

WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

ANNUAL REPORT

TO THE

GOVERNOR AND THE LEGISLATURE

CALENDAR YEAR 1998



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Chair

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THE HONORABLE CECIL H. UNDERWOOD
Governor, State of West Virginia
and
MEMBERS OF THE LEGISLATURE

Dear Governor and Members of the Legislature:

With pride in its accomplishments, it is my privilege to submit the 1998 Annual Report of the West Virginia Education and State Employees Grievance Board.

ROGER SMITH, II
CHAIR

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History. Mission and Operations

The Legislature created the West Virginia Education Employees Grievance Board and established a grievance procedure for educational employees in 1985. W. Va. Code §§ 18-29-1, et seq. The procedure is intended to provide a simple, expeditious and fair process to resolve grievances at the lowest possible administrative level.

In 1988, the Legislature enlarged the Grievance Board's jurisdiction considerably by enacting a Grievance Procedure for State Employees, which covers most state employees.¹ The purpose of this law is to establish a procedure for the equitable and consistent resolution of employment grievances. This law also changed the agency's name to the West Virginia Education and State Employees Grievance Board (hereinafter Board). W. Va. Code §§ 29-6A-1, et seq.

The Board's mission is to equitably, consistently and quickly resolve employment disputes between employees and county boards of education, higher education institutions, and state agencies so that good morale may be maintained, effective job performance may be enhanced and the citizens of this State may be better served.

In 1998, the Legislature made several changes to the law governing state employee grievances.² One of the most significant changes was the inclusion of a default provision by which an employee can win his or her grievance, if the grievance evaluator at Level

¹ Employees of constitutional officers are not covered, unless they are in the classified service, and apparently none of these employees is in the classified service. Employees of the Legislature and uniformed members of the State Police are also expressly excluded.

² House Bill 4314, effective July 1, 1998.

One, Two or Three fails to respond to the grievance in the time required by law. Another notable change gives the Board jurisdiction over procedural matters at Levels Two and Three of the grievance procedure in both state and education employee grievances. Until this change in the law, the Board's authority was limited to administering Level Four of the procedure.

The Board consists of three members appointed by the Governor, with the advice and consent of the Senate, for three year terms. In March 1997, Governor Underwood appointed three new members to the Board. Billy Coffindaffer, from Monongalia County, was appointed for a term ending July 1, 1998, replacing James P. Geary, who had served as Chair of the Board since 1985. Roger Smith, II, from Cabell County, was appointed to a term that expires on July 1, 1999, filling a vacancy on the Board. The third new member, Lowell Witters from Kanawha County, was appointed to a term expiring on July 1, 2000, replacing David L. White, who had served as a member of the Board since 1985.

The Board employs full-time attorneys to preside over grievances that reach Level Four of the grievance procedure. These attorneys are designated as "hearing examiners" in the grievance procedure statutes, but the Board refers to them administrative law judges (ALJs) in view of their duties and responsibilities.³ The Board requires its ALJs to be licensed to practice law in West Virginia, and they are not permitted to have an outside law practice.

The Board has seventeen (17) budgeted positions in a flat organizational structure

³ In its classified-exempt plan, the West Virginia Division of Personnel has placed these positions in the class title of ALJ II.

and currently employs 16 employees. See Appendix A. The Director, an Administrative Officer, four ALJs, one Secretary and a part-time Secretary are assigned to the Board's principal office in Charleston.⁴ Two ALJs and a Secretary are based in the Morgantown office that was opened in December 1995. One ALJ and a Secretary are assigned to the Beckley and Elkins branch offices. The Wheeling Office is staffed with only a Secretary presently. Most of the hearings in the Wheeling Office are conducted by the ALJs based in Morgantown.

The Board's primary activities are to: (1) Schedule and conduct Level Four hearings and prehearing conferences in public employee grievances; (2) Issue binding, written decisions with findings of fact and conclusions of law, subject to limited judicial review in the circuit courts; (3) Provide mediation services to actively assist employers and employees in identifying, clarifying and resolving issues anytime before a Level Four hearing; (4) Administer Levels Two, Three and Four of both the education and state employees grievance procedure; and (5) Prepare transcripts and certify records to circuit courts when decisions are appealed

The Board has identified the following goals and objectives: (1) Issue timely and prompt decisions; (2) Issue decisions within 30 working days after the cases are ready for decision, as required by law; (3) Process grievances in a fair, objective manner, according respect and courtesy to all parties; (4) Assist the parties in settling grievances through prehearing conferences and mediation; (5) Issue readable decisions based upon a

⁴ The Director has performed the functions of a chief administrative law judge for the past few years.

consistent application and interpretation of law and policy; and (6) Promptly publish decisions and case summaries on the Internet for all interested persons.

Both grievance procedure laws contain a broad definition of what can be grieved. Employees may grieve nearly any employer action affecting their compensation, hours, terms, and conditions of employment, including allegations of discrimination, favoritism and harassment. W. Va. Code §§ 18-29-2 (1985) & 29-6A-2 (1988).⁵ The Board also exercises jurisdiction over claims based upon alleged violations or misinterpretations of federal and state wage and hour laws, and claims that may also be filed under the West Virginia Human Rights Act.

In 1996 the Board estimated that West Virginia's grievance procedures cover approximately sixty-four thousand, nine hundred four (64,904) public employees, consisting of about forty-four thousand two hundred (44,200) educational employees, nineteen thousand six hundred nine (19,609) state employees, and one thousand ninety-five (1,095)

⁵ For example, "Grievance" is defined by W. Va. Code § 29-6A-2(i) (1988) as:

"Any claim by one or more affected state employees alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of their employer; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the employees."

Pension, retirement and medical insurance matters, however, are expressly excluded, and are, therefore, not grievable.

local health department employees.⁶ It is believed that the number of covered employees has not changed significantly since 1996. More than thirty-eight hundred (3,800) decisions have been issued since the Board was created.

In accordance with the Administrative Procedures Act, the Board adopted new Procedural Rules effective February 1, 1996, governing the practice and procedure for handling grievances at Level Four. These Procedural Rules were promulgated under the authority granted by W. Va. Code §§ 18-29-5(a) & 29-6A-5(a), and are codified at 156 Code of State Regulations 1 (156 C.S.R. 1).

