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A N N U A L R E P O R T

T O T H E

G O V E R N O R

A N D T H E

L E G I S L A T U R E

FORWARD

The Legislature established a grievance procedure for education employees to provide a mechanism for the resolution of employment problems¹ and created the West Virginia Education Employees Grievance Board to administer the fourth level of that procedure, effective on July 1, 1985. W.Va. Code, 18-29-1, et seq.² The express goals of this innovative law are 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, expeditious and fair process by which to resolve grievances at the lowest possible level.

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.

In the three years after the statutory grievance procedure was enacted, over eleven hundred (1,100) grievances were filed by education employees, primarily county board of education employees. During this time the Board hired four full-time hearing examiners, 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 employees was enacted³ 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 independent board or commission of State government, with limited exceptions.⁵

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, but 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.

Because the Board's jurisdiction was substantially increased by this new legislation, the number of hearing examiners was increased from four to six in 1988 and a Director, who also serves as a hearing examiner in some cases, was employed in 1989. With additional funding provided by the Legislature during the last regular session, the number of hearing examiners was increased to seven. The Director and four examiners are assigned to the Charleston office, while a hearing examiner and one secretary are assigned to each branch office. In recognition of the nature of their duties and responsibilities, the Board's hearing examiners were given the title of administrative law judge (hereinafter ALJ).

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 8, 1992, 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 1991 calendar year to attend or to submit written comments. Nine people attended the hearing and nineteen written comments were received. The purpose of the 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.

1991 CALENDAR YEAR

OPERATIONAL DATA AND MAJOR ACTIVITIES

During calendar year 1991, the Board received a total of five hundred twenty-four(524) grievances, for an average of approximately forty-four (44) grievances a month. Two hundred seventeen (217) grievances were filed by state employees, two hundred fifty-five (255) by education employees and fifty-two (52) by employees of higher education.⁶ The total number of grievances filed was fifteen (15) less than received in the previous calendar year. The number of grievances by county board of education employees declined slightly, while the number of cases filed by employees of higher educational institutions increased slightly.

Disposition was made of three hundred twenty-eight (328) grievances by written decision. Two hundred (200) dismissal orders and more than thirty-five (35) remand

⁶ Appendix A shows the number of grievances filed in 1991 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 1991.

orders were issued.⁷ Despite this significant level of productivity, the Board had an active caseload of approximately two hundred and sixty-nine (269) cases at the beginning of 1992. The beginning caseload in the 1991 calendar year was slightly lower.

The Board ruled in favor of the employee in approximately thirty (30) percent of the grievances and in favor of the employer in about fifty-nine (59) percent of the cases (two percent of the grievances were disposed of by other means). Eight (8) percent of the decisions were granted in part and denied in part. A breakdown of the percentages by category is given below:

	<u>Granted</u>	<u>Denied</u>	<u>Granted In Part</u>
Education employees:	28%	66%	6%
State employees:	38%	52%	10%
Higher Education:	20%	72%	8%

⁷ 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.

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

	<u>Decisions Issued</u>	<u>Level Four Hearings</u>		<u>Cases submitted on Record</u>
		Scheduled	Held	
Charleston	175	357	143	18
Elkins	54	170	55	13
Beckley	43	121	41	3
Triadelphia	56	68	25	5
	<u> </u>	<u> </u>	<u> </u>	<u> </u>
TOTAL	328	716	264	39

The Board is required by law to give preference to cases involving dismissal, suspension and demotion for cause. The Board received sixteen (16) discharge and twenty-nine (29) disciplinary suspension grievances. It rendered written decisions on the merits in seven (7) of these cases, granting three (3) and denying four (4). Five (5) disciplinary suspension cases were decided; three (3) were granted and two (2) were denied.⁸

Approximately one hundred and eleven (111) decisions were appealed to circuit court in 1991, compared with approximately fifty-two (52) in 1990. Transcripts were prepared in a large percentage of these cases by the Board's

⁸ The statistical information contained in this report about the outcome of grievances may not be absolutely accurate for a variety of reasons. This information, however, is substantially accurate.

secretarial staff, and the records in all of these cases, some of which were voluminous, have been certified and transmitted to the circuit courts in which the appeals were filed. Producing transcripts continues to be a substantial task for the Board's limited secretarial staff, although they have been able to meet short court-imposed deadlines.⁹

The Board was made a party-defendant in one civil proceeding in circuit court that was brought by a State agency challenging a discovery ruling made by an administrative law judge in a case involving the dismissal of a State employee. The Director was appointed to serve as a Special Assistant Attorney General in that case, and the Board ultimately prevailed on the merits.

