

FIFTH ANNUAL REPORT  
TO THE  
GOVERNOR AND THE LEGISLATURE

SUBMITTED BY:

WEST VIRGINIA EDUCATION AND  
STATE EMPLOYEES GRIEVANCE BOARD

## FORWARD

The Legislature established a four-step grievance procedure covering approximately fifty-five thousand (55,000) education employees and created the West Virginia Education Employees Grievance Board to administer the fourth level of the procedure effective on July 1, 1985. W.Va. Code §§18-29-1, et seq.<sup>1</sup> This legislation provided a mechanism for the resolution of employment problems and had as its express goal the maintenance of good morale, the enhancement of job performance and the improvement of the system of education that serves the citizens of this State. The procedure was intended to be a simple and expeditious process for resolving grievances at the lowest possible level.

During the next three years over eleven hundred grievances were received from education employees, primarily those of county boards of education. During this time period the Board hired four full-time hearing examiners, a

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<sup>1</sup> Level I involves an informal conference with the immediate supervisor of the employee followed by the filing of a written grievance and a written decision from the supervisor. Level two requires an evidentiary type hearing to be held by the county superintendent, chief administrator or a designee and at level three the County Board of Education may also conduct a hearing. W.Va. Code §18-29-4. The Grievance Board is only responsible for the administration of level four, where a decision is rendered following an evidentiary hearing or submission of the case on the record developed at the lower level steps. Either party may appeal that decision within thirty days of its receipt to the Circuit Court of Kanawha County or the circuit court of the county in which the grievance arose.

limited secretarial staff and opened offices in Charleston, Elkins, Beckley and Wheeling.

A similar grievance procedure statute covering approximately thirty thousand state employees was enacted and made effective on July 1, 1988, and the agency's title was accordingly changed to the West Virginia Education and State Employees Grievance Board. W.Va. Code §§29-6A-1 et seq.<sup>2</sup> This legislation applies to employees of any department, governmental agency or any independent board or commission of State government with limited exceptions. Employees of constitutional officers are not covered, unless they are in the classified service and protected by state personnel laws. Employees of the Legislature and uniformed members of the Department of Public Safety are also not covered.

After the Board's jurisdiction was substantially increased by this new legislation in 1988, it increased the number of hearing examiners from four to six and employed a Director in early 1989, who also serves as a hearing examiner in some cases. The Director and three hearing examiners are assigned to the Charleston office and a hearing examiner and one secretary are assigned to each branch

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<sup>2</sup> The multi-level procedure created under the state employee grievance procedure statute closely parallels the steps in the grievance procedure statute for education employees, except only a conference is required at level two and there is no provision expressly authorizing the employing agency to waive a level three hearing. Appeals by state employees, however, can only be filed in the circuit court of the county where the grievance arose.

office. Currently, all six hearing examiners hear and decide grievances from both state and education employees.

In accordance with the requirements of W.Va. Code §18-29-5 (1985) and W.Va. Code 29-6A-5 (1988), the Board, after proper notice, conducted its annual open hearing in Charleston on the third day of January, 1990, and invited all state agencies, educational institutions, county superintendents, employee organizations, the acting director of the Division of Personnel and all grievants who had participated in level four proceedings during the 1989 calendar year to attend or to submit written comments about their experiences. The purpose of this opening meeting and the solicitation of comments was to assist the Board in its evaluation of the operation of the level four grievance process and the performance of its hearing examiners and its preparation of this annual report to the Governor and the Legislature.

#### EVALUATION

The Board is pleased to report an overall satisfaction with the functioning of level four of the grievance procedure and the performance of its hearing examiners in 1989. Only five people attended the public meeting. They expressed only limited criticism of the grievance procedure and registered no complaint about the performance of our hearing examiners. The Board perceives the limited attendance at the public hearing reflects a continued general

satisfaction with the performance of the level four grievance procedure in 1989.

