. Dep't of Transp., Docket No. 96*-DOH-445 (July 28, 1997).

Standing

- "Standing, defined simply, is a legal requirement that a party must have a personal stake in the outcome of the controversy." *Wagner v. Hardy County Bd. of Educ.*, Docket No. 95-16-504 (Feb. 23, 1996); See Jarrell v. Raleigh County Bd. of Educ., Docket No. 95-41-479 (July 8, 1996).

- In order to have a personal stake in the outcome, Grievant must have been harmed or suffered damages. *Farley v. W. Va. Parkway Auth.*, Docket No. 96-PEDTA-204 (Feb. 21, 1997).

- Where a Grievant does not apply for a vacant position, she does not have a sufficient personal stake in the selection to have standing to file a grievance contesting the selection or the propriety of the posting. *Redd v. McDowell*, Docket No. 2012-0419-McDED

Mitigation

- “Whether to mitigate the punishment imposed by the employer depends on a finding that the penalty was clearly excessive in light of the employee's past work record and the clarity of existing rules or prohibitions regarding the situation in question and any mitigating circumstances, all of which must be determined on a case by case basis.“

- The Grievance Board has held that "mitigation of the punishment imposed by an employer is extraordinary relief, and is granted only when there is a showing that a particular disciplinary measure is so clearly disproportionate to the employee’s offense that it indicates an abuse of discretion. Considerable deference is afforded the employer’s assessment of the seriousness of the employee’s conduct and the prospects for rehabilitation.“

- “Respondent has substantial discretion to determine a penalty in these types of situations, and [ALJs will] not substitute [their] judgement for that of the employer.”