Annual Open Meeting and Second Customer Survey

The Board, after proper notice, conducted its annual open meeting in Charleston on January 12, 1999, as required by W. Va. § 18-29-5 (1985), and W. Va. Code § 29-6A-5 (1988). The purpose of the open meeting is to help the Board to evaluate the functioning of the grievance process, the performance of its ALJs, and to prepare an annual report to the Governor and the Legislature. The Board mailed more than eight hundred (800) notices of the open meeting. All grievants whose cases were completed in 1998 were mailed a notice. State agencies, educational institutions, county superintendents, employee organizations, and the Director of the West Virginia Division of Personnel (Personnel) were also invited to attend or to submit written comments. A Customer Survey form was also mailed along with the open meeting notice.

⁶ County health department employees covered by a merit system are entitled to use the grievance procedure. W. Va. Dept. of Admin. v. W. Va. Dept. of Health and Human Resources/Boone County Health Dept., 192 W. Va. 202, 451 S.E.2d 768 (1994).

Only five people attended the public meeting and spoke about their experiences with the grievance process, both at Level Four and at the lower levels of the procedure. Nearly all the comments and suggestions were about matters over which the Board has little or no control, or which would require changes in the law.

It should be noted here, perhaps even emphasized, that the Board's general practice is to avoid taking positions on public policy questions so that its role and perception as an impartial third party will not be jeopardized. Consequently, the Board does not ordinarily make recommendations about changing the law in response to comments or suggestions made at annual public meetings.

The Board first used the Customer Survey Form in 1997 year to help in the evaluative process and to serve as a benchmark for future evaluations. (Appendix B).⁷ The Board's use of the Customer Survey prompted a larger number of responses again this year than had been obtained by simply allowing grievance participants to file written comments. One hundred and one (101) customer surveys were received by the Board as of January 30, 1999.

The Board's staff used a Microsoft Access database created in 1997 to record and analyze the responses. The purpose of this analysis was to identify the areas in which our customers think we need to improve and then, if possible, make changes to enhance our services. Two reports about the customer survey results for 1998 and 1997 are in

⁷ In designing the customer survey questions, the Board reviewed surveys used by agencies in other states that perform similar functions, and survey forms used in the Department of Administration.

Appendix C. Customers were grouped into five categories on the Customer Survey form: Grievant, Employer, Employee Representative, Counsel, and Other. The survey results were tallied and analyzed based on these categories.⁸ Ratings for most questions on the Customer Survey were as follows: (5) Excellent; (4) Good; (3) Fair; (2) Poor; (1) Very Poor, or Not Applicable. A brief analysis of the customer survey responses is set forth below.

The Board views the responses to the customer survey as favorable overall. The average rating by all customers was well above three in many categories. Importantly, the average ratings in Prompt Decisions, an area all customers agree is highly important, increased as a whole. Only one average rating fell below a three, compared with five such ratings in 1997. ALJs and support staff continued to receive high ratings in Courtesy to customers.

Customers were asked to give their Overall Satisfaction rating of the agency on a scale from 100% to 0%. Not surprisingly, Overall Satisfaction ratings were significantly influenced by the category of customer responding. Although the Overall Satisfaction rating declined in 1998 for most customer types, Grievants expressed an increased satisfaction in doing business with the Board. Customers were also asked to indicate whether their Overall Satisfaction with the Board Increased, Decreased, Remained the Same, or was Not Applicable in 1998. Forty-three (43) customers reported that their

⁸ Three responses were largely incomplete and were not included in this database or otherwise considered. In several instances, the persons responding identified themselves as both a grievant and an employee representative. These persons were placed in the grievant category and were not counted twice. The Board recognizes that quasi-judicial administrative agencies do not have "customers" in the ordinary meaning of that term.

satisfaction level had Remained the Same, while 19 reported increased satisfaction, and 25 reported decreased satisfaction.

On all thirteen questions on the first page of the customer survey form, Grievants rated the agency higher than they did last year, while Counsel and Employee Representatives rated the agency lower in nearly every question. Average Employer ratings were about evenly divided, with higher ratings on six questions and lower ratings in seven areas.

The Board asked customers to rate the importance of various factors about the quality of the adjudication services. Counsel most frequently ranked the quality of decisions as most important, while Employee Representatives most frequently ranked Promptness in issuing decisions as the most important quality. Employers and Grievants shared the opinion that Promptness in Deciding cases was very important, but Grievants ranked as number one, Conscientiousness of ALJs in Finding Facts and Interpreting the Law Without Regard to Public Criticism, a factor not ranked highly by any other type of customer. This is consistent with the concern public employees have frequently expressed about whether ALJs can be objective in deciding cases, since they are public employees too.

As it did last year, the Board plans to review the survey results at its next meeting in March 1999. The Board will meet with all staff to discuss the survey results and to consider setting goals and taking initiatives to improve the agency's performance. Last year this process culminated in the Board preparing a brochure to provide employees with more information about the grievance process and what they could expect at Level Four.

Grievances Filed and Adjudication Activities in 1998

The number of grievances filed at Level Four has not fluctuated greatly in the last several years; however, the number of cases filed in 1998 decreased by about 10 percent from 1997, reaching a six-year low. This decline was due to a 31 percent decline in the number of grievances filed by county board of education employees. This drop was partly offset by state employee grievances that increased by 15 percent this year, following a 31 percent increase in 1997.⁹

The increase in state employee cases reaching Level Four was directly related to the 1998 amendments to the grievance procedure laws. In the six months since the amendments became effective (July 1, 1998), nearly forty (40) appeals were filed involving state employees who sought to prevail by default. ALJs are conducting hearings and issuing rulings on these default claims. The table below shows the number of cases reaching the Board during the past seven years for each major category of employer.¹⁰

⁹ A detailed breakdown of grievance activity for the last seven calendar years is contained in Appendices D and E. Appendix D shows the number of grievances filed at Level Four against higher education institutions and county boards of education. Appendix E is an alphabetical listing by state agency showing the number of grievances filed at Level Four during the same period of time.

¹⁰ The table does not include five hundred forty-six (546) grievances higher education classification cases filed in 1994 after the Mercer Project was implemented. For information about those cases, please review the 1997 report which is available on-line at the Board's web page. The number of cases filed includes cases remanded by circuit courts and claims filed by state employees seeking relief by default. The number of grievances filed at Level Four represents less than 1 percent of all public employees who have the right to invoke the grievance procedure.