As was noted in both the 1988 and 1987 annual reports, the written criticism we have received about the decision rendered in a particular case is the type of comment normally expected of litigants involved in any type of adversarial proceeding. Such comments were few in number and are a good indication that the Board has achieved the neutral stance intended by the legislation.

As in previous years, the most frequent and principal criticism voiced in the written comments received was about the time it takes to process a grievance at every level of the grievance procedure, including level four. There is cause for concern on this point. The Board's primary concern is not about delay as such but only unnecessary or unreasonable delay at level four. For example, delay caused by a desire of the parties to submit findings of fact and conclusions of law is not considered to be unnecessary delay. There are numerous factors that may contribute to delay, including the complexity of the legal and factual issues presented in a particular case, fluctuating caseloads, increasing active caseloads, turnover in hearing examiner positions, and other normal human factors present in an agency operating with only limited staff. We hope to be able to make progress in this area, but that will depend on a number of factors, including circumstances that are beyond our control, such as the impact of the hiring freeze,

whether budget reductions will require a reduction in the number of our employees and the number of grievances filed in 1990. The Board is intent on preventing lengthy delays in conducting hearings and rendering decisions.

There was also concern expressed about frivolous grievances being taken to level four without any recourse by the employer for the time expended and the expense incurred in defending the charge. The fact that a grievance is denied on the merits does not, of course, mean the grievance was frivolous. Beyond that further comment on this issue is considered inappropriate.

The Board's most controversial decisions continue to be those involving the dismissal of public employees for off-duty criminal misconduct. In these cases, the Board's hearing examiners must apply the legal principles first enunciated by the West Virginia Supreme Court of Appeals in Golden v. Board of Educ. of the County of Harrison, \_\_\_ W.Va. \_\_\_, 285 S.E.2d 665 (1981).<sup>3</sup> Those principles place a heavy burden on government employers to establish a connection between the employee's off-duty misconduct and job performance. The Court in Golden held that conviction of a crime is not immorality "per se," and found the county board

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<sup>3</sup> The Supreme Court in Golden relied in part on its earlier decision in Thurmond v. Steele, 225 S.E.2d 210 (W.Va. 1976). It is clear, however, that Golden is the leading case embracing what is known as the "rational nexus" test for dismissing an education employee for off-duty misconduct.

of education's failure to establish a connection between the employee's criminal conduct, shoplifting, and the employee's job performance as a school guidance counselor warranted reinstatement with backpay.

The majority of the Board's decisions, however, have not been subject to any public criticism or controversy and the high rate of affirmations in the courts is a good indication that hearing examiners are knowledgeable in the law pertaining to the employer/employee relationship, are able to apply the law to diverse factual situations, and are rendering fair and just decisions based on the law and the evidence. The Board believes the quality of its decisions has improved in 1989.

#### 1989 CALENDAR YEAR

The calendar year of 1989 was by far the Board's busiest year. It received seven hundred and twenty-four (724) grievances, more than double the three-hundred and sixty (360) filed in 1988, for an average of about sixty (60) a month. Three hundred and sixty-seven (367) grievances were filed by state employees during the first full calendar year after passage of the grievance procedure for state employees. Three hundred and fifty-seven (357) cases were filed by education employees, a twenty-five (25) per

cent increase above the two hundred and eighty-six (286) grievances filed in 1988.<sup>4</sup>

Nearly two hundred (200) of the grievances filed by State employees involved an allegation that the employee had worked out of classification for some period of time and was entitled to backpay. One hundred and forty-six (146) of these misclassification grievances were filed by employees of the Division of Human Services (DHS). More than ten grievances were filed against each of the following divisions: Highways, Natural Resources and Tax. Fortunately, it appears that a large percentage of the misclassification grievances filed against DHS will be settled, thereby relieving the Board of the prospect of being completely overwhelmed and unable to conduct hearings or to render decisions within a reasonable period of time.

