



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

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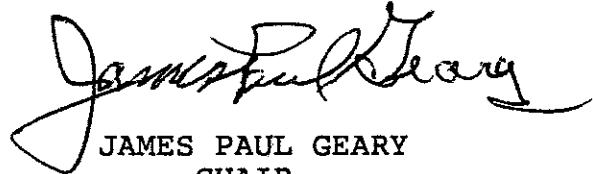
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**TO THE GOVERNOR AND THE LEGISLATURE  
EIGHTH ANNUAL REPORT**

In accordance with W. Va. Code, 18-29-5 and W. Va. Code, 29-6A-5, it is my honor and privilege to submit the annual report of the West Virginia Education and State Employees Grievance Board for calendar year 1993.

Respectfully yours,

  
JAMES PAUL GEARY  
CHAIR

**ANNUAL REPORT**

**TO THE**

**GOVERNOR AND THE LEGISLATURE**

**CALENDAR YEAR 1993**

## Background

Effective July 1, 1985, the Legislature established a grievance procedure for education employees<sup>1</sup> to provide a mechanism for the resolution of employment problems that inevitably arise in the work place and created the West Virginia Education Employees Grievance Board to administer the fourth level of that procedure. W. Va. Code, 18-29-1, et seq. 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.

Effective July 1, 1988, the Grievance Board's jurisdiction was enlarged by the enactment of a second grievance procedure statute covering state employees<sup>2</sup>, and the Board was renamed the West Virginia Education and State Employees Grievance Board. W. Va. Code, 29-6A-1 et seq.<sup>3</sup> This legislation, having essentially the

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<sup>1</sup> According to information gathered and provided by the West Virginia Division of Personnel, this grievance procedure covers over fifty thousand (50,000) employees.

<sup>2</sup> According to information provided by the West Virginia Division of Personnel, this grievance procedure is available to over twenty thousand (20,000) state employees. The Grievance Board has ruled that it has no jurisdiction to hear grievances by county health department employees. There are over seven hundred (700) of such employees. Chafin v. W.Va. Dept. of Health and Human Resources/Boone County Health Dept., Docket No. 92-HHR-132 (July 24, 1992).

<sup>3</sup> The four step procedure in the state employee grievance procedure closely parallels the steps in the grievance procedure for education employees. However, only a conference, not a  
(continued...)

same objectives, covers employees of any department, governmental agency or independent board or commission of State government, with limited exceptions.<sup>4</sup>

Because the Board's jurisdiction was increased substantially by this new legislation, the number of Administrative Law Judges (hereinafter ALJs)<sup>5</sup> was increased from four to six in 1988 and a Director, who also serves as an ALJ and a mediator, was employed in 1989. With additional funding provided by the Legislature in 1991, the number of ALJs was increased to seven. The Director and four ALJ positions are assigned to the Charleston office, while one ALJ and Secretary II are assigned to each branch office.<sup>6</sup> Since its inception the Board has issued over two thousand (2000) decisions.

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<sup>3</sup>(...continued)  
hearing, is required at level two and there is no provision expressly authorizing a state agency to waive a level three hearing. Appeals in state employee grievances can only be filed in the circuit court of the county where the grievance arose, whereas appeals in education employee grievances can be made to the county where the grievance arose or in the Circuit Court of Kanawha County.

<sup>4</sup> 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.

<sup>5</sup> The Board employs attorneys, who are licensed to practice law in West Virginia, to hear and decide grievances that reach level four of the grievance procedure. These attorneys are designated as "hearing examiners" in the grievance procedure statutes. In recognition of the nature of their duties and responsibilities, the Board now refers to them as Administrative Law Judges (ALJs). ALJs serve on a full-time basis and are not permitted to have an outside law practice.

<sup>6</sup> The Board's three branch offices are located in Beckley, Tridelfhia and Elkins.

### Annual Meeting

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, 1994. The purpose of the open meeting is to assist the Board in evaluating the level four grievance process, including the performance of its ALJs, and to prepare this annual report. All grievants, state agencies, educational institutions, county superintendents, employee organizations, and the Director of the Division of Personnel were invited to attend or to submit written comments. Over eight hundred (800) notices of the open hearing were mailed to individuals and organizations that participated in the grievance procedure at level four during calendar year 1993.