Grievances filed at Level Four	1998	1997	1996	1995	1994	1993	1992
State	301	261	200	265	276	252	217
Higher Education	36	56	57	38	57	48	30
County Boards of Education	186	269	277	283	277	243	261
Totals	523	586	534	586	610	543	508

The Board issued a relatively large number of Decisions in 1998, as reflected in the table below.¹¹ The clearance rate for 1998 was about 106 percent, with 552 cases disposed of and 523 cases filed.

All Decisions and Orders	1998	1997	1996	1995	1994	1993	1992
Decisions Issued	366	422	339	349	313	280	274
Dismissal and Default Orders	181	240	389	266	201	225	198
Totals	547	662	728	615	514	505	472

In 1998, ALJs issued their decisions as promptly as ever before, cutting the number of working days by 39 percent, and thereby achieving a major goal of the agency in 1998. Total case processing time also declined by nearly 18 percent. The table below shows the average number of working days it took to issue decisions after the cases became mature, average total case processing time at Level Four, the percentage of all cases issued within thirty working days, and the percentage of dismissal cases issued within thirty working

¹¹ Dismissal orders are often entered when grievances have been prematurely appealed to Level Four without a required lower level hearing having been held, or when cases are settled and the grievant requests that the grievance be dismissed. Occasionally, however, these rulings involve complicated procedural or substantive issues.

days.¹²

Average Number of Working Days	1998	1997	1996	1995	1994
Decision-Making Time	39	69	44	39	67
Total Processing Time	149	181	145	136	154
Percentage of Cases Decided within 30 Working Days	52%	19%	38%	40%	17%
Dismissal Cases Decided within 30 Days	71%	37%	41%	60%	12%

Eighty-five (85) decisions issued in 1998 are known to have been appealed to circuit court.¹³ The appeal rate has fluctuated moderately from year to year, as shown in the table below.

1998	1997	1996	1995	1994	1993	1992
23%	17%	22%	17%	20%	26%	23%

The overall percentage of grievances granted has remained relatively constant for several years, but did increase in 1998 by 3 percent, to 29 percent. Part of this overall increase was due to a 7 percent increase in state employee grievances granted. The Board ruled in favor of the employee in approximately 26 percent of the grievances in both

¹² A case is considered mature for decision on the date the ALJ has everything he or she needs to render a decision. For example, a case is not considered mature for decision until proposed findings of fact and conclusions of law are filed or the time for filing proposed findings and conclusions has expired. ALJs are required to render decisions within thirty (30) working days after the Level Four hearing.

¹³ Four dismissal orders issued in 1998 were also appealed to circuit court.

1997 and 1996, compared with 24 percent in 1995 and 27 percent in 1994.¹⁴ A breakdown for 1998 by category of employee is listed below.

1998 DECISIONS	DECISIONS ISSUED	GRIEVANCES GRANTED	PERCENT GRANTED
Higher Education	42	17	40%
State	126	30	24%
Boards of Education - Professional Personnel	78	21	27%
Boards of Education - Service Personnel	120	38	32%
TOTALS	366	106	29%

The Board gives priority to cases in which employees were dismissed from employment over other types of grievances, to expedite the disposition of those cases. The Board received more than sixty (60) dismissal cases again in 1998, as shown in the table below, and issued decisions in forty-one (41) cases.

Dismissal Cases	Cases Filed	Decisions Issued	Grievances Granted
1998	65	41	12
1997	69	34	9
1996	61	21	6

The Board disposed of an additional thirty (30) dismissal and suspension cases by

¹⁴ Cases were counted as granted, if the grievance was granted in any part. Cases were counted as denied, if the grievance was rejected on the basis that it was not timely filed. Two grievances against State Department of Education institutions, both of which were denied, were counted as board of education professional personnel cases in the table of grievances granted in 1998. Higher education cases involving classification matters were not broken out and examined separately as "Mercer" cases.

Dismissal Order due to such factors as settlements, withdrawals and the like. This compared with thirty-four (34) dismissal and suspension cases disposed of by Order in 1997, and fifty (50) cases in 1996.

The number of cases decided based upon the record made at lower levels of the grievance procedure, without a Level Four hearing, decreased in 1998. ALJs issued decisions in these cases much more quickly than last year, as reflected in the table below.

Submitted on Record (SOR) Cases	1998	1997	1996	1995
Number of SOR Decisions Issued	63	82	53	73
Working Days To Issue	33	63	31	27
Percentage of All Cases Decided	17%	23%	18%	21%

The number of hearings scheduled increased in 1998, as did the number of hearings held, as shown in the table below:

Hearing Activity	1998	1997	1996	1995	1994
Hearings Scheduled	758	688	789	988	725
Hearings Held	337	313	303	386	268

Administrative Support Activities and Increasing Use of the Internet

In 1998 the Board's secretarial staff assembled and transmitted nearly as many certified records to circuit clerk's offices as in 1997, and last year was a record high. Like last year the secretarial staff typed the transcripts in about 70 percent of these cases. Producing transcripts continues to be a substantial task for the Board's limited secretarial staff. Nonetheless, the certified record is generally transmitted within thirty (30) days of

receipt of the circuit court order requiring submission of the record.¹⁵

Records Certified to Circuit Court	1998	1997	1996	1995	1994
	86	90	82	66	60

It must be noted that the Board does not comply with its statutory duty under W. Va. Code § 29-6A-6(d), to provide promptly a certified copy of the Level Four hearing transcript to any party upon request. With its limited resources and small secretarial staff, the Board cannot comply with this obligation. Hearings held at the Board's offices are mechanically recorded but a transcript is not ordinarily prepared, unless the case is appealed to circuit court. Thus, ALJs must listen to audio tapes in most cases to draft their decisions. The Board, however, has equipped each office with a high-speed tape reformator and, upon request, it provides the parties with audio tapes, instead of a transcript. In addition, when a case is appealed, the Board recently began providing the parties with a copy of the transcript in electronic form.

In 1997, the Board entered into an open-ended statewide contract for transcription services with a court-reporting company. The Board used the transcription service primarily to obtain transcripts in Mercer cases. The contract was rebid in 1998 and the contract was awarded to a different transcription service as the low bidder.