The number of cases processed also set a new high in 1989. Disposition was made of four hundred and ninety-four (494) cases, three hundred and twelve (312) by written published decision, one hundred and thirty (130) by remand, and fifty-two (52) by dismissal. Remand orders were generally entered because the lower level steps had not been

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<sup>4</sup> Appendix A contains a list showing the number of grievances filed in 1989 against public and higher education employers. Similarly, Appendix B is an alphabetical listing showing the number of grievances filed against state agencies in 1989. Appendix C is a county outline map showing the four regions the Board utilizes for case assignment purposes.



followed. Dismissals occurred for a number of reasons, frequently because the grievance was either settled<sup>5</sup> or was simply withdrawn. Despite this level of productivity the Board's active caseload grew from one hundred and sixty-one (161) cases at the beginning of the year to two hundred and twenty-two (222) cases at the end of the year. The Board ruled in favor of the employee in approximately forty (40) percent of the grievances and in favor of the employer in about sixty (60) percent of the cases.

A partial breakdown of the work performed in each branch office is as follows:

	<u>Decisions Issued</u>	<u>Level Four Hearings</u>		<u>Cases submitted on Record</u>
		Scheduled	Held	
Charleston	143	348	123	13
Elkins	61	172	57	11
Beckley	57	191	60	7
Wheeling	51	132	57	8
	—	—	—	—
TOTAL	312	843	297	39

Seventy-nine (79) decisions were appealed to circuit court in 1989, compared with approximately ninety (90) in

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<sup>5</sup> In the last few months of the year, the Board's hearing examiners took modest steps to encourage the parties to settle grievances prior to the level four hearing. This produced settlements in a number of cases to the benefit of the parties, the Board and the State.

1988. This slight decrease occurred even though almost one hundred (100) more decisions were rendered on the merits in 1989. Sixty-nine (69) records were indexed, copied and transmitted to circuit court during the year, and forty-four transcripts were prepared in-house. Producing transcripts continues to be a substantial burden on the Board's limited secretarial staff.

Unfortunately, it is difficult to determine the outcome of appeals due to the inconsistent and sporadic manner in which the Board is informed of these decisions.<sup>6</sup> The Board continues to search for a viable method of determining the outcome of appeals. It has begun working with the Circuit Court of Kanawha County to obtain a complete history of all appealed decisions and has begun to routinely request other circuit courts to provide copies of the decisions on appeal when they are rendered. The information available to the Board shows a high percentage of decisions being upheld.

Since the Board's inception in 1985, approximately two hundred and sixty-two (262) decisions have been appealed. The information currently available to the Board indicates that circuit courts have affirmed seventy-eight (78),

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<sup>6</sup> There is no provision in either the education or the state employees grievance procedure statute requiring the parties or the circuit court to notify the Board of the decision on appeal. Although parties are asked to provide the Board with a copy of the circuit court's decision, this has not proven to be a reliable way in which to obtain this important information.

affirmed two in part, reversed twenty-two (22) and remanded four with instructions. About eleven (11) appeals were withdrawn due to out-of-court settlements. At present it appears that the Board's decisions are affirmed ~~in~~ approximately eighty (80) percent of the time. To date the West Virginia Supreme Court of Appeals has decided ten cases involving the Board's decisions. The Court has affirmed the decision of the hearing examiner eight times, affirmed one in part and remanded to the circuit court, and reversed on one occasion. One appeal was apparently withdrawn due to a settlement pending appeal.

The Board has nearly completed its goal of having personal computers with word processing and database research capabilities available for all its hearing examiners to assist them in rendering high quality decisions in an efficient and effective manner. Now all but one of our hearing examiners have computers to draft and edit decisions, perform research and manage their caseloads.

