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

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1990

ANNUAL REPORT

TO THE

GOVERNOR AND THE LEGISLATURE

FORWARD

The Legislature established a four-step grievance procedure for education employees¹ 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.² This legislation provides a mechanism for the resolution of employment problems and has as its express goals 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

¹ According to information provided by the West Virginia Department of Education and the Higher Education Central Office, this procedure covers approximately forty-eight thousand five hundred (48,500) employees.

² Level one 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 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 after an evidentiary hearing or the submission of the case on the record developed at the lower levels. Either party may appeal that decision within thirty (30) days of its receipt to the Circuit Court of Kanawha County or the circuit court of the county in which the grievance arose.

those of county boards of education. During this time period the Board hired four full-time hearing examiners and a limited secretarial staff and opened offices in Charleston, Elkins, Beckley and Wheeling.

Effective on July 1, 1988, a similar grievance procedure statute for state employees³ was enacted and, accordingly, the agency's title was changed to the West Virginia Education and State Employees Grievance Board. W.Va. Code, 29-6A-1 et seq.⁴ This legislation applies to employees of any department, governmental agency or any independent board or commission of State government, with limited exceptions.⁵

After the Board's jurisdiction was substantially increased by this new legislation, the number of hearing examiners was increased from four to six and a Director was

³ According to the West Virginia Division of Personnel, this procedure is available to approximately twenty-one thousand (21,000) state employees, including employees of local health departments.

⁴ 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.

⁵ 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 excluded.

employed, who also serves as a hearing examiner in some cases. The Director and three hearing examiners are assigned to the Charleston office. A hearing examiner and one secretary are assigned to each branch office. The Director and the 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 January 7, 1991, inviting all state agencies, educational institutions, county superintendents, employee organizations, the Director of the Division of Personnel and all grievants who had participated in level four proceedings during the 1990 calendar year to attend or to submit written comments about their experiences. Thirteen people attended the hearing and numerous written comments were received. The purpose of this open meeting, including 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 to prepare 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 1990. Only limited criticism of the grievance procedure and the

performance of our hearing examiners was made. The Board perceives the limited attendance at the public hearing to reflect a continued general satisfaction with level four of the grievance procedure, although the number of complaints about decisional delay has increased.

As was noted in both the 1988 and 1989 annual reports, the written criticism received about the conduct of hearing examiners and the decisions rendered in particular cases is the type of comment normally expected of litigants involved in adversarial proceedings. Such comments were few in number and are a good indication that the hearing examiners are providing fair hearings, that the decisions are generally perceived by the parties to be fair, and that the Board has achieved the neutral stance intended by the legislation.

As in previous years, the most frequent and principal criticism received concerned delays in the processing of grievances at every level of the procedure, including level four. This is obviously a major area of concern, because decisions at level four are frequently not rendered within the mandatory statutory time limits. The Board's primary concern is not delay as such, but 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.

As in previous years, it has been suggested that the statutory time limits on rendering decisions be extended from the present thirty (30) working days to sixty (60) or ninety (90) days. The Board has not endorsed this or other suggestions for legislative action in the past, and does not do so now, believing that it would be inconsistent with its statutory role to take positions on proposed legislation.

The Board will strive to meet its statutory duties, but progress will depend on a number of factors, including circumstances that are beyond its control, such as the number of grievances that are filed in calendar year 1991. The Board is determined to prevent lengthy delays in rendering decisions if at all possible.

As in prior years, the Board's most controversial decisions in 1990 were cases involving the dismissal of public employees for off-duty criminal misconduct. In these cases the Board's hearing examiners must apply the law as 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),⁶ which places a heavy

⁶ 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
(Footnote Continued)

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 of education failed to establish a connection between the employee's shoplifting offense and her job performance as a school guidance counselor. The employee was reinstated with back pay.

Although the number of grievances of this type were exceedingly few in number, the Legislature in apparent reaction to public criticism surrounding these cases amended the law and made certain types of dismissals nongrievable. W.Va. Code, 18A-2-8, effective August 30, 1990, provides that county boards of education "may suspend or dismiss any person ... at any time for: the conviction of a felony or a plea of nolo contendere to a felony charge" and further provides that a dismissal on such grounds "is not by itself a grievable dismissal." This legislation authorizes but does not require school boards to dismiss employees based upon the conviction of any felony.