Nine years ago the Board's staff created an electronic database, called Boardlaw,

¹⁵ The Administrative Procedures Act, specifically W. Va. Code § 29A-5-4(d), provides that an agency shall transmit, within fifteen days of receipt of the petition for appeal or within such further time as the court may allow, a certified copy of the record to the circuit court. Circuit courts must decide cases on appeal based only upon the evidentiary record developed in the grievance procedure. See W. Va. Code §§ 18-29-7 & 26-6A-7.

that now contains case summaries and pertinent information on more than three thousand eight hundred and sixty (3,860) decisions issued since 1985. The database is a valuable research tool for the ALJs and all interested persons who need to be aware of new precedent interpreting and applying the extensive body of personnel laws and regulations applicable to public employees. The database was redesigned and improved in 1997. It is updated monthly with a summary of the new decisions rendered and with any information received about the status of cases on appeal to the courts.

In 1997 the Board began using the Internet to provide access to its decisions and to improve the services it provides. The Board's staff created a Home Page, located on the State of West Virginia's Home Page, with the assistance of the Information Services and Communications Division of the Department of Administration (IS&C). The address is www.state.wv.us/admin/grievanc/grievanc.htm. The Board is proud to report that it has made great strides in using modern communication technology to provide more effective and efficient services to customers. The Internet has become the Board's primary method of distributing information. This Board intends to continue to improve the web site to fulfill its statutory duties and responsibilities, to provide timely access to information, and to improve the grievance process.

Customers have responded very positively to the web site, and they are using it. According to recent reports from IS&C, the number of user sessions per day increased during 1998 and rose to an average of one hundred five (105) sessions per day during the second half of 1998. As discussed briefly below, the Board is now using the Internet in a variety of ways to effectively and efficiently fulfill its duties and responsibilities and to

improve the services it provides.

For example, the Board now disseminates Boardlaw through the web site. It can be downloaded in a compressed format. Accordingly, the Board has almost phased out its disk subscription service that had grown to forty-two (42) subscribers by early 1997. All information in Boardlaw is also published using Microsoft Access and it can be searched separately from the decisions. The full text of all decisions issued from January 1994 to the present are on-line and can be searched. New decisions are published twice a month. All these decisions can be downloaded in WordPerfect format from the web page. The Board's Procedural Rules are also available on the web site.

In response to last year's customer survey, the Board's staff created a brochure primarily to help employees in handling a grievance. It contains frequently asked questions and other helpful information. When the Board's web page was redesigned in 1998, the frequently asked questions contained in the brochure were added to the web site. The Board's staff also designed a new grievance form for state employees that is available on-line in Adobe Acrobat format.

The Board is required by W. Va. Code § 18-29-11 (1992) to provide a statewide quarterly report to inform the members of both higher education governing boards and all county boards of education and employee organizations of current personnel-related issues. The Board distributes the report on a monthly basis rather than quarterly to distribute the information more quickly. The report contains summaries of all cases decided each month and is disseminated to about one hundred (100) persons. The Board's staff changed the manner in which the report is created and now distributes the

report by e-mail to most customers. The Secretary of State's office is provided copies of all decisions in electronic form twice a month.

In 1998, the Board continued to replace and upgrade its equipment and software to provide all employees better tools to perform their duties more effectively and efficiently and to solve any Year 2000 problems. The Charleston office now has a peer-to-peer computer network to share files and printer resources and is tied directly into the State's computer network. All offices have access to the Internet and use e-mail more frequently. All ALJs have ready access to Michie's West Virginia Law on CD-ROM.

In the area of education and training, the Board conducted a one day seminar in Charleston on Effective Writing for Lawyers and Administrative Law Judges. Our objective was to hold a high quality, low cost legal education program primarily for attorneys employed by the State of West Virginia. The seminar was attended by more than 75 attorneys and was very well received. The speaker was a nationally recognized expert in this field, a professor of law from Emory University School of Law.

This summary of administrative support activities is by no means comprehensive. It does not include any data on important functions and activities performed by the agency's administrative staff. For example, the Board's staff answers procedural questions, both orally and in writing, about the grievance process on a daily basis. Although the Board does not keep statistics on the number of procedural inquiries it receives, the number of questions definitely increased after the 1998 amendments. The Board is also being asked more frequently to act on procedural matters at the lower levels of the procedure.

Mediation

W. Va. Code § 18-29-10 (1992), requires the Board to engage in mediation and other dispute resolution techniques to actively help the parties in identifying, clarifying and resolving issues prior to the Level Four hearing, to the extent feasible with existing personnel and resources. After the enactment of this provision in 1992, the Board expanded a limited, experimental mediation program it had previously initiated. A report on the progress of the mediation project was filed with the Legislature on December 23, 1992. The Board recommended the grievance procedure laws be revised to give ALJs the authority to compel the parties to participate in settlement conferences. Under the law at that time, ALJs could conduct settlement conferences only with the consent of the parties. W. Va. Code §§ 18-29-6 & 29-6A-6. In 1998, the Legislature adopted this recommendation for state employee cases by amending W. Va. Code § 29-6A-6.

Mediation involves a trained, impartial third party who helps two or more parties negotiate to reach a mutually acceptable agreement to resolve their dispute. Mediation emphasizes solutions that satisfy the interests of the parties, rather than litigation to determine which party has the "correct" legal position.

The Board continued to offer mediation services in 1998. In every case in which a hearing is requested, the Board sends a Notice of The Availability of Mediation Services to all parties explaining what mediation is and when the Board will provide a mediator. The ALJs also hold prehearing conferences more frequently, typically by a recorded conference call, in an effort to identify and clarify issues and to encourage settlement discussions.

The ALJs serve as mediators and are generally able to schedule mediation sessions

so as not to delay the processing of the case.¹⁶ In the past the Board ordinarily provided mediation services only where all parties had agreed to it and had attempted, without success, to settle the controversy on their own. In a sense, the Board only mediated the difficult cases the parties could not settle on their own. In 1997, the ALJs initiated a project to increase the number of mediation sessions held. The Mediation Notice was revised, and now when any party expresses interest in settlement discussions, the Director contacts the other parties and attempts to arrange a mediation session.

The number of mediation sessions conducted increased to twelve in 1998, compared with seven in 1997, five in 1996, and four the year before that. Fifty (50) percent of the cases mediated this year resulted in settlement.