A major project involving the creation of an electronic database containing all the Board's significant decisions is now actively underway. This will facilitate the research of the Board's precedent and will help ensure its decisions are consistent. The Board's objective is to utilize its limited human resources in the most efficient and effective manner. This goal was strongly endorsed by Governor Caperton's Reorganization Implementation Team, which concluded in its report:

This agency appears to be functioning at this point with bare bones staffing. The 1988 addition of 30,000 state employees to the constituency from which grievance flow to the agency, is causing the Board and Director great concern. To handle what amounts to an essential doubling of workload, they have requested 2 additional hearing examiners and 2 clerk typists but received no approval.

Currently, the agency is using PC's [personal computers] in three locations. We recommend consideration be given to additional PC's for the remainder of the board staff. These should increase productivity and reduce the requirement for additional staff to meet rising workloads. Perhaps, more analysis and communication in concert with the new Personnel Division can also be a means of reducing case load.

#### RECOMMENDATIONS

First, as stated in last year's annual report, the Board is of the opinion that the existing process of selecting Board members should be preserved in order to ensure the integrity, continuity and consistency of the functioning of level four of the grievance procedure.

Second, the Board recommends that two additional hearing examiners and two secretaries be added to its existing staff, bringing the total number of employees to eight examiners, seven secretaries, one administrative assistant and a director. The Board is of the opinion that it can substantially comply with the legal requirements imposed by the two grievance procedure statutes it administers with two additional full-time hearing examiners averaging approximately five decisions each per month. The Board will continue to give expedited scheduling treatment to cases involving dismissals and suspensions for obvious

reasons, though this preference will cause some delay in the disposition of other types of grievances.

This recommendation is based upon an estimate that a total of approximately eight hundred grievances will be filed in 1990, a modest increase of about eighty (80) cases. Although a sizeable decrease in the number of misclassification grievances filed by state employees seems likely, this will probably be more than offset by two major factors. The first is simply that more state employees will have become aware of the procedure and will not be reluctant to utilize it. The second component of this prediction is that a sizeable number of grievances are likely to arise as a result of actions taken by the current administration designed to reduce the size of State government.

Third, the Board recommends that another branch office be opened by the end of the 1990 calendar year in an area to be determined by a study of the geographical distribution of employee grievances. With the concentration of state employees in Kanawha County, there is an obvious need to assign one of the proposed additional examiners to the Charleston office but concentrations of grievances in other heavily populated areas of the state would make an office in one of those areas cost-effective.<sup>7</sup>

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<sup>7</sup> A level four hearing occasionally involves a group of grievants and often a large numbers of witnesses, including supervisors and administrators. The cost in terms of lost (Footnote Continued)

Finally, it is essential that the Board be given the discretion to increase the salaries of its hearing examiners to thirty-five thousand dollars in order to attract and retain experienced personnel. As noted in the 1987 and 1988 reports, recruitment experience has clearly demonstrated that the majority of experienced lawyers will not consider these positions, except on a part-time basis with the current salary level. This inadequacy has seriously handicapped the Board in recruitment efforts and continues to be a disincentive to the hearing examiners presently carrying the burden of the day-to-day operations of this agency. The nature of the work they perform is such that turnover in these positions will generally result in decisional delays.

#### FISCAL SUMMARY

The Board's 89-90 Fiscal Year request was for \$646,616 not including employee benefits. This request would have permitted the opening of a branch office and the employment of an additional hearing examiner and secretary. This request was not granted, the budget was reduced by about four per cent from the previous fiscal year, and then during the year an another three per cent reduction was imposed because tax revenues fell substantially below revenue estimates. The failure to appropriate the funds requested

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(Footnote Continued)

man hours and transportation expenses can be high when those persons must travel.

and the subsequent spending cut and other factors created a shortage in employee benefits and the necessity of creating a negative attrition line item.

For Fiscal Year 90-91 the Board submitted a budget request of \$542,505, as required by the budget preparation instructions, but it was pointed out to Secretary Polan that this amount was not sufficient to permit the Board to comply with its statutory duties or to properly operate the agency. An additional \$220,000 was suggested as an amount that would permit the opening of a branch office and the employment of additional hearing examiners and secretaries. Like most agencies in the executive branch, however, our budget request has been reduced by about three per cent in personal services and employee benefits, in effect continuing the three per cent spending reduction imposed in the fall of 1989.

