WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

808 Greenbrier Street
Charleston, WV 25311
Telephone 558-3361
FAX 558-1106

ANNUAL REPORT

TO THE

GOVERNOR AND THE LEGISLATURE

CALENDAR YEAR 1994

WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD

JAMES PAUL GEARY
Chair
DAVID L. WHITE
Member
RONALD WRIGHT
Director

GASTON CAPERTON
Governor

808 Greenbrier Street
Charleston, WV 25311
Telephone 558-3361
FAX 558-1106

February 7, 1995

TO THE GOVERNOR AND THE LEGISLATURE
NINTH ANNUAL REPORT

In accordance with W. Va. Code § 18-29-5 (1985) and W. Va. Code § 29-6A-5 (1988), it is my honor and privilege to submit the the West Virginia Education and State Employees Grievance Board annual report for the calendar year 1994.

Respectfully yours,

JAMES PAUL GEARY
CHAIR

TABLE OF CONTENTS

Background, Purpose and Overview

Effective July 1, 1985, the Legislature established a grievance procedure for education employees[1] to provide a mechanism for the resolution of the 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 is 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[2], and the Board was renamed the West Virginia Education and State Employees Grievance Board. W. Va. Code §§ 29-6A-1, et seq.[3] This legislation, having essentially the

---

[1] This grievance procedure covers over fifty thousand (50,000) employees according to information provided by the West Virginia Division of Personnel.

[2] The state employee grievance procedure is available to over twenty thousand (20,000) employees. The Supreme Court of Appeals of West Virginia ruled recently that the Grievance Board has jurisdiction to hear grievances by county health department employees covered by a merit system. W. Va. Dept. of Admin. v. W. Va. Dept. of Health and Human Resources/Boone County Health Dept., No. 22169 (Nov. 18, 1994). County health departments employ approximately seven hundred (700) persons.

[3] 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.[4]

Because the Board's jurisdiction was increased substantially in 1988 by this new legislation, the number of Administrative Law Judges (hereinafter ALJs)[5] was increased from four to six in 1988, and a Director, who also serves as an ALJ in a small number of cases and as a mediator, was employed in 1989.[6] With additional funding provided by the Legislature in 1991, the number of ALJs was increased to seven. In November 1994, with the approval of the Secretary of the Department of Administration, an eighth ALJ was employed because higher education classified employees filed more

---

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

[4] 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.

[5] The Board employs attorneys, who are licensed to practice law in West Virginia, to hear and decide grievances which 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.

[6] When the Executive Branch of State government was reorganized in 1989, the Board was placed in the Department of Administration, along with West Virginia Division of Personnel.

than five hundred and fifty (550) reclassification grievances. The Board presently employs fourteen (14) people. A Director, an Administrative Officer, five ALJs and a Secretary[7] are assigned to the Charleston office; one ALJ and a Secretary are assigned to each branch office.

The Board's principal office in Charleston was relocated in January 1994 to a building that, unlike its former office, 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 less expensive to lease than the former office. This new location better serves the employers and employees using our services. The Board also moved its Wheeling office to a more desirable location in 1994. The remaining two offices are located in Elkins and Beckley. Since its inception, the Board has issued over two thousand four hundred (2,400) written decisions.

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 meeting in Charleston on January 20, 1995. 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

[7] A secretarial position in the Charleston office was eliminated to assist in achieving Governor Caperton's and the Department of Administration's goal of reducing the number of employees in State government.

grievants whose cases were disposed of in 1994, state agencies, educational institutions, county superintendents, employee organizations, and the Director of the West Virginia Division of Personnel (Personnel) were invited to attend or to submit written comments. The Board mailed over one thousand one hundred (1,100) notices of the open meeting to participants in the grievance procedure at level four during calendar year 1994.

Nine people attended the public hearing. As was the case last year, no public employer appeared to offer testimony. Two lay representatives who had assisted county board of education employees in one grievance questioned whether the level four decision in that case was legally correct. One county board of education employee, who had recently lost a grievance at level four, questioned the fairness of the process, complained that the process was too slow and suggested that school administrators who violate employee rights should be penalized in some manner. One state employee who had previously filed several grievances complained about the manner in which he was treated by his employer and two ALJs, suggested that discovery should be made more available, and made a number of critical comments about the handling of his cases by both his employer and the ALJs. One person who had served as a representative for state employees inquired about remedies for delays at level three.

A representative of the West Virginia State Employees Union (SEU) made generally favorable comments about the hearing process but noted that the timeliness of level four decisions remained a

problem. The SEU representative outlined a number of suggested amendments to the grievance procedure for state employees, most of which were proposed in 1992 by the Blue Ribbon Personnel Commission appointed by Governor Caperton, (see Report of Blue Ribbon Personnel Commission (1992)), including a recommendation that the Grievance Board be removed from the Department of Administration to eliminate any possibility of ALJs being unconsciously influenced by the Secretary's control over this agency's budget and the award of merit pay increases. Counsel for the W. Va. School Service Personnel Association (SSPA) expressed concern about three specific legal issues and urged that these matters be closely examined or reconsidered. Two SSPA members from Monongalia County made brief remarks about their experiences and perceived problems with the grievance process at the lower levels.

Twenty-five written comments were received. The W. Va. Division of Personnel complimented the Grievance Board's ALJs and support staff and made a number of recommendations requiring either legislative or rule-making action. Personnel's most significant legislative recommendations were to revise the definition of grievance to exclude grievances involving reclassification[8] and to allow the State Personnel Board to appeal a level three decision. As to rule making, Personnel suggested, among other things, that ALJs be prohibited from declaring a rule and regulation invalid on the basis of a conflict between a statute and a regulation, and

[8] Under this proposal, state employees would retain their right to file grievances contending they were misclassified, i.e., performing work out of classification.

that a procedure be adopted to permit reconsideration of decisions.

Only one public employer offered written comment: a county board of education stated that the ALJs and their staff performed in a competent and courteous manner. No employee organization offered written comment. One higher education employee representative complained that decisions were not rendered at level four within the time periods required by law or within a reasonable time period, that the grievance procedure statute was vague as to the costs grievants must bear, that the procedure at level four is too complicated, and that grievants are unfairly disadvantaged because higher education institutions are always represented by counsel.