The majority of the Board's decisions, however, have not been subject to any public criticism or controversy and the low frequency of appeals and the high rate of

(Footnote Continued)

leading case embracing what is known as the "rational nexus" test for the dismissal of a public employee for off-duty misconduct.

affirmations in the courts is a good indication that hearing examiners are knowledgeable in the law, are able to apply the law to diverse factual situations, and can render fair and just decisions based on the law and the evidence. The Board believes that the improved quality of decisions rendered in 1989 continued in 1990.

1990 CALENDAR YEAR

PERFORMANCE AND MAJOR ACTIVITIES

During calendar year 1990, the Board received a total of five hundred forty-one (541) grievances, for an average of forty-five (45) grievances a month. Two hundred thirty-two (232) grievances were filed by state employees, two hundred sixty-two (262) by education employees and forty-seven (47) by employees of higher education.⁷ The total number of grievances filed was one hundred eighty-three (183) less than received in the previous calendar year and represents a twenty-five (25) percent decrease.

Much of the decline in grievance activity is directly attributable to one factor: in 1989 one hundred forty-six (146) misclassification grievances were filed against one agency, the Department of Human Services (DHS). This was a

⁷ Appendix A shows the number of grievances filed in 1990 against higher education institutions and county boards of education. Appendix B is an alphabetical list showing the number of grievances filed against State agencies in 1990.

one-time phenomenon and when it is factored out the decline in the number of grievances was relatively small. Likewise, the forty-one (41) misclassification grievances filed by State employees in 1990 constituted only a slight decline in these type cases when the 1989 DHS misclassification grievances are not considered. Although the number of grievances by county school board employees also declined, the number of cases filed by employees of higher educational institutions almost doubled in number from twenty-four (24) to forty-seven (47).

The number of cases processed set a new high in 1990. Disposition was made of two hundred eighty-one (281) grievances by written decision. An additional seventeen (17) grievances were disposed by these decisions due to the consolidation of cases containing common issues of law or fact. The total number of grievances disposed of by decision was therefore two hundred ninety-eight (298). Three hundred and three (303) dismissal orders and more than forty-two (42) remand orders were issued.⁸ Despite this record level of productivity, the Board's had an active caseload of approximately two hundred and twenty-five (225) cases at the beginning of 1991.

⁸ Remand orders are generally entered because the lower level steps were not followed. Dismissals occur for a number of reasons, frequently because the grievance was settled or was rendered moot by intervening circumstances.

In the 1990 calendar year, the Board's hearing examiners made additional efforts to encourage the parties to settle grievances prior to the level four hearing. This produced an increased number of settlements, to the benefit of the parties, the Board and the State of West Virginia.

The Board ruled in favor of the employee in approximately thirty-five (35) percent of the grievances and in favor of the employer in about sixty-two (62) percent of the cases. Three (3) percent of the decisions were granted in part and denied in part. A breakdown of the percentages by category is listed below:

	<u>Granted</u>	<u>Denied</u>	<u>Granted In Part</u>
Education employees:	40%	57%	3%
State employees:	26%	70%	4%
Higher Education:	20%	80%	0%

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	159	398	165
Elkins	50	135	49
Beckley	37	101	35
Triadelphia	35	77	52
TOTAL	281	711	301

The Board is required by law to give preference to cases involving dismissal, suspension and demotion for cause. Thirty-three (33) grievances were filed alleging an improper termination and ten (10) grievances were received alleging improper suspension.

Approximately fifty-two (52) decisions were appealed to circuit court in 1990, compared with approximately seventy-nine (79) in 1989. Producing transcripts continues to be a substantial burden on the Board's limited secretarial staff.