Although mediation services were provided in only a relatively small number of cases, the Board continues to believe mediation is the single, most cost-effective means of resolving grievances. The proper use of mediation promotes equitable settlements to the benefit of all parties. Delay and costly litigation are eliminated. It is clear that public employers can use mediation to save money, make more efficient use of their resources, retain some control over the outcome of grievances, and, perhaps what is most important, preserve the integrity of ongoing working relationships. No negative consequences have been experienced by the Board's use of mediation.

It appears highly likely that the Board's mediation efforts have fostered a climate in

¹⁶ All ALJs have received either one or two days of intensive mediation training sponsored by the United States District Court for the Northern District of West Virginia and/or the West Virginia State Bar.

which the parties engage in settlement activity more frequently. However, the Board's experience teaches that only a small percentage of its cases will be resolved as a direct result of mediation. This is partly because the grievance procedure is itself a form of alternative dispute resolution. It should also be noted that settling grievances in the public sector appears to be more difficult and time consuming than in the private sector, especially cases involving back pay for a lengthy time period.

Evaluation of Level Four Grievance Process and ALJ Performance

Based upon its observations and the available information, including the responses to the Customer Survey, the Board believes the grievance procedure at Level Four is functioning well. The Board's primary goal in 1998 was to issue decisions more quickly, without sacrificing the quality of decisions. The Board was successful in reducing decision-making time as discussed earlier in this Report.

The Board believes its ALJs performed well as a whole in 1998. The Board continues to believe its ALJs have maintained the neutral and impartial role envisioned by the Legislature and are providing fair hearings and issuing high quality decisions. In the Annual Report last year, the Board stated that 1998 might be a better year than 1997 and this prediction proved to be true.

Grievances are being decided based upon the law and the evidence, not based on politics or any other impermissible factor. The percentage of grievances granted or denied simply reflects the merits of the individual cases. Grievances are denied frequently because employees must meet a high legal standard to prevail. For example, in a case in which the grievant contends he should have been selected for a position rather than the

successful applicant, the grievant cannot prevail, absent legal error, unless he can prove the employer's decision was arbitrary and capricious or a significant flaw was present in the selection process. Proving an employer abused its discretion is no easy task and is not frequently done. Furthermore, it must be remembered that ALJs have a limited role under the law. It is not their job to manage the agency or to substitute their judgment or management philosophy for those who have the responsibility to set policy and make personnel decisions in the first instance. See Skaff v. Pridemore, 200 W. Va. 700, 490 S.E.2d 787 (1997).

It is also important to understand that this State has an unusual, if not unique, system for resolving public employee grievances. In West Virginia, an individual public employee has the right to file a grievance and pursue it through Level Four of the grievance procedure. In sharp contrast, in collective bargaining situations the grievance generally belongs to the union, and it alone decides which cases are sufficiently meritorious to pursue to arbitration. As a result, legally marginal grievances that may be difficult or impossible to prove are screened out and are not pursued to arbitration. Although public employee unions and associations undoubtedly screen out grievances here too, distinct differences remain between the grievance procedure in West Virginia and arbitration in a collective bargaining situation.

The low percentage of decisions reversed by the Courts is a good indicator that the ALJs are properly applying the law to diverse factual situations and are rendering legally sound and fair decisions. The ALJ's ruling is final in most cases. By December 31, 1998, the Board had issued final decisions in three thousand eight hundred and sixty (3,860)

cases. Nine hundred seventy-three (973), or 25 percent, of those decisions were appealed to circuit court. The Board's records contain the following known results of judicial review: The courts reversed only one hundred twenty-six (126), or 13 percent, of the cases appealed. Accordingly, approximately 97 percent of the Board's decisions were either not appealed or not reversed on appeal.

The Board continues to be concerned about unnecessary delay in the processing of grievances at the lower levels. The Board has limited information available to it about that issue, and only limited options to address delay problems at the lower levels. However, the Board has begun allowing grievants to bypass the lower levels of the grievance procedure where they want to skip those levels because the employer has not complied with the time limits for holding hearings. See W. Va. Code § 29-6A-3(a).

Fiscal Summary

The Board was appropriated \$1,031,022 for FY 1999. The Board's actual expenditures for FY 1998 was \$913,483. The Board does not charge for any of its services and generates no revenue, although it did charge a registration fee for its continuing legal education seminar to cover most of the expense of the program.

Recommendations

Because of its role as the neutral third party and its limited statutory duties and responsibilities, the Board, as noted earlier, generally does not take positions on public policy questions. The Board, however, has three recommendations to make to the Governor and the Legislature. First, the Board recommends that the Legislature revise the grievance procedure laws to help insure its complete neutrality. The Board's role is that

of an impartial third party to resolve employment disputes. When the Executive Branch of State government was reorganized in 1989, the Board was placed within the Department of Administration, along with the West Virginia Division of Personnel. The Board objected to this then and continues to believe this organizational structure creates a conflict of interest, and at least an appearance of impropriety. For example, the Board must hear and decide grievances filed by employees who work for agencies that are within the Department of Administration. Some of these cases involve personnel decisions made by the Secretary of this Department, who has substantial control over the Board budget. Public employees have expressed distrust of this agency partly because of this structural arrangement.

From a structural or organizational standpoint, the Board should be in a more autonomous position. Consequently, the Board favors an amendment to Chapter 5F of the West Virginia Code removing the Board from the Department of Administration, and making it an independent agency within the Executive Branch of government. It should be made clear, however, that no attempt has been made by anyone in authority to exert any influence or to exact any retribution from the Board or its ALJs.

Second, the Board repeats a recommendation it made in 1992: Give ALJs the statutory authority to require public employers and employees to participate in settlement conferences and mediation sessions. The law was changed for state employee cases in 1998, and this change should now be extended to grievances by educational employees. This would improve communications and perhaps resolve difficult and/or complex disputes without litigation. It is not likely that this authority would be exercised frequently, but the

selective use of this power in a thoughtful and professional manner could achieve significant benefits.¹⁷

The Board also again recommends that the Governor and Legislature support efforts to raise ALJs salary levels to assure the recruitment and retention of well qualified and competent attorneys. As noted in several previous annual reports, the Board's experience has proved that most experienced lawyers will not consider full-time ALJ positions at the salary levels offered by this agency. The Board was permitted to increase entry level salaries in late 1997 from \$37,300 to \$42,000. This was a step in the right direction, but additional increases are needed.