Twenty-two grievants, almost all of whom had lost their grievances at level four, filed written statements, and, although some positive comments were made about the grievance process at level four and the performance of its ALJs, the vast majority of the comments were extremely critical. The most frequent criticism was that the ALJs take too long to render decisions and that the process is unfair because management is almost always represented by an attorney.[9]

1994 Calendar Year

Operational Data and Major Activities

During calendar year 1994, one thousand one hundred and fifty-

[9] In view of this perception of unfairness, cases decided in 1994 were reviewed. This review revealed that in slightly over fifty (50) percent of the cases granted, the grievant was represented by a non-lawyer representative or by himself.

three (1,153) grievances were filed at level four, more than double the number filed in 1993. Classified higher education employees filed five hundred forty-six (546) grievances challenging the classification/pay grade assigned as a result of the Mercer Project. Excluding the Mercer grievances, six hundred and ten (610) grievances were filed in 1994, for an average of about fifty-one (51) grievances a month; this is sixty-seven (67) more grievances than were filed the previous year.

All categories of employees filed more grievances at level four. State employees filed two hundred seventy-six (276) grievances, twenty-four (24) more than last year. County board of education employees filed two hundred seventy-seven (277) grievances, an increase of thirty-four (34), and higher education grievances, excluding the Mercer Grievances, increased by nine, to fifty-seven (57).[10] Even with this major increase, less than two percent of all covered employees filed grievances at level four.

ALJs again this year issued more opinions and disposed of more cases than last year. They issued three hundred and thirteen (313) written decisions, almost a twelve percent (12%) increase, and disposed of a total of five hundred fourteen (514) cases, including one hundred eighty-three (183) dismissal orders[11] and seventeen

---

[10] Appendix A shows the number of grievances filed in calendar years 1994, 1993 and 1992 against higher education institutions and county boards of education. Appendix B is an alphabetical listing showing the number of grievances filed against state agencies in 1994, 1993 and 1992.

[11] Dismissal orders are often entered when grievances have been prematurely appealed to level four without a required hearing (continued...)

(17) remand orders.[12] Sixty-four (64) of these rulings, or about twenty percent (20%), were appealed to circuit court, down from an appeal rate of twenty-six percent (26%) in 1993, and twenty-eight percent (28%) in 1992.

The Board ruled in favor of the employee in approximately twenty-seven percent (27%) of the grievances and in favor of the employer about seventy-three percent (73%) of the time. A breakdown by category is listed below:

	Granted	Denied
Education employees:	29%	71%
State employees:	35%	65%
Higher Education:	17%	83%

The Board gives priority to cases involving dismissal, suspension and demotion for cause. The Board received fifty-one (51) discharge cases and twenty-nine (29) suspension grievances. This is almost identical to the number of such grievances filed last year. ALJs issued decisions in twenty-nine (29) dismissal cases (an increase of nine), overturning three (3), and upholding twenty-six (26). Ten (10) suspension cases were decided; four (4) were overturned and six (6) were upheld. An additional twenty (20)

---

[11](...continued)
having been held or when cases have been settled. Occasionally, however, these rulings involve complicated procedural or substantive issues. According to our records, only one dismissal order entered in 1994 was appealed to circuit court.

[12] Despite increased productivity by the ALJs, it takes approximately seven months from the date a grievance is filed at level four to the issuance of a level four decision. Total processing time was approximately the same as last year.

discharge cases and nineteen (19) suspension cases were dismissed from the docket by order.

The Board's secretarial staff assembled and transmitted approximately sixty (60) certified records, some of which were voluminous, to circuit courts in 1994, substantially fewer than last year when ninety (90) were transmitted. This decline resulted from a backlog of 1992 appeals being eliminated in 1993, and from fewer appeals to circuit court being filed in 1994. The secretarial staff 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, but in most cases the record is transmitted within thirty days of receipt of the appeal petition.[13]

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.[14] Hearings held at the Grievance Board's offices are mechanically

---

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

[14] Seven hundred and twenty-five (725) hearings were scheduled and two hundred and sixty-eight (268) hearings were conducted. Forty-four (44) cases were submitted for decision on the record made at a lower level in the grievance procedure.

recorded and are not ordinarily transcribed, unless the case is appealed to circuit court.[15] ALJs listen to the audio tapes in drafting their decisions. The Board, however, has equipped each office with a high-speed tape duplicating machine and provides audiotapes, in lieu of a transcript, to any party upon request.

As was the case last year, the Board was made a party defendant in a 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.[16] This case was settled, and the grievant received the information ordered disclosed, subject to a protective order. A second grievance has been stayed by the circuit court pending a ruling on whether another employee should be permitted to intervene in the grievance proceeding.

The Board's staff created an electronic database, called Boardlaw, that now contains case summaries and pertinent information on more than two thousand four hundred (2,400) decisions which have been rendered by the Board's ALJs. The database is updated and distributed on a monthly basis to fourteen (14) organizations. The database is a valuable research tool for the ALJs and all interested persons who need to be aware of new precedent interpreting and applying personnel laws and regulations

---

[15] In instances where the ALJ agrees to conduct a hearing at another location, the employer agrees ordinarily to employ a court reporter who provides a transcript to the ALJ.

[16] The Director was not allowed by the Attorney General's Office to represent the Board as had been done prior to 1993.

applicable to public employees. It facilitates the research of precedent and helps to ensure consistent decisions.

Each month the Board's staff prepares a summary or synopsis, which is included within the database, of all decisions rendered in the previous month. The database is then used to generate a monthly, written report that is mailed to thirty-eight (38) organizations and individuals to keep them apprised of new decisions. The most recent report is made a part of this annual report as Appendix C.

As required by W. Va. Code § 18-29-11 (1992),[17] the Board provides a statewide quarterly report to, among others, each county board of education and employee organization to inform them of current personnel related issues. The Board distributes seventy-five (75) copies of each quarterly report. All decisions rendered each month are provided to the Secretary of State's office, which through a subscription service provides copies of the decisions to a number of organizations. Beginning in January 1994, in order to provide better access to decisions by the Grievance Board, the full text of current decisions have been provided to Technet, an electronic database and bulletin board service operated by the West Virginia State Bar, and subscribed to by over four hundred (400) lawyers.

Mediation

W. Va. Code § 18-29-10 (1992), requires the Board, to the

[17] The Legislature placed additional duties on the Board in 1992 when it amended the grievance procedure for education employees. See W. Va. Code §§ 18-29-3, 5, 10, 11.

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 a 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. The Board has continued offering mediation services,[18] and has increasingly held prehearing conferences, typically by telephone conference call, in an effort to clarify issues and to encourage settlement discussions.[19]

Mediation involves a trained, impartial third party[20] who helps two or more parties negotiate to reach a mutually acceptable agreement to resolve their dispute. Mediation emphasizes solutions that satisfy the interests of the parties, rather than litigation to determine which party has the "correct" legal position. The Board does not view mediation as an additional step in the

---

[18] In every case in which a level four hearing is requested, a Notice of The Availability of Mediation Services is sent to all parties explaining what mediation is and the circumstances in which the Board will provide a mediator.

[19] It is believed that these efforts have produced more settlements than in prior years. At least forty-one (41) cases were dismissed from the docket during 1994 due to the parties having reached a settlement.