This level of appropriation is not even sufficient to maintain our current level of staffing. It will further impair the Board's ability to comply within the statutory time limits for conducting hearings and issuing decisions, will result in transcription delays on appeals to circuit court, will cause additional complaints about decisional delay, will otherwise damage the effectiveness of the agency, and will perhaps precipitate litigation to compel compliance with the strict time requirements of the law.

## CONCLUSION

The Board's accomplishments during 1989 demonstrate the wisdom of the legislation creating a comprehensive grievance procedure for education and state employees. The extensive body of law developed through past decisions provides employers and administrators, as well as employees and their representatives, a tremendous resource in personnel matters and a source of guidance to resolve employment conflicts as quickly and simply as possible.<sup>8</sup>

The transition from a Board which dealt solely with education employees to one which now performs the same functions for the great majority of state employees has been smooth, and has rather consistently received high marks from employers and employees alike. It is, therefore, with a sense of pride and accomplishment that the West Virginia

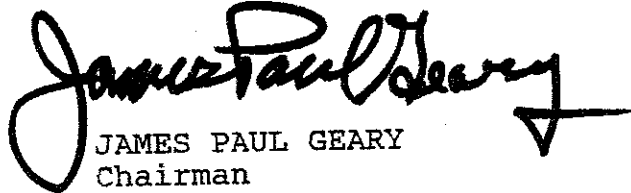
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<sup>8</sup> Circuit Courts also benefit as they no longer have to conduct extensive evidentiary hearings necessary in many cases and can decide the legal issues on appeal upon the record developed below in the grievance procedure.



Education and State Employees Grievance Board respectively tenders its 1989 Annual Report to the Governor and the Legislature.

Respectfully,



JAMES PAUL GEARY  
Chairman

ORTON A. JONES  
Member

DAVID L. WHITE  
Member

APPENDIX A

GRIEVANCES FILED IN 1989 AGAINST COUNTY BOARDS OF  
EDUCATION/BOARD OF REGENTS

Barbour County Board	6
Berkeley County Board	12
Board of Regents:	
Fairmont State College	2
Glennville State College	1
Marshall University	2
Parkersburg Community College	1
West Virginia University	15
West Liberty State College	2
West Virginia Northern Community College	1
Boone County Board	6
Braxton County Board	1
Cabell County Board	14
Doddridge County Board	2
Fayette County Board	5
Gilmer County Board	4
Greenbrier County Board	8
Hampshire County Board	1
Hancock County Board	12
Hardy County Board	2
Harrison County Board	15
Jackson County Board	1
Jefferson County Board	1
Kanawha County Board	44
Lewis County Board	1
Lincoln County Board	32
Logan County Board	16
Marion County Board	1

Marshall County Board	5
Mason County Board	8
McDowell County Board	8
Mercer County Board	7
Mineral County Board	2
Mingo County Board	14
Monongalia County Board	3
Monroe County Board	2
Morgan County Board	1
Nicholas County Board	4
Ohio County Board	7
Pendleton County Board	3
Pocahontas County Board	6
Preston County Board	1
Putnam County Board	13
Raleigh County Board	4
RESA I	1
RESA IV	1
Ritchie County Board	10
Summers County Board	9
Tucker County Board	1
Upshur County Board	1
Wayne County Board	14
Webster County Board	1
Wetzel County Board	2
Wood County Board	7
Wyoming County Board	3
	<hr/>
	346

NONE FROM:

Brooke  
Calhoun  
Clay  
Grant  
Pleasants  
Randolph  
Roane  
Taylor  
Tyler  
Wirt