Only four people attended the public hearing, including one member of the press, and twenty-four written comments were received. Two people who attended the annual public meeting expressed dissatisfaction and frustration with the fact that county health department employees have no recourse through the grievance procedure to challenge classification determinations made by the West Virginia Division of Personnel.<sup>7</sup> One person expressed the opinion that the adverse decision rendered in his grievance was contrary to the evidence.

As was the case last year, no public employer appeared to offer testimony, although several county boards of education

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<sup>7</sup> Chafin v. W.Va. Dept. of Health and Human Resources/Boone County Health Dept., Docket No. 92-HHR-132 (July 24, 1992).

submitted written comments. Three county boards of education voiced concern with the filing of what they considered to be a series of frivolous grievances by an employee(s). They recommended some change in existing law to permit ALJs to impose costs and/or attorney's fees in proper instances. The Board notes that the grievance procedure statute covering State employees currently permits an ALJ to assess the costs of a level four hearing where one party has been found to have acted in extreme bad faith. W. Va. Code, 29-6A-7. No such provision is contained in the grievance procedure for education employees. No employee organization appeared or offered written comment.

#### 1993 CALENDAR YEAR

#### OPERATIONAL DATA AND MAJOR ACTIVITIES

During calendar year 1993, the Board received a total of five hundred forty-three (543) grievances, thirty-five (35) more than last year, for an average of approximately forty-five (45) grievances a month. State employees filed two hundred fifty-two (252) grievances at level four. County board of education employees filed two hundred forty-three (243) grievances and higher education employees filed forty-eight (48).<sup>8</sup>

State employees filed thirty-five (35) more grievances this year thereby accounting for the entire increase. This increase appears to be attributable to grievances stemming from the Division

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<sup>8</sup> Appendix A shows the number of grievances filed in 1993, 1992 and 1991 against higher education institutions and county board of education. Appendix B is an alphabetical list showing the number of grievances filed against state agencies in 1993, 1992 and 1991.

of Personnel's ongoing reclassification project for State employees. While higher education employees filed eighteen (18) more grievances than in 1992, county board of education employees filed eighteen (18) fewer. Less than one percent of all covered employees filed or appealed grievances to level four.

ALJs issued more opinions and disposed of more cases than last year. They disposed of five hundred five (505) cases in 1993 and issued two hundred eighty (280) written decisions. Seventy-two (72) of these decisions, or twenty-six (26) percent, were appealed to circuit court, down from an appeal rate of twenty-eight (28) percent in 1992. They issued two hundred six (206) dismissal orders and approximately eighteen (18) remand orders.<sup>9</sup> Despite an increase in productivity, because more grievances were received than were disposed of in 1993, the Board's caseload at the beginning of 1994 increased to three hundred eleven (311).

ALJs issued decisions more expeditiously in 1993 than last year. They issued decisions within ninety-six (96) calendar days, or sixty-five (65) working days, after the case became mature for decision. Total case processing time was also reduced slightly to about one hundred forty-one (141) working days.

The Board ruled in favor of the employee in approximately twenty-nine (29) percent of the grievances and in favor of the employer about seventy-one (71) percent of the time. A breakdown

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<sup>9</sup> Remand orders are generally entered because the lower level steps were not followed. Dismissals occur for a number reasons, frequently because the grievance was settled or was rendered moot by intervening circumstances. None of these orders were appealed according to our records.

by category is listed below:

	<u>Granted</u>	<u>Denied</u>
Education employees:	27%	73%
State employees:	28%	72%
Higher Education:	60%	40%

The Board gives priority to cases involving dismissal, suspension and demotion for cause. The Board received fifty-six (56) discharge cases and thirty (30) suspension grievances. ALJs issued decisions on the merits in twenty (20) of the dismissal cases, overturning six (6), and upholding fourteen (14). Fourteen (14) suspension cases were decided; six (6) were overturned and eight (8) were upheld. An additional nineteen (19) discharge cases and fifteen (15) suspension cases were dismissed from the docket. A number of these cases were settled due to pre-hearing conferences or mediation sessions.<sup>10</sup>

The Board's secretarial staff submitted approximately ninety-four (94) certified records, some of which were voluminous, to circuit courts in 1993.<sup>11</sup> They prepared the transcripts in a large percentage of these cases. Producing transcripts continues to be a substantial task for the Board's limited secretarial staff, although the staff has been able to meet short court-imposed

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<sup>10</sup> The Board's mediation activities are discussed briefly in the next section of this Report.