[20] All but the most recently hired ALJ has received either one or two days of extensive mediation training sponsored by the United States District Court for the Northern District of West Virginia and/or the West Virginia State Bar. In 1994, the Board also sponsored an in-house, legal writing seminar for its ALJs, entitled "Plain English for Lawyers."

grievance procedure, and the Board ordinarily provides mediation services only where all parties request it and have attempted, without success, to settle the controversy on their own. In a sense, the Board generally only mediates the difficult cases.

Only five mediation sessions were conducted in 1994, and only one of those cases produced a settlement. A second case was settled following a mediation session in late 1993 and was dismissed from the docket in 1994. One of these cases that was resolved through mediation was complicated and would have required a lengthy hearing and substantial time to write a decision.

Notwithstanding what appears to be a low settlement rate, the Board believes mediation is the single, most cost-effective means of resolving grievances, and that the proper use of mediation promotes equitable settlements to the benefit of all parties. Delay and costly litigation are eliminated. It is clear that public employers can use mediation to save money, make more efficient use of their resources, retain some control over the outcome of grievances, and, perhaps most importantly, preserve the integrity of ongoing working relationships. Furthermore, the emphasis placed upon the settlement of grievances by the use of prehearing conferences and mediation notices has been beneficial.[21]

---

[21] The Board's ALJs and clerical staff directly benefit from mediation because: (1) the number of level four evidentiary hearings is reduced; (2) fewer decisions need be written; (3) 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 is eliminated; and, (4) perhaps most importantly, future grievances involving the same parties may be reduced or eliminated by establishing that it is possible for them to work together to (continued...)

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 statutes or personnel regulations[22] 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 1994. The nature and the extent of criticism of the grievance procedure and the performance of the ALJs was limited. The Board continues to believe that level four of the grievance procedure is functioning well, although there is room for more improvement.

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. The consensus is that ALJs are providing fair hearings and that their decisions are generally fair and well reasoned. The Board believes that its ALJs have maintained the neutral and impartial role envisioned by the Legislature.

The perennial complaint is that the Board rules too frequently

---

[21](...continued)
reach agreements or understandings meeting their needs.

[22] The term "ambiguous" as used here includes situations where the statute or regulation is silent on how to address a recurring factual situation.

in favor of the employer. The Board is of the firm 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 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 generally belongs to the union and it alone decides which cases are sufficiently meritorious to pursue to arbitration.

The high percentage of decisions affirmed by the Courts is an excellent indicator that the ALJs can properly apply the law to diverse factual situations and are rendering legally sound and fair

decisions. 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.[23] From the information currently available, the Board estimates that circuit courts have affirmed the ALJs at least eighty percent (80%) of the time. Grievance Board decisions have also fared well in the Supreme Court of Appeals of West Virginia, which has affirmed the ALJs in about seventy percent (70%) of the fifty (50) cases it has decided. Appendix D is a brief summary of the opinions by the Supreme Court of Appeals rendered in 1994 on appeal from Grievance Board decisions.

As in previous years, the most frequent criticism was about delay in the processing of grievances at every level of the procedure, including level four. The Board is responsible for administering level four of the procedure. In a few instances in 1994, the ALJs advised the parties how they were inclined to rule at the conclusion of the hearing, where they felt 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. Some cases therefore

---

[23] 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.

become mature for decision immediately after the level four hearing and thus may provide the ALJ with an opportunity to issue a quicker ruling and to reduce 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.

The Board's primary concern is thus with unnecessary[24] and unreasonable delay by ALJs in issuing decisions after the cases have become mature for decision. The Board now tracks the processing of grievances more closely, keeps detailed information about decisional delay, and considers such information to be critically important in rating and evaluating the performance of its ALJs. The Board's major goal for 1995 is to reduce delay at level four, without any sacrifice in the quality of decisions rendered. The Board will continue to strive to meet its important statutory duties.

Fiscal Summary

The Board was appropriated $625,298 for Fiscal Years 1993-94. During that fiscal year, the Board expired $12,544, largely due to ALJ turnover. The Board's appropriation for Fiscal Year 1994-1995

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

is $689,438. The increased appropriation was designed primarily to improve ALJ salaries in order to reduce turnover, and to permit the hiring and retention of qualified attorneys. The Board has requested a supplemental appropriation of sixty thousand dollars ($60,000) for this fiscal year for hearing and deciding the reclassification grievances filed by higher education classified employees, i.e., the Mercer grievances.

Recommendations

First, the Board is of the opinion that the existing process of selecting Board members should be preserved in order to insure the integrity, continuity, and continued improvement in the functioning of the grievance procedure.

Second, it must be emphasized that the Board's role as a neutral and impartial body is critically important. As noted earlier, when the Executive Branch of State government was reorganized in 1989, the Board was placed within the Department of Administration, along with the West Virginia Division of Personnel. The Board objected to this immediately and still believes this organizational structure creates a conflict of interest or at least an appearance of impropriety, and that it would be preferable from a structural standpoint for the Board 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 take the Board out of the Department of Administration. It must be made clear, however, that no attempt has been made by anyone in authority to exert any influence or retribution against

the Board or its ALJs for rulings 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. Turnover is particularly troublesome because of the time it takes to recruit and train new ALJs who do not ordinarily 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, the Legislature should increase the Board's funding in order to minimize, if not eliminate, the continual criticism about unreasonable delay at level four and to comply with other mandatory duties imposed by the grievance procedure laws. The Board has requested additional funding sufficient to permit the opening of an additional hearing office, probably in the Clarksburg area, staffed with two ALJs and a Secretary, and to employ an additional ALJ based in the Charleston office. This is imperative if the Mercer higher education grievances are to be handled in an expeditious manner.

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 fairly resolved to the benefit of public employers, public employees and the citizens of this State whom we all serve. The vast majority of the Board's decisions on appeal have been affirmed and the percentage of decisions appealed has steadily declined. The body of employment 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 Ninth Annual Report to the Governor and the Legislature.