ALJ turnover is particularly troublesome because of the time it takes to recruit and train new ALJs. New ALJs typically do not reach full performance level for several months. Meanwhile pending cases must be reassigned and are often delayed as a result. Clearly, the lack of adequate compensation and turnover in ALJ positions has been the most significant negative factor affecting the Board's ability to process grievances in a prompt and efficient manner.

Conclusion

The Board's accomplishments show the wisdom of the legislation establishing a grievance procedure and creating an independent forum to resolve disputes. Many

¹⁷ The Board first made this recommendation in a 1992 Report to the Legislature. The Board was required by law to file a report with the Legislature concerning the results of its mediation efforts by January 1, 1993. W. Va. Code § 18-29-10 (1992). The Board continues to believe this change in the law would constitute good public policy. Under current law ALJs can hold settlement conferences in education cases only if all parties consent.

disputes have been resolved fairly and quickly, without resort to the courts, to the benefit of public employers, public employees and the citizens of this State. The Board believes the benefits of the grievance procedure far outweigh its cost. The existence of the procedure helps to resolve disputes quickly by offering a channel for communications. The procedure helps to prevent improper actions against public employees involving a broad range of personnel matters, including questions of discipline, reductions in force, promotion, transfer, compensation, discrimination and favoritism. The procedure helps prevent costly litigation in the courts involving current and former employees.

The Board, through its decisions, has established a body of employment law to guide agencies and employees that should serve to improve public personnel management in West Virginia. Public employers frequently look to Board decisions for guidance in making personnel decisions, and employee organizations likewise consult the decisions in advising employees about whether to file and/or to pursue grievances to higher levels in the process.

The Board will continue to focus its efforts on prompt decision making and the avoidance of unreasonable delays at Level Four, particularly unreasonable delay by ALJs in issuing decisions after the cases are ready to be decided.¹⁸ The Board will continue to track the processing of grievances, keep detailed information about decisional delay, and

¹⁸ Parties frequently delay cases for legitimate reasons. Delay caused by the parties' desire to submit findings of fact and conclusions of law is not considered to be unnecessary delay. Numerous circumstances can contribute to delay, including the complexity of the legal and factual issues presented, fluctuating caseloads, turnover in ALJ positions, performance problems, and other human factors present in any agency.

consider such information to be a critical factor in evaluating the performance of its ALJs.

This Board is committed to continuing to improve Level Four of the grievance process. It will continue to strive to meet its important statutory duties and responsibilities, and to improve the quality of the adjudication services and all other services it provides. The Board will also exercise its new jurisdiction over procedural matter at Levels Two and Three in a deliberate and judicious manner in an effort to improve the overall functioning of the grievance process.

With pride in its accomplishments, the West Virginia Education and State Employees Grievance Board, therefore, respectfully submits its Annual Report to Governor Cecil H. Underwood and the Legislature.

Appendix A

ORGANIZATIONAL CHART

WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

JOSEPH F. MARKUS
Secretary
WV Department of Administration

BOARD MEMEBERS *

CHAIRMAN
ROGER SMITH, II

MEMBERS
LOWELL WITTERS
BILLY COFFINDAFFER

DIRECTOR**
C. RONALD WRIGHT

ADMN ASSISTANT
VALERIE RIST

ADMN LAW JUDGES
IONA KELLER
JANIS REYNOLDS
LEWIS BREWER
MARY JO SWARTZ
BRENDA GOULD
DENISE M SPATAFORE
ANDREW MAIER
RANDY MILLER
VACANT (1)

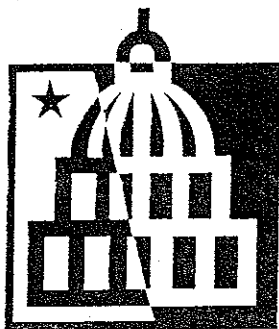
SECRETARIES
E. SCHOONOVER
C. POWELL
L. CARNAHAN
D. MADDEN
L. GEORGE
K. GLADIS***

* Board appointed by Governor 18-29-5,
part of Department of Administration
5F-2-1 (a) (7)

** No statutory provision for a Director

*** Part-time

Prepared: February 9, 1999



Appendix B

State of West Virginia

Education and State Employees Grievance Board

Customer Satisfaction Survey

We would appreciate your help in telling us how we can improve the services provided by the Education and State Employees Grievance Board. Please respond to the questions below and mail your completed survey to: Customer Survey; 808 Greenbrier Street, Charleston, WV 25311. All surveys must be postmarked no later than January 8, 1999. You may also fax this information by that date to (304) 558-1106. If you have any questions regarding this survey, please feel free to contact Ron Wright of the Grievance Board at (304) 558-3361.

I. Adjudication Services: Administrative Law Judge Performance

	Excellent	Good	Fair	Poor	Very Poor	Not Applicable
1. Promptness in deciding cases	5	4	3	2	1	N/A
2. Quality of written decisions, e.g., readability, proper discussion of legal and factual issues	5	4	3	2	1	N/A
3. Ability to conduct orderly and fair hearings	5	4	3	2	1	N/A
4. Knowledge of law applicable to the hearing	5	4	3	2	1	N/A
5. Conscientiousness in finding facts and interpreting the law without regard to public criticism	5	4	3	2	1	N/A
6. Courtesy to parties and witnesses	5	4	3	2	1	N/A
7. Please rank the top three (3) qualities, by question number listed above, which you find most important. For example, if promptness in deciding cases is the most important, you would place a "1" in the first blank space. (most important) _____ (second most important) _____ (third most important) _____						

II. Level Four of Grievance Procedure: Administrative and Secretarial Staff

8. Simplicity of forms utilized to file grievance	5	4	3	2	1	N/A
9. Simplicity of procedure	5	4	3	2	1	N/A
10. Promptness in obtaining a hearing date	5	4	3	2	1	N/A
11. Promptness in responding to requests for information about the grievance procedure	5	4	3	2	1	N/A
12. Accuracy of information provided	5	4	3	2	1	N/A
13. Courtesy of staff	5	4	3	2	1	N/A

See Reverse Side for Continuation of Customer Survey

III. General Comments:

14. Circle the percentage of your overall satisfaction in doing business with the Grievance Board
- 100% 90% 80% 70% 60% 50% 40% 30% 20% 10% 0%
15. During 1998, has your overall satisfaction with the Grievance Board:
- ☐ Increased ☐ Decreased ☐ Remained the Same ☐ Not Applicable
16. What are your top three (3) recommendations to improve the services provided by the Grievance Board?
17. Is there anything else you want to tell us?

