|  |
| --- |
| **Advisory Board on Teacher Education**  **and Licensure** |

**AGENDA ITEM: 2**

**DATE: April 18, 2022**

**TOPIC: Review of Proposed Amendments to the *Procedure for dismissals* to Comport with Legislation from the 2020 General Assembly**

**Background:**

During the 2020 Session, the General Assembly passed legislation requiring amendments to the Board of Education’s *Procedure for dismissals* (8VAC20-90-70).

The proposed amendments to the *Procedure* incorporate these legislative changes and will follow the fast-track rulemaking requirements of the Administrative Process Act (APA). [§ 2.2-4012.1](https://law.lis.virginia.gov/vacode/title2.2/chapter40/section2.2-4012.1/) of the *Code of Virginia* provides that the fast-track rulemaking process may be followed for rules that are expected to be noncontroversial.

This agenda item also includes amendments to 8VAC20-90-10 in order to conform the definition of “grievance” and add a definition of “military status” in order to comply with legislation in [2020](https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+CHAP1137&201+ful+CHAP1137) and [2021](https://lis.virginia.gov/cgi-bin/legp604.exe?212+ful+CHAP0477&212+ful+CHAP0477).

**Statutory Authority:**

SB 377 (Bell) amended §§ [22.1-311](http://law.lis.virginia.gov/vacode/22.1-311) and [22.1-313](http://law.lis.virginia.gov/vacode/22.1-313) of the Code of Virginia to permit a school board to conduct a teacher grievance hearing before a three-member fact-finding panel consisting of one member selected by the teacher, one member selected by the division superintendent, and an impartial hearing officer selected by the other two panel members to serve as the chairman of the panel. Under the amended law, the school board continues to have the option of appointing a hearing officer or conducting the hearing itself. The bill also removes the requirement that a teacher grievance hearing be set within 15 days of the request for such hearing and extends from five days to 10 days the minimum period of advanced written notice to the teacher of the time and place of such hearing.

**Proposed Amendments to *Procedure for dismissals* in Virginia:**

The proposed amendments to the *Procedure incorporate* these legislative changes as follows. Below are the affected sections of the *Procedure*, outlining the proposed revisions (yellow background and underlined) to comport with the 2020 General Assembly legislation. The proposed revision is as follows:

**8VAC20-90-10. Definitions.**

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise.

"Business day" means any day that the relevant school board office is open.

"Days" means calendar days unless a different meaning is clearly expressed in this procedure. Whenever the last day for performing an act required by this procedure falls on a Saturday, Sunday, or legal holiday, the act may be performed on the next day that is not a Saturday, Sunday, or legal holiday.

"Dismissal" means the dismissal of any teacher within the term of such teacher's contract.

"Grievance" means~~, for the purpose of Part II (8VAC20-90-20 et seq.),~~ a complaint or a dispute by a teacher relating to his employment, including ~~but not necessarily limited to~~ (i) disciplinary action including dismissal; (ii) the application or interpretation of (a) personnel policies, (b) procedures, (c) rules and regulations, (d) ordinances, and (e) statutes; (iii) acts of reprisal against a teacher for filing or processing a grievance, ~~or~~ participating as a witness in any step, meeting, or hearing related to a grievance, or serving as a member of a fact-finding panel; ~~or~~ and (iv) complaints of discrimination on the basis of race, color, creed, religion, political affiliation, ~~handicap~~ disability, age, national origin, ~~or~~ sex, pregnancy, childbirth or related medical conditions, marital status, sexual orientation, gender identity, or military status. Each school board shall have the exclusive right to manage the affairs and operations of the school division. ~~"Grievance" means, for the purposes of Part III (8VAC20-90-60 et seq.), a complaint or a dispute involving a teacher relating to his employment involving dismissal. The~~ Accordingly, the term "grievance" shall not include a complaint or dispute by a teacher relating to (a) the establishment and revision of wages or salaries, position classifications or general benefits; (b) suspension of a teacher or nonrenewal of the contract of a teacher who has not achieved continuing contract status; (c) the establishment or contents of ordinances, statutes or personnel policies, procedures, rules and regulations; (d) failure to promote; (e) discharge, layoff, or suspension from duties because of decrease in enrollment, decrease in enrollment ~~in~~ or abolition of a particular subject, or insufficient funding; (f) hiring, transfer, assignment and retention of teachers within the school division; (g) suspension from duties in emergencies; (h) the methods, means and personnel by which the school division's operations are to be carried on; or (i) coaching or extracurricular activity sponsorship. While these management rights are reserved to the school board, failure to apply, where applicable, ~~these~~ the rules, regulations, policies, or procedures as written or established by the school board is grievable.