APPENDIX A

GRIEVANCES FILED IN CALENDAR YEAR 1994, 1993 AND 1992 AGAINST COUNTY BOARDS OF EDUCATION/BOARD OF REGENTS

Board of Directors:

	1994	1993	1992
Bluefield State College	1	6	2
College of Graduate Studies	0	1	0
Concord State College	4	0	2
Fairmont State College	0	3	3
Glenville State	2	0	0
Potomac State College	1	0	1
Shepherd College	6	7	2
West Liberty State College	0	5	1
West Virginia Institute of Technology	4	1	2
West Virginia Northern Community College	4	1	2
West Virginia Southern Community College	1	2	1
West Virginia State College	3	2	1
West Virginia State College/Graduate College	0	2	0

Board of Trustees:

Marshall University	11	10	4
West Virginia University	19	8	8
West Virginia University Hospitals	0	0	1
West Virginia University/Charleston	0	0	0
W. Va. School of Osteopathic Medicine	1		
	57	48	30

County Boards of Education:

Barbour County Board	12	5	3
Berkeley County Board	3	2	2
Boone County Board	4	7	1
Braxton County Board	0	1	2
Brooke County Board	2	7	7
Cabell County Board	4	7	11
Calhoun County Board	0	0	1

Clay County Board	0	0	1
Doddridge County Board	0	0	0
Fayette County Board	4	9	4
Gilmer County Board	0	1	2
Grant County Board	1	0	1
Greenbrier County Board	3	0	1
Hampshire County Board	0	2	2
Hancock County Board	15	16	6
Hardy County Board	0	0	2
Harrison County Board	1	1	1
Jackson County Board	1	1	1
Jefferson County Board	1	2	2
Kanawha County Board	33	25	28
Lewis County Board	0	4	6
Lincoln County Board	9	15	10
Logan County Board	12	13	12
Marion County Board	7	22	10
Marshall County Board	0	5	2
Mason County Board	19	8	4
McDowell County Board	4	6	10
Mercer County Board	25	8	16
Mineral County Board	2	6	5
Mingo County Board	20	16	12
Monongalia County Board	10	5	10
Monroe County Board	4	1	9
Morgan County Board	1	2	2

Nicholas County Board	0	4	2
Ohio County Board	1	4	5
Pendleton County Board	1	2	1
Pocahontas County Board	0	1	1
Preston County Board	3	2	4
Putnam County Board	4	4	4
Raleigh County Board**	29	4	9
Randolph County Board	6	2	2
Ritchie County Board	0	1	0
Roane County Board	0	2	0
Summers County Board	8	3	9
Taylor County Board	0	0	0
Tucker County Board	2	0	4
Tyler County Board	2	3	1
Upshur County Board	2	0	0
Wayne County Board	3	2	4
Webster County Board	3	3	11
Wetzel County Board	5	1	2
Wood County Board	1	1	6
Wyoming County Board	4	5	10
Multi-County Vocational Centers James Rumsey Technical Institute	1	2	0
Regional Education Service Agency	1	0	1
W. Va. Board of Educ.*	4	3	1
* previously reported as a state agency ** Twenty-five of these grievances involved the same legal issue and, thus, were consolidated for purposes of hearing and decision.	277	246	262

APPENDIX B

GRIEVANCES FILED AGAINST STATE AGENCIES IN CALENDAR YEAR 1994, 1993, AND 1992

	1994	1993	1992
Administration	1	5	4
Alcohol Beverage Control Commission	1	1	1
Board of Examiners for Registered Nurses	0	1	0
Bureau of Employment Programs	10	20	16
Commerce, Labor, Economic Resources	0	3	4
Consolidated Public Retirement Board	1	0	0
Corrections	29	13	18
Culture and History	0	3	1
Development Office	1	0	0
Economic Development Authority	0	1	0
Educational Broadcasting Authority	1	2	0
Employment Security*	0	0	1
*1994 - consolidated into Bureau of Employment Programs			
Energy	0	0	1
Environmental Protection	3	3	0
Farm Management Commission	0	1	0
Fire Commission	0	1	0
Health and Human Resources	100	130	83
Highways	44	24	32
Human Rights Commission	0	0	1
Labor	0	2	1
Library Commission	1	0	0
Lottery Commission	1	0	0

Miners' Health, Safety & Training	1	2	0
Motor Vehicles	19	7	1
Natural Resources	5	0	6
Parkways, Economic Development & Tourism	5	1	4
Personnel	4	1	1
Public Safety	2	1	1
Public Service Commission	6	2	5
Real Estate Commission	1	0	0
Regional Jail Authority	13	3	8
Rehabilitation Services	10	11	7
Solid Waste Management	0	0	1
Tax & Revenue	10	3	5
Tourism & Parks	5	4	2
Transportation	0	0	3
Veterans' Affairs	2	0	0
Workers' Compensation Fund*	0	0	3

*1993 - consolidated into Bureau of Employment Programs

County Health Departments

Boone County Health Department	0	0	2
Barbour County Health Department	0	0	1
Grant County Health Department	0	0	2
Jackson County Health Department	0	1	0
Monongalia County Health Department	0	1	0
	276	247	215

APPENDIX C

WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

NOTICE: These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings on the cases. They are intended to serve as an information and research tool only.

DECEMBER, 1994

GRIEVANT	RESPONDENT	DOCKET No.	DEC. DATE	SYNOPSIS
BEST	JEFFERSON COUNTY BOARD OF EDUCATION	94-19-268	12-30-94	Grievant alleged a violation of W. Va. Code, 18A-4-5a when her employment term and salary was reduced. Respondent argued that the action was proper and appropriate under the circumstances and that Grievant's employment term was inconsistent with those of the two Assistant Principals employed in the county. DECISION: Grievant failed to prove by a preponderance of the evidence that the termination of her 261-day employment term and the instatement of a 240-day employment term was in violation of W. Va. Code, 18A-4-5a. Grievance DENIED.
CANTER	KANAWHA COUNTY BOARD OF EDUCATION	94-20-250	12-15-94	Where Grievant demonstrated that she spent the predominant portion of each workweek monitoring and administering the special education program for pupils in a certain geographic area, Grievant established that she is a "central office administrator" as defined in W. Va. Code, 18A-1-1(c)(4) rather than a "classroom teacher" for purposes of a reduction in force under W. Va. Code, 18A-4-7a. Grievant's testimony persuasively refuted the statement in her written position description that she spent the majority of her time in a direct instructional and counseling relationship with students. It was further determined that conducting reviews of student progress in their established programs where the concerned students were not present does not constitute a "direct" counseling relationship as contemplated by W. Va. Code, 18A-1-1(c)(1). Grievant's position was also supported by a State Superintendent of Schools' opinion that a "special education specialist or coordinator" should be treated as a "central office administrator" for seniority purposes. Grievance GRANTED and school board ORDERED to rescind Grievant's transfer and restore her to her previous position.