Each month the Board prepares a summary or synopsis of all decisions rendered in the previous month. This case summary is mailed to thirty-one (31) entities and organizations to assist them in keeping abreast of the current legal issues and case precedent. Copies of all decisions are also filed with the administrative law division of the Secretary of State's office. That office sends copies of decisions to any person upon request for a small fee and has twelve regular subscribers to whom all decisions are sent each

⁹ Circuit courts benefit from the grievance procedure because they no longer have to conduct extensive evidentiary hearings and can decide the cases on appeal upon the records already developed below.

month. This is a revenue-generating activity for that office. The Grievance Board does not charge for the services it provides.

In 1991 the Board took additional steps to encourage 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, the Courts and the State of West Virginia. In this regard the Board on a limited, experimental basis also offered mediation services to assist the settlement of grievances. The results were encouraging and the Board intends to continue to provide such services on a limited basis consistent with its limited resources.

The Board and the Workers' Compensation Fund jointly sponsored a three and one-half day training program for administrative law judges in Charleston. This worthwhile training program was conducted by the prestigious National Judicial College. Presentations were also made by a Justice of the Supreme Court of Appeals of West Virginia and a Judge from the Circuit Court of Kanawha County.

The Board has completed its goal of having personal computers with word processing and database research capabilities available for ALJs to assist them in rendering high quality decisions in an efficient and effective manner. ALJs have personal computers to draft and edit decisions, perform research and to 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 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 becoming an increasingly valuable resource to the Board's ALJs and all interested parties. This database will facilitate the research of Board precedent and will help ensure its decisions are consistent. Significantly, this project was done in-house by the Board's employees without the expense of hiring outside consultants.

The Board also has acquired a high-speed tape duplicating machine for each hearing office and provides audio-tape recording of the hearing to the parties upon request in lieu of providing transcripts.¹⁰

¹⁰ It should be noted that the Board does not, and cannot with its current secretarial staff, comply with its statutory duty under W.Va. Code, 29-6A-6, to promptly provide a certified copy of the level four transcript to any party upon request.

EVALUATION

The Board is pleased to report that it is generally satisfied with the functioning of level four of the grievance procedure and the performance of its ALJs in 1991. Only limited criticism of the grievance procedure and the performance of our ALJs was made. The Board perceives this limited criticism to reflect a continued general satisfaction with level four of the grievance procedure.

As was true in the last three annual reports, the written commentary received about the conduct of ALJs 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 ALJs 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 voiced concerned delays in the processing of grievances at every level of the procedure, including level four. Unnecessary and unreasonable delay is a major area of concern to the Board for several reasons. One reason is that decisions at level four are frequently not rendered within the mandatory statutory time limits. The Board's

primary concern is with unnecessary or unreasonable delay at level four.¹¹

In 1991 the Board made progress in reducing the time it takes to render decisions and in preventing lengthy delays in rendering decisions. The recent hiring of an additional ALJ should aid the Board in its efforts in this regard. The Board will continue to strive to meet its statutory duties.

Another perennial complaint registered again this year was that the Board ruled too frequently in favor of the employer. The Board is of the firm opinion that this is not a valid complaint. Grievances are decided based upon the law and the evidence. The percentages as to grievances granted or denied are simply a reflection of the merits of the individual cases. It should also be pointed out that frequently several employees will file separate grievances raising the same legal issue. If the legal argument is rejected in one case and the grievance is accordingly denied, then all other grievances raising that issue will be also denied.