"Hearing officer" means an impartial hearing officer from outside the school division who possesses some knowledge and expertise in public education and education law and who is capable of presiding over an administrative hearing.

“Military status” means status (i) as a member of the uniformed forces, as defined in 10 U.S.C. § 101(a)(5), of the United States or a reserve component thereof named under 10 U.S.C. § 10101, (ii) a veteran as defined in 38 U.S.C. § 101(2), or (iii) a dependent as defined in 50 U.S.C. § 3911(4) except that the support provided by the service member to the individual shall have been provided 180 days immediately preceding an alleged action that if proven true would constitute unlawful discrimination under this section instead of 180 days immediately preceding an application for relief under 50 U.S.C. Chapter 50.

"Personnel file" means, for the purposes of Part III (8VAC20-90-60 et seq.), 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 regarding the teacher maintained within a school in which the teacher serves.

"Teacher" or "teachers" means, for the purposes of Part II (8VAC20-90-20 et seq.), all employees of the school division involved in classroom instruction and all other full-time employees of the school division except those employees classified as supervising employees. "Teacher" means, for the purposes of Part III (8VAC20-90-60 et seq.), all regularly licensed professional public school personnel employed by any school division under a written contract as provided by § 22.1-302 of the Code of Virginia as a teacher or as an assistant principal, principal, or supervisor as provided by § 22.1-294 of the Code of Virginia.

"Shall file," "shall respond in writing," or "shall serve written notice" means the document is either delivered personally or is mailed by registered or certified mail, return receipt requested, and postmarked within the time limits prescribed by this procedure to the grievant or office of the proper school board representative.

"Supervisory employee" means any person having authority in the interest of the board (i) to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employees; and (ii) to direct other employees; or (iii) to adjust the grievance of other employees; or (iv) to recommend any action set forth in clause (i), (ii), or (iii) above; provided that the authority to act as set forth in clause (i), (ii), (iii), or (iv) requires the exercise of independent judgment and is not merely routine and clerical in nature.

"Written grievance appeal" means a written or typed statement describing the event or action complained of, the date of the event or action complained of, and a concise description of those policies, rules, regulations, or statutes upon which the teacher bases his claim. The grievant shall specify what he expects to obtain through use of the grievance procedure. A written grievance appeal shall be on forms prescribed by the Board of Education and supplied by the local school board.

**8VAC20-90-70. Procedure for dismissals.**

A. Notice to teacher of recommendation for dismissal.

1. In the event a division superintendent determines to recommend dismissal of any teacher, written notice shall be sent to the teacher on forms prescribed by the Board of Education notifying ~~him~~ the teacher of the proposed dismissal and informing the teacher 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 school board, a hearing officer appointed by the school board, as provided in § 22.1-311 of the Code of Virginia.

2. During such 10-business-day period and thereafter until a hearing is held in accordance with the provisions ~~herein~~ of this subsection, 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 herein~~ in this subsection.

3. 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 ~~or 22.1-312~~ of the Code of Virginia, 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 that may be used in the respective parties' cases-in-chief. The cost of copying such documents shall be paid by the requesting party.

4. Upon a timely request for a hearing, the school board or, at the school board's option, a hearing officer appointed by the school board 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 of the hearing.

B. Procedure for hearing.

1. ~~The hearing shall be conducted by the~~ Upon a timely request for a hearing pursuant to subsection A, the school board or, at the ~~school board's~~ option of the school board, a hearing officer appointed by the school board or a three-member fact-finding panel shall set a hearing and the teacher shall be given at least 10 days’ written notice of the time and the place. ~~The teacher and the division superintendent may be represented by legal counsel or other representatives.~~ The hearing shall be private, unless the teacher requests ~~a public~~ 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 or hearing officer, as the case may be, shall establish the rules for the conduct of the hearing, and such rules shall include the opportunity for the teacher and the division superintendent to make an opening statement and to present all material or relevant evidence, including the testimony of witnesses, and the right of all parties to cross-examine the witnesses. Witnesses may be questioned by the school board or hearing officer.~~