GRIEVANT	RESPONDENT	DOCKET No.	DEC. DATE	SYNOPSIS
CARR	MERCER COUNTY BOARD OF EDUCATION	94-27-074	12-30-94	Grievant alleged that she is entitled to the same schedule held by a teacher Grievant replaced at PJHS. Board argued that the posting for the position specified only a vacancy for a music teacher and there was no indication of which grade levels or courses would be assigned to the successful candidate. DECISION: A teacher employed to provide instruction in a general subject, such as music, has no entitlement to an assignment of preferred grade levels or subjects. Grievance DENIED.
CLAY	MINGO COUNTY BOARD OF EDUCATION	94-29-516	12-29-94	Grievant argued he should not have been terminated because all the transfers that necessitated his termination did not take place. The record in this grievance was very limited and the Level II decision was nonresponsive to the issue Grievant presented. Additionally, the BOE's argument to this Board was not supported by the record. No evidence was presented by the respondent to rebut the Grievant's arguments, thus his view of the evidence was accepted. Grievance GRANTED.
COLLIER/ HEWITT	RANDOLPH COUNTY BOARD OF EDUCATION	94-42-269	12-30-94	Grievants alleged they were more qualified than the successful applicant for the position of principal who did not possess the required teaching experience of the elementary level. Board argued that absent specific authority to the contrary its interpretation that 7th grade was elementary school experience must be upheld. DECISION: Grievants proved by a preponderance of the evidence that the successful applicant for the position of principal did not meet the Board's qualifications. Grievance GRANTED.
DUNFORD	MERCER COUNTY BOARD OF EDUCATION	94-27-618	12-21-94	Grievant, on the preferred recall list, but holding certification in mathematics 5-8 only, challenged the

GRIEVANT	RESPONDENT	DOCKET No.	DEC. DATE	SYNOPSIS
				selection of a candidate not on the recall list for a vacant behavioral disorders position. Grievant argued he was entitled to be "recalled" to the position because he had completed special education credits and was permit-eligible, had taught some special education classes in the past and had obtained more seniority than the successful applicant. DECISION: Recall rights confined to area(s) in which certification is held. No statutory violation occurred because no applicant was certified, and the employer properly filled the job under the hiring criteria and not under the recall provisions of W. Va. Code, 18A-4-7a. Grievance DENIED.
EGGLESTON	GREENBRIER COUNTY BOARD OF EDUCATION	94-13-395	12-29-94	Grievant protested her dismissal for cruelty and unsatisfactory performance. Based on unsatisfactory rating on evaluation, Grievant placed on improvement plan. Deficiencies related to handling of special education students in her care as aide. Several witnesses testified to specific instances of cruelty and poor judgment in relation to these students. Respondent determined Grievant did not successfully complete improvement plan and was dismissed. Respondent met burden of proof. Grievance DENIED.
FARLEY/ DOWNING	MASON COUNTY BOARD OF EDUCATION	94-26-243	12-14-94	Grievants alleged they were entitled to extra day's pay for extra-duty vocational bus run because prior bus operator filed a grievance and settled for that amount. No agreement or promise by Respondent to pay them extra day's pay when they agreed to take run. They agreed to take run for 1/2 day's pay. Settlement of a grievance does not entitle another like-situated employee to the relief provided pursuant to that settlement agreement. Board is not prohibited from combining what was once previously designated as a shuttle run with other

GRIEVANT	RESPONDENT	DOCKET No.	DEC. DATE	SYNOPSIS
				duties to create a regular, full-time position. Grievance DENIED.
GLEASON	MASON COUNTY BOARD OF EDUCATION	94-26-282	12-22-94	Grievant successfully bid upon a vacancy to drive a bus route, knowing that the previous driver had settled a grievance to receive one and one-half day's pay for driving the same route. The position posting simply referred to the appropriate pay grade and salary schedule. Grievant never saw the actual posting nor inquired about the rate of pay before accepting the position. As this Grievance Board concluded in a related case, Farley v. Mason County Bd. of Educ., Docket No. 94-26-243 (Dec. 14, 1994), the administrative settlement of an individual grievance does not bind the school board to likewise grant an extra one-half day's pay to that employee's successor. Grievance DENIED.
HANLON	LOGAN COUNTY OF EDUCATION AND TIM MURPHY	93-23-502	12-29-94	Grievant alleged the Board abused its discretion when he was not selected for the head basketball coach position. He also argued the Board could not select a person from outside the Logan county school system when there was an applicant from within the school system. No abuse of discretion was found. The selection of the successful applicant was not arbitrary and capricious. W. Va. Code, 18A-3-2a(4) had no application in this matter. Grievance DENIED.
HAYNES	KANAWHA COUNTY BOARD OF EDUCATION	94-20-337	12-16-94	Where Grievant was notified of and provided a hearing upon her transfer from a 261-day secretarial position to a 210-day secretarial position in March 1994, her grievance submitted on June 29, 1994 was untimely under W. Va. Code, 18-29-4(a)(1), notwithstanding that Grievant learned of a W. Va. Supreme Court of Appeals decision on June 27, 1994 which rejected the

GRIEVANT	RESPONDENT	DOCKET No.	DEC. DATE	SYNOPSIS
				interpretation of W. Va. Code, 18A-4-8b under which she had been transferred. The "event upon which the grievance is based" was the elimination of her position and placement on the transfer list to a lesser position, not the successful outcome of another employee's related grievance. Grievance DENIED as untimely filed at Level I.
LANE	MERCER COUNTY BOARD OF EDUCATION	94-27-231	12-16-94	Grievant, a classroom teacher, challenged her termination in reduction-in-force action (RIF) because a less-senior staffer in her school holding a hybrid teaching/administrative post not requiring a specific certification area was not released. Grievant did not establish that any staff then employed as an instructor in any certification area she also held was retained; thus, she did not demonstrate that her release was contrary to the RIF provisions of W. Va. Code, 18A-4-7a. In short, Grievant is not entitled to position in question on the basis of the professional personnel definitions found in W. Va. Code, 18A-1-1 or on the basis of the RIF lateral placement provisions of W. Va. Code, 18A-4-7a. Grievance DENIED.
LEWIS	MASON COUNTY BOARD OF EDUCATION	94-26-175	12-12-94	Grievant had been apprised of work deficiencies in writing on an ongoing basis for two years, received two evaluations indicating she did not meet expectations, and was placed on three plans of improvement in two-year period. Grievant attributed poor performance to serious health problems but never informed her supervisor of these problems. Respondent met its burden of proving unsatisfactory performance and complied with provisions of W. Va. Code, 18A-2-8 and Policy 5300 in dismissing Grievant. Grievance DENIED.
MULLINS	KANAWHA COUNTY BOARD	94-20-364	12-29-94	Grievant alleged he should have been chosen to fill the