<sup>11</sup> Twenty-three (23) of the certified records submitted to circuit courts in 1993 arose from grievances decided in previous calendar years.



deadlines thus far.<sup>12</sup>

As was the case last year, the Board was made a party defendant in one civil proceeding in circuit court brought by a State agency challenging a discovery ruling by an ALJ that required the agency to provide the grievant with information it contended was privileged from disclosure. The Director was appointed to serve as a Special Assistant Attorney General in the case last year, and the Board ultimately prevailed on the merits. This year the request by the Director to serve as a Special Assistant Attorney General was refused by the Attorney General's Office on the policy ground that such appointments are never granted. The current civil litigation remains pending.

Each month the Board's staff prepares a summary or synopsis of all decisions rendered in the previous month. This summary is mailed to thirty-five (35) organizations and individuals to keep them informed of new decisions interpreting and applying personnel laws and regulations. As required by W. Va. Code, 18-29-11 (1992),<sup>13</sup> the Board provides a statewide quarterly report to, among others, each county board of education and employee organization in order to afford them an overview of current personnel related issues. The Board distributes seventy-five (75) copies of each

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<sup>12</sup> Circuit Courts benefit from the grievance procedure because they no longer are required to conduct evidentiary hearings. Circuit Courts must decide cases on appeal based upon the record developed below, as certified to the them by the Grievance Board. See W. Va. Code, 18-29-7 & 26-6A-7.

<sup>13</sup> The Legislature placed additional duties on the Board in 1992 when it amended the grievance procedure for educational employees. See W. Va. Code, 18-29-3,5,10,11.

quarterly report. The most recent quarterly report is made a part of this annual report as Appendix C.

The Board's staff has created an electronic database, called Boardlaw, containing case summaries and pertinent information on the over two thousand (2,000) decisions that have been rendered. The database is updated and distributed on a monthly basis to ten organizations. The database is a valuable research tool for the Board's ALJs and all interested parties. It facilitates the research of precedent and helps to ensure consistent decisions.

It must be noted that the Board does not comply with its statutory duty under W. Va. Code, 29-6A-6, 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 simply cannot comply with this obligation. The Board, however, has equipped each branch office with a high-speed tape duplicating machine and provides audiotapes, in lieu of a transcript, to any party upon request.

The Board has leased new office space and relocated its Charleston office in January 1994 to a building that, unlike its present offices, is handicap accessible. This building is located closer to the Capitol Complex, has parking for staff and for persons attending prehearing conferences and hearings and is likely to be less expensive than the Board's present offices.

#### Mediation

W. Va. Code, 18-29-10 (1992), requires the Board, to the extent feasible with existing personnel and resources, to engage in

mediation and other dispute resolution techniques to actively assist the parties in identifying, clarifying and resolving issues prior to the level four hearing. After the passage of this statute, the Board expanded the limited, experimental mediation program it had previously initiated. A report on the progress of the mediation program was filed with the Legislature on December 23, 1992. In 1993, the Board continued offering mediation services and increasingly held prehearing conferences, typically by telephone, in an effort to clarify issues and to encourage settlement discussions.

In mediation, a trained, impartial third party<sup>14</sup> helps two or more parties negotiate to reach a mutually acceptable agreement to resolve their dispute. Mediation emphasizes problem solving and satisfying the interests of the parties, rather than litigation over who has the "correct" legal position. The Board does not view mediation as an additional step in the grievance procedure in the sense that all cases must be mediated. Rather, the Board ordinarily offers mediation services only where all parties request it and they have attempted to settle the controversy on their own without success. In a manner of speaking, the Board only mediates the more difficult cases that the parties have been unable to settle on their own. As of December 31, 1993, the Board had conducted twenty-seven (27) mediation sessions. Eleven (11) of

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<sup>14</sup> Five of the Grievance Board's ALJs have received mediation training sponsored by the United States District Court for the Northern District of West Virginia and/or the West Virginia State Bar.

these cases or forty-one (41%) percent settled. Several of these cases were rather complicated cases that would have required multiple-day hearings and a substantial amount of staff time. The settlement rate would have been higher except that in at least two instances one of the parties simply wanted to find out more about the mediation process and did not come to the session prepared to negotiate in good faith to resolve the matter. Most of these mediation sessions were conducted by the Director of the Board.