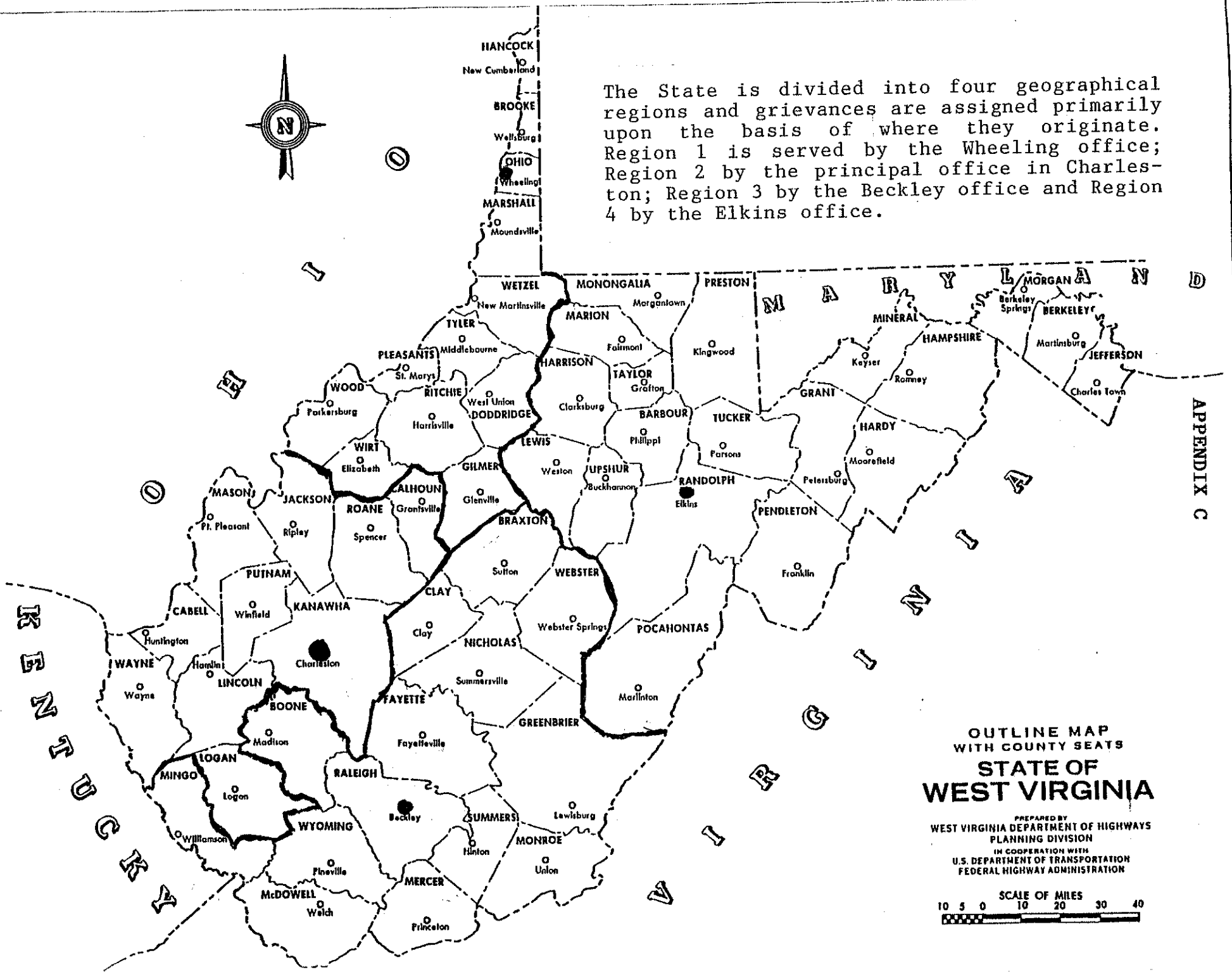
APPENDIX B

GRIEVANCES FILED AGAINST STATE AGENCIES IN 1989

Alcohol Beverage Control Commission	9
Administration	1
Agriculture	1
Board of Embalmers and Funeral Directors	1
Governor's Office of Community and Industrial Development	5
Commerce	1
Corrections	32
Education	1
Educational Broadcasting Authority	1
Employment Security	7
Energy	1
Finance and Administration	1
Health	41
Highways	25
Human Services	173
Insurance Commissioner	1
Labor	2
Library Commission	1
Motor Vehicles	2
Natural Resources	4
Personnel	1
Public Safety	4
Public Service Commission	1
Regional Jail and Prison Authority	1