GRIEVANT	RESPONDENT	DOCKET No.	DEC. DATE	SYNOPSIS
	OF EDUCATION			position of program manager in a newly created position that would train contractors about OSHA and EPA regulations. This position was under the Business and Industry section and did not deal with school-age learners. The Respondent did not find the Grievant to be minimally qualified for the position and did not interview him. Further, Respondent did not post the position as needing an administrative certification. The Grievant was not minimally qualified for the position, thus he did not have standing to complain about the selection of another person as he was not adversely affected. Grievance DENIED.
NEAL	CABELL COUNTY BOARD OF EDUCATION	94-06-238	12-22-94	Grievant was a member of the Board's sick leave bank when she made a request for benefits due to a disability. Sick leave board denied Grievant's request because it determined that her condition was not life-threatening. Grievant challenges the authority of the SLB to make such a ruling in light of the language of its own regulations governing eligibility. DECISION: Sick leave review committee erroneously interpreted the language of its own regulation when it applied such to Grievant's request for benefits. The regulations at issue do not narrow eligibility for benefits to only those individuals suffering from a life-threatening accident or illness; therefore, Grievant established that she was entitled to benefits she requested. Other defenses to Grievant's request for benefits were raised which were not relied upon at time decision at issue was made. These defenses based upon other provisions of SLB's administrative regulations were rejected. Grievance GRANTED.
PICCIRILLO	BROOKE COUNTY BOARD OF EDUCATION	94-05-626	12-30-94	Vacancy occurred in high school English department, but employer posted it with no grade level specified. The

GRIEVANT	RESPONDENT	DOCKET No.	DEC. DATE	SYNOPSIS
				only two applicants considered were already on staff in the department, and Grievant, one of those applicants, challenged the selection of the other staffer. However, Grievant and the successful applicant were not legitimate candidates for a non-grade level specific secondary English teaching position since both were already employed in the English Department, and hiring either of them for that position would be unnecessary. The dispute was really about who would teach twelfth-grade classes, but, under W. Va. Code, 18A-2-9, school principals are responsible for scheduling courses and teachers. Hence, this grievance, as it relates to a selection dispute under W. Va. Code, 18A-4-7a, has no basis in fact or law and is therefore DENIED.
PIETRANTOZZI	MERCER COUNTY BOARD OF EDUCATION	94-27-130	12-29-94	Grievant signed an employment contract with Board in 1975. Under this contract, Grievant was required to work a seven hour day. In 1983, Grievant signed another contract which was a form contract derived from language of statute. Said statutory provision stated that all existing contractual rights would remain. The 1983 contract did not contain a term modifying Grievant's length of work day. Grievant contends that principal's schedule, which results in her having to work longer than seven hours per day, creates a reduction in her rate of pay which is impermissible under W. Va. Code, 18A-4-8. DECISION: Grievant is correct that her employment is still governed by the terms of the 1975 contract because of the language of W. Va. Code, 18A-2-5; therefore, she has a contractual right to work a seven hour day. Grievant's request for back pay was limited to fifteen days prior to the filing of the grievance based upon the fact that the violation was a continuing

GRIEVANT	RESPONDENT	DOCKET No.	DEC. DATE	SYNOPSIS
				one and that she waited a long time to file grievance. Grievance GRANTED.
SKEENS, ET AL.	LINCOLN COUNTY BOARD OF EDUCATION	94-22-544	12-29-94	Grievants allege they should be paid for vocational runs they do not make on snow and personal leave days contrary to the contracts signed by these bus operators. No violation of statute was demonstrated by the Grievants that would require the contracts to be declared null and void. Grievance DENIED.
TRIBBLE	PUTNAM COUNTY BOARD OF EDUCATION	94-40-248	12-30-94	Grievant is a bus driver for the board of education. On a day, Grievant was responsible for a severely handicapped student having been left on his bus at his morning run. For this accident, Grievant was indefinitely suspended from ever driving a school bus again. He was charged with willful neglect of duty and gross incompetence. DECISION: A board of education may only suspend or fire an employee for having committed one of the offenses listed in W. Va. Code, 18A-2-8. Here, it was determined that Grievant's conduct could be classified as incompetence. However, under W. Va. Code, 18A-2-8, boards are not granted the authority to suspend an employee forever. Therefore, case was REMANDED to Board for a reassessment of the penalty.

GRIEVANT	RESPONDENT	DOCKET No.	DEC. DATE	SYNOPSIS
AUSTIN, ET AL.	BOARD OF TRUSTEES/ WEST VIRGINIA UNIVERSITY	94-BOT-219	12-1-94	Grievants allege a violation of W. Va. Code, 18-29-3 when Respondent failed to timely issue a Level I decision. Respondent argued that the remedy may not be awarded Grievants because they have stated no grievable issue and have failed to follow the procedure outlined in W. Va. Code, 18-29-4. DECISION: The requested remedy, a salary increase to at least that earned by another employee, although Respondent failed to issue a Level I decision within statutory timelines, is not tied to the alleged wrong, and is contrary to law. Grievance DENIED.
HENDERSHOT	BOARD OF DIRECTORS/ WEST LIBERTY STATE COLLEGE	93-BOD-207	12-30-94	Grievance challenging employer's selection for secretarial position deemed untimely. Grievant failed to timely perfect her level four appeal pursuant to W. Va. Code, 18-29-4, and to offer any reasonable excuse for the delay. Nevertheless, Grievant would not have prevailed on the claim. In short, she failed to demonstrate that she was more qualified than the successful applicant for the position in question. During the time the position was posted and filled, late 1991 and early 1992, regulations did not require that qualified internal candidates be hired over qualified external candidates. Other allegations of wrongdoing on employer's part not supported by the record. Grievance DENIED.
ONI	BOARD OF DIRECTORS/ BLUEFIELD STATE COLLEGE	93-BID-515/ 408/302	12-30-94	Grievant, Director of Student Support Services, was suspended, reprimanded and eventually dismissed for failure to adhere to regular work hours, insubordination, and abandonment of position. He denied the charges and asserted that the dismissal and other disciplinary measures taken against him were part of on-going harassment by his immediate supervisor. DECISION: College proved by a preponderance of the

GRIEVANT	RESPONDENT	DOCKET No.	DEC. DATE	SYNOPSIS
				evidence that the Grievant was guilty of the charges levied against him and established good cause for his dismissal. Grievant established that his supervisor at times acted inappropriately but failed to show that his conduct constituted harassment as that term is defined in W. Va. Code, 18-29-3(n). Grievance DENIED.
SCRAGG	BOARD OF DIRECTORS/ WEST VIRGINIA STATE COLLEGE	93-BOD-436	12-30-94	Grievant was employed as a police officer at West Virginia State College. Grievant had once received information from a student which led to the expulsion of other students for the possession of firearms within the College's dormitory. Thereafter, the student who had provided such information, a member of the student newspaper, provided information to a local newspaper about Grievant which ultimately became published. Grievant was unhappy with this information being made public and he then threatened the student. Grievant was fired for having made this threat. DECISION: College proved the charges upon which Grievant's dismissal was based. Further, good cause was shown for which to base Grievant's dismissal. Procedurally, Grievant was not provided with adequate pretermination due process notice. Therefore, he was awarded nominal damages.