¹¹ Delay caused by a desire of the parties to submit findings of fact and conclusions of law is not considered to be unnecessary delay. Numerous circumstances contribute to delay, including the complexity of the legal and factual issues presented, fluctuating caseloads, turnover in ALJ positions and other human factors present in any agency operating with only limited staff. Frequently delay is sought for legitimate reasons by the parties.

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.¹² The Board continues to search for a viable method of determining the outcome of appeals. One technique it currently utilizes to determine the outcome of the appellate process is to periodically review the docket of the West Virginia Supreme Court 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 four hundred seventy-nine (479) decisions have been appealed. At present it appears that the Board's decisions have been affirmed by the circuit courts in about eighty (80) percent of the cases.

To date the West Virginia Supreme Court of Appeals has decided some seventeen (17) appeals involving the Board's decisions. The Court has affirmed the decision of the ALJ fourteen (14) times, affirmed three (3) in part, and reversed on three (3) occasions.

The Board is of the opinion that the high percentage of decisions affirmed by the Courts is a good indication that

¹² 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 information.

ALJs are knowledgeable in the law, 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 also believes that ALJs continued to craft high-quality decisions.

The Board believes that the grievances processed in 1991 tended to be more complex than cases adjudicated in previous years, requiring longer hearings and more research time. It also appears that the parties were more frequently represented by attorneys resulting in the cases becoming more legally and factually complex.

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. Second, 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 continues to create 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 Service Commission.

Third, the Board recommends that an additional office be opened, staffed with an ALJ and a secretary, and that an additional secretarial position be created in the Charleston office. With such additional staff, the Board is of the opinion that it can substantially comply with the demanding legal requirements imposed by this State's two grievance procedure statutes. It is difficult to predict the number of grievances that will be filed in 1992; however, it does not appear that any significant increase or decrease will occur based upon the frequency of filings in past three years. The effects of recent legislation affecting public education will undoubtedly continue to produce grievances, higher education grievances may well continue to increase and grievances stemming from reclassification projects undertaken by the Division of Personnel will produce some grievances.

Finally, it is extremely important that the salaries of ALJs be increased in order to retain experienced personnel and to attract qualified attorneys when vacancies do occur. As noted in earlier annual reports, recruitment experience has demonstrated that the majority of experienced lawyers will not consider these positions at the current salary level. This salary inadequacy has handicapped the Board in

its recruitment efforts and will create a retention problem. The nature and difficulty of the work ALJs perform are such that any turnover in these positions will result in substantial decisional delay because it takes time to recruit and select ALJs and it also takes several months, at least, for an ALJ to reach a full performance level. The lack of proper compensation may therefore undermine one of the primary purposes of the grievance procedure legislation: the expeditious resolution of employment disputes.

FISCAL SUMMARY

The Board was appropriated \$665,120 for Fiscal Year 1991-92. The Board's submitted a proposal to the Department of Administration requesting an additional \$216,000 for FY 1993 to open a satellite office staffed with an ALJ and secretary, to employ a third secretary in the Charleston office and to increase the salary base for the Board's administrative law judges.

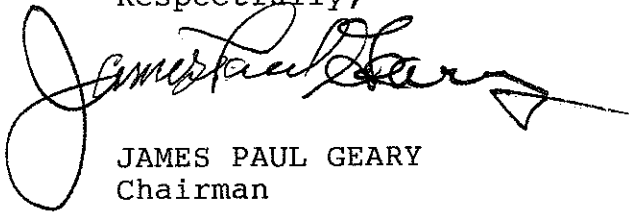
Without additional personal services funding in the FY 1993, the Board will be unable to comply with the statutory time limits for issuing final decisions. Without such funding the Board may become embroiled in litigation to compel its compliance with the law, and this would impair the efficiency of the Board.

CONCLUSION

The Board's accomplishments during the past six years demonstrate the wisdom of the legislation creating a grievance procedure for education and state employees. The extensive body of law that has been developed through past decisions provides public employers, as well as employees and their representatives, an invaluable source of information relating to the proper way to handle employment disputes.

It is, therefore, with a sense of pride and accomplishment that the West Virginia Education and State Employees Grievance Board respectively tenders its 1991 Annual Report to the Governor and the Legislature.