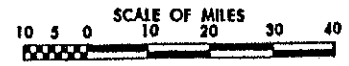
Railroad Maintenance Authority	3
Rehabilitation Services	23
State Fire Commission	1
Tax	9
Veterans' Affairs	8
Workers' Compensation Fund	7
	<hr/>
	368

The State is divided into four geographical regions and grievances are assigned primarily upon the basis of where they originate. Region 1 is served by the Wheeling office; Region 2 by the principal office in Charleston; Region 3 by the Beckley office and Region 4 by the Elkins office.



OUTLINE MAP  
WITH COUNTY SEATS  
**STATE OF  
WEST VIRGINIA**

PREPARED BY  
WEST VIRGINIA DEPARTMENT OF HIGHWAYS  
PLANNING DIVISION  
IN COOPERATION WITH  
U.S. DEPARTMENT OF TRANSPORTATION  
FEDERAL HIGHWAY ADMINISTRATION



APPENDIX C

HANCOCK

BROCKE

OHIO

MARSHALL

# REGION 3

WETZEL

MONONGALIA

PRESTON

TYLER

MARION

MINERAL

MORGAN

BERKELEY

HAMPSHIRE

JEFFERSON

PLEASANTS

HARRISON

TAYLOR

WOOD

RITCHIE

DODDRIDGE

BARBOUR

TUCKER

GRANT

HARDY

WIRT

LEWIS

UPSHUR

RANDOLPH

PENDLETON

TRASON

JACKSON

ROANE

CALHOUN

BRAXTON

WEBSTER

POCAHONTAS

# REGION 2

PUTNAM

CABELL

KANAWHA

CLAY

WEBSTER

WAYNE

LINCOLN

BOONE

FAYETTE

GREENBRIER

# REGION 4

MINGO

LOGAN

RALEIGH

SUMMERS

MONROE

WYOMING

MERCER

MCDOWELL





**Members**  
James Paul Geary  
Chairman  
Orton A. Jones  
David L. White

**WEST VIRGINIA EDUCATION AND  
STATE EMPLOYEES GRIEVANCE BOARD**

**GASTON CAPERTON**  
Governor

**Offices**  
240 Capitol Street  
Suite 515  
Charleston, WV 25301  
Telephone 348-3361

N O T I C E

TO: ALL EMPLOYERS, INSTITUTIONS, EMPLOYEE ORGANIZATIONS,  
GRIEVANTS, AND THE ACTING DIRECTOR OF PERSONNEL  
PARTICIPATING IN LEVEL FOUR GRIEVANCES IN 1989

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West Virginia Code, Chapter 18, Article 29, Section 5 and West Virginia Code, Chapter 29, Article 6A, Section 5, 1931, as amended, requires that the Education and State Employees Grievance Board evaluate annually the level four grievance process and the performance of all hearing examiners and include this evaluation in an annual report to the Governor and the Legislature. In making the evaluation, the Board is required to notify you of this evaluation process and to provide for the submission of written comment and/or hearing of testimony regarding the grievance process.

Accordingly, you are requested to submit any written comment you might have to the Board office and/or participate at an open meeting to be conducted on January 3, 1990, commencing at 10:00 a.m., at the Charleston House Holiday Inn, 600 Kanawha Boulevard, East, Charleston, West Virginia. If you need further assistance, write or telephone the office at 348-3361.

Dated: December 1, 1989

WEST VIRGINIA EDUCATION AND  
STATE EMPLOYEES GRIEVANCE BOARD