GRIEVANT	RESPONDENT	DOCKET No.	DEC. DATE	SYNOPSIS
BAILEY, ET AL.	DEPARTMENT OF TRANSPORTATION/ DIVISION OF HIGHWAYS	94-DOH-389	12-20-94	Where the employer's safety awards policy contained a clear and unambiguous provision entitling employees in Grievants' situation to a safety award for obtaining an "absolute zero" safety rating for 1993, Grievants established by a preponderance of the evidence that they were entitled to the award at issue. Decision discusses application of the parol evidence rule, concluding that certain evidence introduced at Level III should be excluded from consideration at Level IV. Evidence in question involved an unsworn hearsay statement by the employer's representative at Level III which attempted to interpret the plain language contained in the employer's written policy. Grievance GRANTED.
LARSEN	DEPARTMENT OF HEALTH AND HUMAN RESOURCES AND DIVISION OF PERSONNEL	94-HHR-222	12-22-94	Grievant is classified as an Office Assistant II and her Functional title is Office Manager. She claims that she is misclassified and that she should either be classified as an Office Manager, Secretary I or Office Assistant III. The nature of Grievant's job responsibilities is clerical. Grievant does not "manage" an office nor does she supervise staff. She also does not relieve her superior of administrative functions. DECISION: Based upon Personnel's admission at hearing, Grievant is GRANTED Office Assistant III classification, but otherwise grievance was DENIED.
ROBERTS	DEPARTMENT OF ADMINISTRATION/ DIVISION OF PERSONNEL	94-DOP-182	12-1-94	Grievant challenges the decision not to award her a merit raise. The evidence established that Grievant's superior did not comply with the spirit and intent of Personnel's administrative regulations in his evaluation of staff for merit raises. Personnel's regulation prohibits merit raises from being awarded based upon factors unrelated to recorded measures of

GRIEVANT	RESPONDENT	DOCKET No.	DEC. DATE	SYNOPSIS
				job performance. Grievant's supervisor, in his effort to evaluate his employees for merit raises, both utilized non-merit factors such as seniority and salary equity, in making his recommendation. Further, he was not consistent in considering the same factors for each individual. Therefore, he abused his discretion. However, Grievant could not establish an entitlement to a raise even if her supervisor had complied with Personnel's regulations because the written performance evaluation score was in the lower third of the employees. Grievance DENIED.
VIARS	DEPARTMENT OF HEALTH AND HUMAN RESOURCES/ HUNTINGTON STATE HOSPITAL AND DIVISION OF PERSONNEL	94-HHR-512	12-29-94	Grievant was unable to meet her burden of demonstrating that the Division of Personnel's classification of her position as a Secretary II, rather than as an Administrative Secretary, was "clearly wrong" as required under the W. Va. Supreme Court of Appeals' holding in W. Va. Dept. of Health v. Blankenship. Although Grievant demonstrated that another secretary at Huntington State Hospital performed substantially similar work, Personnel's explanation that other secretary worked directly for the Hospital Administrator while Grievant worked for the Clinical Director who reports to the Hospital Administrator is entitled to deference since it is not clearly wrong to consider an employee's status in the organization's hierarchy when classifying positions. Grievance DENIED.
WAUGH	DIVISION OF ENVIRONMENTAL PROTECTION AND DIVISION OF PERSONNEL	94-EP-390	12-30-94	Grievant challenged effect of reclassification on longevity pay increase under Admin. Rule 5.09. DECISION: 1) DOP not bound by its representations concerning proposed revisions to longevity pay policy; 2) Grievant failed to prove discrimination with respect to application of the longevity increase, Rule 5.09;

GRIEVANT	RESPONDENT	DOCKET No.	DEC. DATE	SYNOPSIS
				3) DOP's decision to retain Rule 5.09 pertaining to longevity increases under new pay implementation plan was not arbitrary and capricious. Grievance DENIED.
WILDS	DEPARTMENT OF TRANSPORTATION/ DIVISION OF HIGHWAYS	94-DOH-290	12-30-94	DOH erroneously applied old temporary upgrade policy to Grievant, and told him they could not pay him in the higher pay grade if he continued to perform the duties of the higher pay grade on a temporary basis. Grievant volunteered to perform the work in the higher pay grade without additional pay, believing that he could not be paid the difference between his assigned pay grade and the higher pay grade. Had DOH applied the correct policy to Grievant, Grievant could have been paid in the higher pay grade. Grievant was awarded back pay under AFSCME I for temporary work in a higher pay grade because Grievant would not have volunteered to perform the job without additional pay had he known that he could be paid in the higher pay grade under the then effective temporary upgrade policy. Grievant was not entitled to permanent assignment to the higher pay grade merely because of his temporary duty, or as a remedy for DOH violating the temporary upgrade policy. Personnel Pilot Policy on Temporary Upgrades was applicable to DOH effective July 15, 1993, regardless of when received by DOH.

Style	Citation	Case Summary
'arham v. Raleigh :ounty Bd. of Educ.	No. 22252; 12-16-94	The ALJ denied the Grievant's claim and upheld the decision of the Raleigh County Bd. of Educ. to suspend the Grievant for ten days without pay. Raleigh County Circuit Court, and Supreme Court affirmed. The Supreme Court, relying upon the principle that "evidentiary findings made at an administrative hearing should not be reversed unless they are clearly wrong", upheld the ALJ's finding that Grievant, a biology teacher and head baseball coach at Woodrow Wilson High School in Beckley, struck a student out of anger, not in self-defense. The Court further found that the notice of suspension was adequate where it stated the reasons for suspension as "'neglect of duty,' 'insubordination' and 'striking a student'", and that the board of education's authority to suspend a teacher was found in W. Va. Code, 18A-2-8. While the notice of suspension did not specifically allege "'willful neglect of duty,' as required by W. Va. Code, 18A-2-8", the Court found the act of striking the student out of anger to be willful, and that the notice of suspension should have put Grievant on notice that his neglect of duty was willful. Finally, the Court ruled that the penalty imposed was not unreasonable, arbitrary or capricious, and therefore, was not too severe.
:hafin v. W.Va.)ept. of Health and luman Res.	No. 22169; 11-18-94	The ALJ dismissed the Grievant's complaint, holding that the Grievance Board does not have jurisdiction to hear complaints filed by employees of the Boone County Board of Health (BCBH), because the BCBH is not an "employer" "created by an act of the Legislature" and its employees are not "state employees" within the meaning of W.Va. Code, 29-6A-1 through 11 (1992). The Circuit Court of Boone County affirmed. The Court reversed, citing a Grievance Board prior holding in Seddon v. W.Va. Dept. of Health, which the instant case had overruled, as correct. The Court held that an employee of a county health department that is a member of the state merit system is subject to the grievance procedures for state employees and may file grievances pursuant to W.Va. Code, 29-6A-1 through 11. Court relied on State Personnel Board rules, 10 C.S.R 143-1-22, 143-3.4 and 143-3.7. Also cited W.Va. Code, 16-2-1, et seq.; 16-2A-1, et seq.; Dailey v. Bechtel Corp., 207 S.E.2d 169 (W.Va. 1974); and AFSCME v. Civil Service Comm'n, 380 S.E.2d 43 (W.Va. 1989).
mith v. Greenbrier ounty Bd. of Educ.	No. 22154; 12-08-94	The ALJ denied the Grievant's claim to the state equity supplement (W. Va. Code, 18A-4-5) as a part of his substitute teacher remuneration. Kanawha Co. Cir. Ct. affirmed; Supreme Court affirmed. The Court concluded "that the term `basic salaries' as it is defined in West Virginia Code Section 18A-4-1 only refers to the corresponding amount of salary appearing in the minimum salary schedule amounts within West Virginia Code Section 18A-4-2 and does not encompass any additional amounts, such as equity supplements. Therefore, the calculation of the