Respectfully,

A handwritten signature in black ink, appearing to read "James Paul Geary", with a large, stylized initial "J" and a long, sweeping underline.

JAMES PAUL GEARY
Chairman

ORTON A. JONES
Member

DAVID L. WHITE
Member

APPENDIX A

**GRIEVANCES FILED IN 1991 AND 1990 AGAINST COUNTY BOARDS OF
EDUCATION/BOARD OF REGENTS**

<u>Board of Directors:</u>	<u>1991</u>	<u>1990</u>
Bluefield State College	3	2
College of Graduate Studies	1	0
Concord State College	5	1
Fairmont State College	3	3
Glenville State	0	1
Potomac State College	0	1
Shepherd College	3	0
West Liberty State College	4	5
West Virginia Institute of Technology	3	1
West Virginia Northern Community College	1	1
West Virginia Southern Community College	6	9
West Virginia State College	0	1
 <u>Board of Trustees:</u>		
Marshall University	5	3
West Virginia University	16	19
West Virginia University Hospitals	1	0
West Virginia University/Charleston	1	0
	<u>52</u>	<u>47</u>
 <u>County Boards of Education:</u>		
Barbour County Board	0	1
Berkeley County Board	7	2
Boone County Board	7	5
Braxton County Board	0	1
Brooke County Board	8	1
Cabell County Board	2	12
Doddridge County Board	0	3
Fayette County Board	6	7

Gilmer County Board	2	4
Grant County Board	3	3
Greenbrier County Board	4	10
Hancock County Board	21	12
Harrison County Board	14	12
Jackson County Board	1	1
Jefferson County Board	1	1
Kanawha County Board	39	27
Lewis County Board	5	4
Lincoln County Board	10	15
Logan County Board	12	10
Marion County Board	6	4
Marshall County Board	7	0
Mason County Board	3	0
McDowell County Board	3	3
Mercer County Board	13	11
Mineral County board	2	3
Mingo County Board	11	23
Monongalia County Board	6	3
Monroe County Board	1	2
Morgan County Board	3	0
Nicholas County Board	3	3
Ohio County Board	11	5
Pendleton County Board	2	1
Pocahontas County Board	1	0
Preston County Board	7	6

Putnam County Board	7	11
Raleigh County Board	7	8
Randolph County Board	3	6
Roane County Board	0	1
Summers County Board	4	9
Taylor County Board	1	0
Tucker County Board	2	1
Tyler County Board	1	1
Upshur County Board	2	1
Wayne County Board	1	14
Webster County Board	1	1
Wetzel County Board	1	0
Wood County Board	3	11
Wyoming County Board	1	13
	<hr/>	<hr/>
	255	262

APPENDIX B

GRIEVANCES FILED AGAINST STATE AGENCIES IN 1991 AND 1990

	<u>1991</u>	<u>1990</u>
Alcohol Beverage Control Commission	12	10
Adjutant General	1	0
Administration	4	1
Board of Education	1	0
Commerce, Labor, Economic Resources	8	1
Corrections	9	4
Department of Education	4	2
Employment Security	3	4
Energy	4	3
Farm Management Commission	2	0
Finance and Administration	3	2
Health and Human Resources (combination Dept of Health/Dept Human Services)	77	110
Highways	35	27
Housing Development Fund	0	1
Human Rights Commission	1	0
Insurance Commissioner	0	1
Labor	1	0
Lottery Commission	0	1
Motor Vehicles	1	1

Natural Resources	3	24
Parkways, Economic Development & Tourism	9	0
Personnel	1	2
Public Safety	4	0
Public Service Commission	3	5
Racing Commission	0	3
Regional Jail Authority	3	0
Rehabilitation Services	3	7
Tax	8	1
Transportation	1	1
Veterans' Affairs	10	4
Workers' Compensation Fund	4	11

County Health Departments:

Cabell Huntington Health Department	0	1
Kanawha-Charleston Health Department	0	2
Logan County Health Department	0	1
Monongalia County Health Department	0	1
Preston County Health Department	0	1
Taylor County Health Department	2	0
	217	232