IV. Customer Information

Please check the box that best describes your role in the grievance procedure:

- ☐ Grievant ☐ Employer
☐ Employee Representative ☐ Counsel
☐ Other _____

(Completing the information below is *optional*, although it may assist us in following up on your comments or complaints)

Name: _____

Agency: _____

Address: _____

Thank You for Your Response

Average Rating by Customer of Adjudication Services for 1997

Customer Type	Responses	Overall Satisfaction	Prompt Decision	Quality Decision	Orderly Hearing	Know Law re Hearing	Public Criticism	Courtesy
COUNSEL	15	80.00	3.93	4.29	4.43	3.93	4.31	4.60
EMPLOYEE REP	13	75.38	2.69	3.62	4.23	4.17	3.58	4.69
EMPLOYER	34	82.58	2.97	4.21	4.44	4.45	4.29	4.59
GRIEVANT	77	39.89	2.23	2.84	3.29	3.33	2.74	3.80
OTHER	4	70.00	3.25	4.00	4.00	4.25	5.00	4.33

Average Rating by Customer of Adjudication Services for 1998

Customer Type	# of Responses	Overall Satisfaction	Prompt Decision	Quality Decision	Orderly Hearing	Know Law re Hearing	Public Criticism	Courtesy
COUNSEL	16	75.94	3.38	3.69	3.81	3.73	3.67	4.25
EMPLOYEE REP	11	62.73	2.55	3.27	4.18	3.50	3.10	4.36
EMPLOYER	30	79.33	3.55	4.17	4.52	4.34	4.24	4.67
GRIEVANT	40	55.77	3.18	3.67	3.75	4.00	3.47	4.16
OTHER	4	92.50	4.00	5.00	5.00	4.50	4.50	5.00

Average Rating by Customer of Administrative Procedures and Staff for 1997

Customer Type	Responses	Overall Satisfaction	Forms Simple	Procedure Simple	Prompt Hearing Data	Prompt Info Response	Info Accuracy	Staff Courtesy
COUNSEL	15	80.00	4.07	4.13	4.13	4.69	4.54	4.47
EMPLOYEE REP	13	75.38	4.38	3.92	4.08	4.00	4.00	4.85
EMPLOYER	34	82.58	4.09	3.85	3.65	4.06	4.24	4.53
GRIEVANT	77	39.89	3.44	3.14	2.51	3.09	3.19	4.10
OTHER	4	70.00	3.50	4.00	3.25	4.33	4.33	4.25

Average Rating by Customer of Administrative Procedures and Staff For 1998

Customer Type	# of Responses	Overall Satisfaction	Forms Simple	Procedure Simple	Prompt Hearing Data	Prompt Info Response	Info Accuracy	Staff Courtesy
COUNSEL	16	75.94	4.21	4.07	3.88	4.25	4.27	4.40
EMPLOYEE REP	11	62.73	3.91	3.55	3.55	3.80	3.82	4.27
EMPLOYER	30	79.33	4.04	3.82	3.96	4.32	4.36	4.41
GRIEVANT	40	55.77	4.00	3.84	3.43	3.72	3.56	4.24
OTHER	4	92.50	4.25	4.00	4.00	4.25	4.50	4.75

Satisfaction Change by Customer Type in 1997

Customer Type	# of Responses	Satisfaction Change
---------------	----------------	---------------------

COUNSEL

3	DECREASED
2	INCREASED
10	SAME

EMPLOYEE REP

1	
3	DECREASED
1	INCREASED
2	N/A
6	SAME

EMPLOYER

4	DECREASED
6	INCREASED
2	N/A
22	SAME

GRIEVANT

1	
40	DECREASED
5	INCREASED
6	N/A
25	SAME

OTHER

1	DECREASED
1	INCREASED
2	SAME

Satisfaction Change by Customer Type in 1998

Customer Type	# of Responses	Satisfaction Change
COUNSEL	2	DECREASED
	1	INCREASED
	4	NOT APPLICABLE
	9	REMAINED THE SAME
EMPLOYEE REP	5	DECREASED
	6	REMAINED THE SAME
EMPLOYER	4	DECREASED
	7	INCREASED
	1	NOT APPLICABLE
	18	REMAINED THE SAME
GRIEVANT	2	
	14	DECREASED
	10	INCREASED
	4	NOT APPLICABLE
	10	REMAINED THE SAME
OTHER	1	INCREASED
	2	NOT APPLICABLE
	1	REMAINED THE SAME

APPENDIX D
GRIEVANCES FILED AT LEVEL FOUR AGAINST GOVERNING BOARDS OF
HIGHER EDUCATION AND COUNTY BOARDS OF EDUCATION
CALENDAR YEAR 1998 THROUGH 1992

Board of Directors:	1998	1997	1996	1995	1994	1993	1992
Bluefield State College	1	2	1	0	1	6	2
College of Graduate Studies	0	0	1	0	0	3	0
Concord State College	2	1	2	2	4	0	2
Fairmont State College	0	2	2	1	0	3	3
Glenville State College	0	0	0	1	2	0	0
Potomac State College	0	1	1	0	1	0	1
Shepherd College	1	7	4	3	6	7	2
West Liberty State College	4	4	3	5	0	5	1
W. Va. Univ. Institute of Technology	0	0	0	0	4	1	2
W. Va. Northern Community College	2	2	3	2	4	1	2
W. Va. Southern Community & Technical College	1	6	2	2	1	2	1
W. Va. State College	2	3	2	4	3	2	1
Board of Trustees:							
Marshall University	10	8	6	5	11	10	4
W. Va. Graduate College	0	0	1	0	0	0	0
W. Va. University	13	18	27	13	19	8	8
W. Va. University Hospitals	0	0	0	0	0	0	1
W. Va. University/Charleston	0	0	0	0	0	0	0
W. Va. School of Osteopathic Med.	0	2	1	0	1	0	0
Totals	36	56	56	38	57	48	30