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.⁹ The Board continues to search for a viable method of determining the outcome of appeals. The information currently available to the Board shows a high percentage of decisions being upheld. Since the Board's inception in 1985, approximately three hundred sixty-eight (368) decisions have been appealed. At present it appears that the Board's decisions have been affirmed approximately eighty (80) percent of the time. To date the West Virginia Supreme Court of Appeals has decided seventeen

⁹ 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 to obtain this important information.

(17) cases involving the Board's decisions. The Court has affirmed the decision of the hearing examiner twelve (12) times, affirmed two (2) in part, and reversed on three (3) occasions.

The Board has 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 hearing examiners have personal computers to draft and edit decisions, perform research and manage their caseloads. The Board's use of personal computers was designed to make the most efficient and effective use of its limited human resources and is consistent with the recommendation of Governor Caperton's Reorganization Implementation Team.

A major project involving the creation of an electronic database containing information on all of the Board's decisions has been completed and has been distributed to numerous interested parties, including the West Virginia Division of Personnel, and both management and labor representatives. This resource is updated on a monthly basis with new decisions and is an increasingly valuable resource to the Board's examiners and all interested parties. Significantly, the project was done in-house by the Board's employees without the expense of hiring outside consultants. This database will facilitate the research of Board precedent and will help ensure its decisions are consistent. The

Board also has acquired a high-speed tape duplicating machine for each hearing office and provides audio-tapes of hearings upon request in lieu of providing transcripts.

RECOMMENDATIONS

First, 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. It must be emphasized that the Board's role and perception as an impartial body are critically important. When the Executive Branch of State government was reorganized in 1989, the Board perceived a conflict of interest was created by its being placed in the Departmental structure. The structural arrangement creates an appearance of impropriety, a problem that is only compounded by the Board's being in the same department as the Division of Personnel. The Board continues to believe that it would be preferable from a structural standpoint for it to be in a more autonomous position, as is the Public Serve Commission.

Second, the Board recommends that an additional office be opened and that two hearing examiners, two secretaries and a paralegal be added to its existing staff.¹⁰ In the

¹⁰ 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 man hours and transportation expenses can be high when those persons must travel.

alternative, the Board recommends that an additional hearing examiner, a secretary and a paralegal be employed. The Board is of the opinion that it can substantially comply with the legal requirements imposed by the two grievance procedure statutes 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.

It is difficult to predict the number of grievances that will be filed in 1991, but a distinct possibility exists that the number of grievances will increase as a result of recent legislation affecting public education. The information available also reveals a definite possibility that the number of higher education grievances will increase dramatically. Reclassification projects in State government may also generate additional grievances.

Finally, it is extremely important that the salaries of hearing examiners be increased in order to retain experienced personnel and to attract qualified hearing examiners. As noted in earlier annual reports, recruitment experience has demonstrated that the majority of experienced lawyers will not consider these positions, except on a part-time basis at the current salary level. This inadequacy has 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 and difficulty of the work hearing examiners perform is such that any turnover in these positions will result in substantial decisional delay, as it takes new hearing examiners several months at least to reach full performance level.

FISCAL SUMMARY

The Board's 1990-91 Fiscal appropriation of \$558,331 was augmented by \$13,353 to meet Personnel and Employee Benefit obligations. Shortages occurred due to the rising costs in PEIA and classification of secretarial employees by the Division of Personnel. Fiscal year 1991-92 appropriation request was again limited and a request made for \$567,962. It is anticipated that we shall fall short in both Personnel and Employee Benefits accounts, without consideration of the ever-rising costs of PEIA and the pilot compensation plan adopted for the Department of Administration.

The Board made a funding request to permit the employment of a hearing examiner, secretary and paralegal in the Charleston office. A second proposal was submitted requesting a branch office in the Clarksburg area, two hearing examiners, two secretaries, and a paralegal. It is estimated that this latter proposal would add approximately \$802,959 to the original request.

Without additional personal services funding in the 1992 fiscal year, the Board will continue to experience great difficulty in complying with the statutory time limits for conducting hearings and issuing decisions. Without such funding the Board may become embroiled in litigation to compel its compliance with the law, and the effectiveness and efficiency of the Board will undoubtedly suffer.