~~2. The parties shall produce such additional evidence as the school board or hearing officer may deem necessary to an understanding and determination of the dispute. The school board or hearing officer shall determine the relevancy and materiality of the evidence offered. All evidence shall be taken in the presence of the school board or hearing officer and of the parties.~~

~~3. Exhibits offered by the teacher or the division superintendent may be received in evidence by the school board or hearing officer and, when so received, shall be marked and made a part of the record.~~

~~4. A stenographic record or tape recording of the proceedings shall be taken. The two parties shall share the cost of the recording equally. The record or recording of the proceedings shall be preserved for a period of six months. If the school board requests that a transcript of the record or recording 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 expense of the transcription.~~

~~5. The teacher shall bear his own expenses. The school board shall bear the expenses of the division superintendent and the hearing officer.~~

~~6. 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.~~

~~7. In the event of a hearing conducted by a hearing officer, the recommendation of the hearing officer shall be based exclusively upon the evidence presented at the hearing. Upon the hearing officer's own motion or upon application by the teacher or the division superintendent, the hearing officer may reopen the hearing for the purpose of hearing after-discovered evidence upon a finding of good cause by the hearing officer at any time before his recommendation is due. The hearing officer shall transmit his written recommendation and a record or recording of the hearing to the school board as soon as practicable and no more than 10 business days after the hearing.~~

~~8. In the event of a hearing by a hearing officer, the school board may make its decision upon the record or recording of such hearing or the school board may elect to conduct a further hearing to receive additional evidence. The school board must hold such further hearing as soon as practicable and must give written notice of the time and place of such further hearing to the division superintendent and the teacher within 10 business days after the board received the record or recording of the initial hearing. The notice must specify each matter to be inquired into by the school board. The school board shall determine the procedure to be followed at such further hearing.~~

2. 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 no 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 subsection C, 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.

3. Each school board may elect for a three-member fact-finding panel to conduct hearings pursuant to this section. The teacher and the division superintendent shall each select one panel member, and the two panel members so selected shall select an impartial hearing officer to serve as the chairman of the panel. 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 subsection C, 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.

4. 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.

5. 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.

6. The school board, hearing officer, or three-member fact-finding panel, as the case may be, shall establish the rules for the conduct of the hearing, and such rules shall include the opportunity for the teacher and the division superintendent to make an opening statement and to present all material or relevant evidence, including the testimony of witnesses, and the right of all parties to cross-examine the witnesses. Witnesses may be questioned by the school board or hearing officer.

7. The parties shall produce such additional evidence as the school board, hearing officer, or three-member fact-finding panel may deem necessary to an understanding and determination of the dispute. The school board, hearing officer, or three-member fact-finding panel shall determine the relevancy and materiality of the evidence offered. All evidence shall be taken in the presence of the school board, hearing officer, or three-member fact-finding panel and of the parties.

8. Exhibits offered by the teacher or the division superintendent may be received in evidence by the school board or hearing officer and, when so received, shall be marked and made a part of the record.

C. School board determination.

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

2. In the event 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. The decision of the school board shall be reached after considering the evidence and information presented at the school board hearing.

~~2.~~ 3. In the event of a hearing before a hearing officer ~~followed by a further hearing by the school board pursuant to subdivision B 8 of this section~~ 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 ~~such further~~ receiving the record or recording of the hearing; however, should there be a further hearing before the school board, such decision shall be furnished the teacher as soon as practicable but in no case more than 30 days after such hearing. The decision of the school board shall be reached after considering the record or recording of the initial hearing, the recommendations of the hearing officer or three-member fact-finding panel, and the evidence and information presented at the further hearing before the school board.

~~3. In the event of a hearing before a hearing officer in cases in which no further hearing is conducted by the school board, the school board shall give the teacher its written decision as soon as practicable and no more than 30 days after receiving the record or recording of the hearing. The decision of the school board shall be reached after considering the record or recording of the hearing and the recommendations of the hearing officer.~~

4. The school board may dismiss or suspend a teacher upon a majority vote of a quorum of the school board.

5. 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 of the Code of Virginia, the superintendent shall be excluded from any executive session of the school board that 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.

6. 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.