The Board's experience has been that mediation is the single most cost-effective means of solving grievances and that the proper use of mediation promotes equitable settlements to the benefit of all parties. 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 most importantly, preserve the integrity of ongoing working relationships.

The Board's ALJs and clerical staff have also directly benefitted by: (1) reducing the number of level four evidentiary hearings; (2) reducing the number of decisions that had to be written; (3) eliminating the need to prepare a transcript of the testimony and to assemble and submit a certified record to circuit court in the event of an appeal; and, (4) perhaps most importantly, reducing or eliminating future grievances involving the same parties by establishing that it is possible for them to work together to reach agreements or understandings that meet their needs.

No substantial negative consequences have been experienced by the Board's utilization of mediation to resolve public employment disputes. Mediation appears to work particularly well in producing agreements on how an employer will interpret or apply ambiguous<sup>15</sup> statutes or personnel regulations in the future.

#### 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 1993. Only limited criticism of the grievance procedure and the performance of the ALJs was made in the public hearing process. The Board perceives this limited criticism to reflect a continued general satisfaction with level four of the grievance procedure. The Board believes that level four of the grievance procedure is functioning very well.

As was true in past years, 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, which were few in number, are a good indication that ALJs are providing fair hearings, that the decisions are generally perceived by the parties to be fair and well reasoned, and, most importantly, that the Board has achieved the neutral stance intended by the legislation.

Another perennial complaint is that the Board ruled too frequently in favor of the employer. The Board is of the firm

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<sup>15</sup> The term "ambiguous" as used here includes situations where the statute or regulation is silent on how to address a recurring factual situation.

opinion that this is not a valid complaint for a number of reasons. First, grievances are decided based upon the law and the evidence and the percentage of grievances granted or denied largely reflects the merits of the individual cases. One of the primary reasons grievances are denied is that employees frequently must meet a high legal standard in order to prevail. For example, in a case in which the grievant contends he/she should have been selected for a position rather than another applicant, absent legal error or a significant flaw in the selection process itself, the grievant cannot prevail if the employer can articulate a rational basis for its selection of the successful applicant.

Second, neither the Governor nor the Legislature should be misled by statistics about how arbitrators from other States rule on grievances alleging violations of collective bargaining agreements. No meaningful comparison can be made with regard to such percentages because this State has a significantly different, if not unique, system for resolving public employee grievances. Here, an individual employee can file a grievance and pursue it through level four of the grievance procedure. In sharp contrast, in collective bargaining situations the grievance belongs to the union and it alone decides which cases are sufficiently meritorious to pursue to arbitration. Furthermore, the method by which arbitrators are selected is also vastly different in collective bargaining states, where the union plays a major role in selecting the arbitrator who will hear and decide the dispute.

It should also be pointed out that frequently several

employees will file separate grievances over a period of time raising the same legal issue. If the legal argument is rejected in the initial case and the grievance is denied, then all other grievances raising that issue will also ordinarily be denied. This fact obviously can also make the statistics misleading.

Furthermore, the Board is, and has been for several years, of the opinion that the high percentage of decisions affirmed by the Courts is a very good indication that ALJs are knowledgeable in the law, can properly apply the law to diverse factual situations, and are rendering legally sound and fair decisions based on the law and the evidence. 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>16</sup> The Board's staff continues to strive to determine the outcome of appeals and, among other things, periodically reviews the dockets of the Supreme Court of Appeals to obtain information.