CONCLUSION

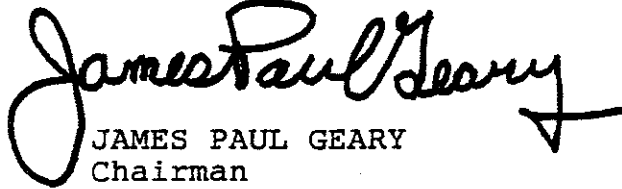
The Board's accomplishments during 1990 demonstrate the wisdom of the legislation that created a comprehensive grievance procedure for education and state employees. The extensive body of law developed through past decisions provides employers and administrators, as well as employees and their representatives, a tremendous resource and a source of guidance for the resolution of employment conflicts as quickly and simply as possible.¹¹

The transition from a Board that dealt solely with education employees to one that now performs the same functions for the great majority of state employees has been smooth. It is, therefore, with a sense of pride and accomplishment that the West Virginia Education and State

¹¹ Circuit Courts also benefit because 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.

Employees Grievance Board respectively tenders its 1990
Annual Report to the Governor and the Legislature.

Respectfully,

A handwritten signature in black ink that reads "James Paul Geary". The signature is written in a cursive style with a large initial "J" and a checkmark-like flourish at the end.

JAMES PAUL GEARY
Chairman

ORTON A. JONES
Member

DAVID L. WHITE
Member

APPENDIX A

GRIEVANCES FILED IN 1990 AGAINST COUNTY BOARDS OF
EDUCATION/BOARD OF REGENTS

Board of Directors:

Bluefield State College	2
Concord State College	1
Fairmont State College	3
Glenville State College	1
Potomac State College	1
West Liberty State College	5
West Virginia Institute of Technology	1
West Virginia Northern Community College	1
West Virginia Southern Community College	9
West Virginia State College	1

Board of Trustees:

Marshall University	3
West Virginia University	19
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County Boards of Education:

Barbour County Board	1
Berkeley County Board	2
Boone County Board	5
Braxton County Board	1
Brooke County Board	1
Cabell County Board	12
Doddridge County Board	3
Fayette County Board	7
Gilmer County Board	4
Grant County Board	3
Greenbrier County Board	10
Hancock County Board	12
Harrison County Board	12

Jackson County Board	1
Jefferson County Board	1
Kanawha County Board	27
Lewis County Board	4
Lincoln County Board	15
Logan County Board	10
Marion County Board	4
McDowell County Board	3
Mercer County Board	11
Mineral County board	3
Mingo County Board	23
Monongalia County Board	3
Monroe County Board	2
Nicholas County Board	3
Ohio County Board	5
Pendleton County Board	1
Preston County Board	6
Putnam County Board	11
Raleigh County Board	8
Randolph County Board	6
Roane County Board	1
Summers County Board	9
Tucker County Board	1
Tyler County Board	1
Upshur County Board	1
Wayne County Board	14
Webster County Board	1

Wood County Board	11
Wyoming County Board	3
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NONE FROM:

Calhoun
 Clay
 Hampshire
 Hardy
 Marshall
 Mason
 Morgan
 Pocahontas
 Ritchie
 Taylor
 Wetzel
 Wirt
 RESA I
 RESA II
 RESA III
 RESA IV
 RESA V
 RESA VI
 RESA VII
 RESA VIII

APPENDIX B

GRIEVANCES FILED AGAINST STATE AGENCIES IN 1990

Alcohol Beverage Control Commission	10
Administration	1
Commerce	1
Corrections	4
Education	2
Employment Security	4
Energy	3
Finance and Administration	2
Health	78
Highways	27
Housing Development Fund	1
Human Services	32
Insurance Commissioner	1
Lottery Commission	1
Motor Vehicles	1
Natural Resources	24
Personnel	2
Public Service Commission	5
Racing Commission	3
Rehabilitation Services	7
Tax	1
Transportation	1
Veterans' Affairs	4
Workers' Compensation Fund	11
County Health Departments:	

Cabell Huntington Health Department	1
Kanawha-Charleston Health Department	2
Logan County Health Department	1
Monongalia County Health Department	1
Preston County Health Department	1

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