County Boards of Education							
Barbour County Board	0	0	2	3	12	5	3
Berkeley County Board	1	7	5	1	3	2	2
Boone County Board	6	1	5	10	4	7	1
Braxton County Board	2	1	1	1	0	1	2
Brooke County Board	1	0	3	4	2	7	7
Cabell County Board	0	11	9	9	4	7	11
Calhoun County Board	3	0	0	0	0	0	1
Clay County Board	0	1	1	0	0	0	1
Doddridge County Board	0	0	0	0	0	0	0
Fayette County Board	3	7	8	5	4	9	4
Gilmer County Board	1	0	0	4	0	1	2
Grant County Board	1	3	2	2	1	0	1
Greenbrier County Board	1	5	7	5	3	0	1
Hampshire County Board	0	3	1	1	0	2	2
Hancock County Board	9	12	11	10	15	16	6
Hardy County Board	0	0	1	1	0	0	2
Harrison County Board	4	4	5	4	1	1	1
Jackson County Board	1	3	2	3	1	1	1
Jefferson County Board	4	2	2	3	1	2	2
Kanawha County Board	13	17	19	17	33	25	28
Lewis County Board	2	4	3	0	0	4	6
Lincoln County Board	30	33	7	9	9	15	10
Logan County Board	7	18	15	21	12	13	12
Marion County Board	3	2	5	5	7	22	10
Marshall County Board	1	3	0	0	0	5	2

Mason County Board	4	5	9	7	19	8	4
McDowell County Board	0	2	5	7	4	6	10
Mercer County Board	2	10	3	8	25	8	16
Mineral County Board	5	3	2	3	2	6	5
Mingo County Board	15	40	49	67	20	16	12
Monongalia County Board	11	0	8	4	10	5	10
Monroe County Board	3	2	6	5	4	1	9
Morgan County Board	3	3	4	1	1	2	2
Nicholas County Board	4	3	3	2	0	4	2
Ohio County Board	1	2	3	3	1	4	5
Pendleton County Board	2	1	0	4	1	2	1
Pleasants County Board	1	0	0	0	0	0	0
Pocahontas County Board	0	2	0	0	0	1	1
Preston County Board	1	0	0	4	3	2	4
Putnam County Board	6	12	3	4	4	4	4
Raleigh County Board	2	10	12	9	29	4	9
Randolph County Board	5	3	7	4	6	2	2
Ritchie County Board	2	1	1	0	0	1	0
Roane County Board	0	0	0	0	0	2	0
Summers County Board	3	2	6	5	8	3	9
Taylor County Board	0	0	1	2	0	0	0
Tucker County Board	1	1	3	0	2	0	4
Tyler County Board	0	0	3	0	2	3	1
Upshur County Board	2	1	2	1	2	0	0
Wayne County Board	6	6	5	4	3	2	4
Webster County Board	0	3	4	2	3	3	11
Wetzel County Board	2	3	6	2	5	1	2

Wirt County Board	1	1	0	0	0	0	0
Wood County Board	3	5	6	4	1	1	6
Wyoming County Board	1	4	2	5	4	5	10
Multi-County Vocational Centers	0	0	2	3	1	2	0
Regional Educ. Serv. Agencies	1	2	1	0	1	0	1
W. Va. Board of Education (previously reported as a state agency)	6	5	6	4	4	3	1
	186	268	276	283	277	246	262

APPENDIX E

GRIEVANCES FILED AT LEVEL FOUR AGAINST STATE AGENCIES CALENDAR YEARS 1998 THROUGH 1992

	1998	1997	1996	1995	1994	1993	1992
Adjutant General	0	4	0	2	0	0	0
Administration, Dept.	5	5	2	5	1	5	4
Agriculture	0	0	2	0	0	0	0
Alcohol Beverage Control Admin.	2	5	0	0	1	1	1
Bd. of Examiners for Reg Nurses	0	0	0	1	0	1	0
Clarksburg Public Library	0	0	0	1	0	0	0
Commerce, Labor, Econ. Resources	0	0	0	1	0	3	4
Consol. Public Retirement Bd.	0	0	4	0	1	0	0
Corrections	64	48	46	34	29	13	18
Culloden Public Serv. Dt.	0	0	0	1	0	0	0
Culture and History	2	2	0	1	0	3	1
Development Office	0	0	0	0	1	0	0
Economic Development Authority	0	0	0	0	0	1	0
Educational Broadcasting Authority	1	0	3	0	1	2	0
Bureau of Employment Programs	14	13	8	6	10	20	20
Bureau of Senior Services	2	NA	NA	NA	NA	NA	NA
Energy	0	0	0	0	0	0	1
Environmental Protection	3	6	7	12	3	3	0
Farm Management Comm'n	0	0	0	0	0	1	0

Fire Commission	0	0	0	1	0	1	0
Forestry	0	1	0	3	0	0	0
Health and Human Resources	70	67	42	85	100	130	83
Highways	40	62	41	52	44	24	35
Housing Development Fund	2	2	0	0	0	0	0
Human Rights Commission	1	0	0	0	0	0	1
Juvenile Services	15	NA	NA	NA	NA	NA	NA
Labor	1	4	0	0	0	2	1
Library Commission	0	0	0	0	1	0	0
Lottery Commission	0	0	0	0	1	0	0
Military Affairs (MAPS)	1	0	0	0	0	0	0
Miners' Health, Safety & Training	0	2	0	0	1	2	0
Motor Vehicles	4	4	1	1	19	7	1
Natural Resources	6	2	2	6	5	0	6
Parkways, Economic Dev. & Tourism	19	14	9	3	5	1	4
Personnel	0	0	1	3	4	1	1
Public Safety	12	1	4	6	2	1	1
Public Service Commission	3	1	5	4	6	2	5
Racing Commission	0	0	0	1	0	0	0
Railroad Maintenance Authority	0	0	0	1	0	0	0
Real Estate Commission	0	0	0	0	1	0	0
Regional Jail Authority	11	7	6	14	13	3	8
Rehabilitation Services	13	3	6	6	10	11	7
Solid Waste Management Bd.	0	0	1	0	0	0	1
Tax & Revenue	5	0	3	8	10	3	5
Tourism & Parks	0	0	0	1	5	4	2

Veterans' Affairs	1	2	0	0	2	0	0
County Health Departments	4	6	9	6	0	2	5
Totals	301	262	202	265	276	247	215