From the information currently available, the Board estimates that circuit courts have affirmed its decisions at least eighty (80) percent of the time. Its decisions have also fared well in the Supreme Court, which has reversed circuit courts on numerous occasions for overruling ALJ decisions, particularly with regard to factual issues. Appendix D is a brief summary of all thirty-five

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<sup>16</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 to obtain this information.

(35) opinions of the Supreme Court of Appeals of West Virginia that have been rendered on appeal from a Grievance Board decision.

As in previous years, the primary and most frequent criticism concerned delays in the processing of grievances at every level of the procedure, including level four. The Board's primary concern is with unnecessary<sup>17</sup> and unreasonable delay in issuing decisions at level four after cases have become mature for decision. The Board now tracks grievances more closely and keeps more information about decisional delay. In 1993, the Board made modest progress in reducing the time it takes to render decisions and in preventing lengthy delays in rendering decisions. The Board will continue to strive to meet its statutory duties and to reduce the time between the submission of a case for decision and the issuance of a written decision.

In this connection, ALJs now advise the parties how they are inclined to rule in certain cases where they feel comfortable in doing so based upon their knowledge of the applicable law and the evidence introduced. ALJs also now advise the parties whether they believe post-hearing briefs or proposed findings of fact or conclusions of law are needed or are likely to be helpful in rendering a proper decision in the case. Certain cases thereby become mature for decision immediately after the level four hearing

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<sup>17</sup> Frequently delay is sought for legitimate reasons by the parties. 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.



thus reducing the time for issuance of a level four decision and overall case processing time. These two steps are consistent with recommendations made by the Commission appointed by Governor Caperton. See Report of Blue Ribbon Personnel Commission (1992). The Board remains committed to improving the administration and functioning of the grievance procedure at level four.

#### Fiscal Summary

The Board was appropriated \$638,515 for Fiscal Years 1992-93 and 1993-1994. This was \$26,605 less than the appropriation in Fiscal Year 1991-1992. This reduction, which was primarily in the current expense account, impaired the Board's ability to operate its activities in a effective and efficient manner and required it to look to the Secretary of the Department of Administration for financial assistance the last two fiscal years.

#### 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 was placed in the Department of Administration along with the Division of Personnel. The Board believes this organizational structure creates a conflict of interest or at least creates an appearance of impropriety. 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.

Consequently, the Board recommends that Chapter 5F of the West Virginia Code be amended to simply take the Board out of the Department of Administration thereby leaving it in a more autonomous position. It must be made clear, however, that no attempt has been made by anyone in authority to exert any political influence over or to engage in any retribution against the Board and its ALJs for rulings that have been made.

The Board also recommends that the Legislature increase the salaries of all its ALJs to at least \$45,000, the average starting salary for ALJs who hear and decide workers' compensation claims, so as to permit the hiring and retention of qualified attorneys. As noted in earlier annual reports, experience has demonstrated that most experienced lawyers will not consider these important positions at the current salary levels. Current salary levels have played a role in three ALJ resignations within the past six months. Recruitment and retention problems have been a major factor contributing to decisional delay. Turnover is particularly troublesome because of the time it takes to recruit and train new ALJs who ordinarily do not reach full performance level for several months. The lack of proper compensation for these positions has definitely undermined the Board's ability to effectuate the legislative intent of expeditiously adjudicating employment disputes.

Fourth, in order to eliminate the continual criticism about

unreasonable delay in issuing decisions and to comply with other mandatory duties imposed by the grievance procedure laws, the Legislature should increase the Board's funding in an amount sufficient to permit the opening of an additional hearing office, probably in the Clarksburg area, staffed with an ALJ and a Secretary, and to employ an additional ALJ based in the Charleston office.

#### Conclusion

The Board's accomplishments demonstrate the wisdom of the legislation creating a grievance procedure for education and state employees. Many employment disputes have been promptly and fairly resolved to the benefit of public employers, public employees and the citizens of this State who we serve. The vast majority of the Board's decisions on appeal have been affirmed. The body of law developed through past decisions provides public employers, as well as employees and their representatives, with an invaluable source of information on employment issues.

It is, therefore, with a sense of pride and accomplishment that the West Virginia Education and State Employees Grievance Board respectfully tenders its 1993 Calendar Year Report to the Governor and the Legislature.