Style	Citation	Case Summary
		daily amount of remuneration paid to a substitute teacher pursuant to West Virginia Code Section 18A-4-7 (1993) does not include an amount for the state equity supplement." Court also cited principle that "`Interpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.'" Court noted that this principle applies even when the agency had recently changed its position, as had occurred in this case, and that the more recent position would be entitled to weight.
Mercer County Bd. of Educ. v. Wirt	No. 22117; 12-21-94	The ALJ reinstated G to the position of head custodian at Ramsey Elem. School with backpay, because G's due process rights were violated when the Bd. of Educ. failed to notify G of the charges against him and failed to provide him an opportunity to respond when his termination was made pursuant to W. Va. Code, 18A-2-8; and because the Bd. failed to meet its burden to prove G engaged in immoral conduct. Mercer County Cir. Ct. affirmed, and the Supreme Court also affirmed. The Court found that all tenured employees have a valuable property interest in their tenure, and that due process requires a pre-termination hearing and written notice of the charges, an explanation of the evidence and opportunity to respond, prior to termination of a tenured employee, unless the employee presents a danger which cannot be reasonably abated. A meeting with the superintendent, and notice of the Bd. of Educ. meeting at which the termination occurred and where G could address the Bd., were insufficient because of lack of notice of the charges. Although the Court disagreed with the ALJ's finding that there were discrepancies in the testimony, the Court found the ALJ's findings to be based on a plausible view of the evidence, and therefore not clearly erroneous.
Gibson v. W.Va. Dept. Hlth. Human Res.	No. 21919; 12-8-94	ALJ denied gender discrimination claim. Cir. Ct. Cabell Co., and Sup. Ct. affirmed. G's, health service workers at Huntington St. Hosp., each with more than 10 yrs. seniority, were laid off by Div. of Health in a court ordered 50% RIF; while 21 of 23 health service workers retained had less seniority (1-7 yrs.). Seniority mandate of W.Va. Code, 29-6-10(5) not violated where agency granted bona fide occupational qualification (BFOQ) by Human Rights Commission. Court cited St. John's Home for Children v. W. Va. Human Rights Commission, 375 S.E.2d 769 (1988), and Dothard v. Rawlinson, 433 U.S. 321 (1977) as authority for BFOQ exception. Court further held that issue of whether BFOQ was proper in this case was not before the Court because G's were given the opportunity to challenge the BFOQ at Level IV, and specifically declined to raise the issue below; therefore the right to challenge the BFOQ was waived, and G's were barred from raising the issue at the appellate level.
Largent v. W.Va.	No. 21864;	The ALJ denied the grievance. Circuit Court of Cabell County and the Supreme

Style	Citation	Case Summary
Div. of Health	11-18-94	Court of Appeals of W. Va. affirmed. Grievants alledged on appeal that because a fellow worker was paid more for the same work, the principle of "equal pay for equal work" had been violated and that the right to equal protection and due process have been violated. All grievants and the fellow worker making more money (known as D.M.) were female licensed practical nurses, classified as LPN II's (pay grade 11) at Huntington State Hospital. The Court held that the Equal Pay for Equal Work Statute, W.Va. Code, 21-5B-1, et seq., is inapplicable to the W. Va. Division of Health and Human Services, and the W. Va. Division of Personnel because they have a duty-linked civil service system in place. The State is covered by the federal Equal Pay Act, 29 U.S.C. 206(d) (1988), but that Act is not applicable to people of the same sex, as in this case. The Court also cited W.Va. Code, 29-6-10, stating that agencies may consider many factors in setting initial salaries, and that "it does not violate the principle of pay equity for the state to pay employees within the same classification differing amounts." 143 C.S.R. 3 (1981). D.M.'s pay was due to legal discretion, not discrimination. No Equal protection or due process violation.
Summers County Bd. of Educ. v. Allen	450 S.E.2d 658 (1994)	The ALJ granted Grievant Bandy's grievance and remanded the grievance of Grievant Allen for the Summers County Bd. of Educ. to determine whether Grievant Allen's position was properly eliminated. The Circuit Court of Kanawha County affirmed, and the Supreme Court of Appeals reversed the decision concerning Grievant Bandy and affirmed the decision concerning Grievant Allen. Summers County Bd. of Educ. (SCBOE) eliminated Bandy's position of principal of Summers County Career Center, and Allen's position of assistant principal Hinton High School in a reduction in force due to loss of state funding for three administrative positions. The Court found that the record did not show whether SCBOE properly eliminated Allen's position. The Court held that W.Va. Code, 18-9A-4, required that central office administrators not required by statute be eliminated first in a reduction in force, which was consistent with the ALJ's holding. However, the Court found, based on its holding in Oxley v. Bd. of Educ. of County of Summers, 438 S.E.2d 602 (1993), that Grievant Bandy was not entitled to be reinstated as the career center principal, because Oxley was the most qualified applicant for the position.
Webster County Bd. of Educ. v. Johns	447 S.E.2d 599 (1994).	The ALJ granted the grievance in 1988, awarding Grievant instatement to the kindergarten aide position she claimed to be entitled to. Circuit Court of Webster County reversed. Supreme Court of Appeals reversed the Circuit Court, holding that a board of education has no discretion to assign an individual to a newly-created service personnel position who did not apply for the position, but was otherwise qualified for the opening, when another individual, holding the necessary qualifications and superior seniority, applied for the position. The

Style	Citation	Case Summary
		Court relied upon the terms "applicant" and "apply" found in W.Va. Code, 18A-4-8b, and found them to be an integral part of the statute. In this case, the position which the Grievant claimed to be entitled to was posted. She applied for the position, and held the requisite qualifications and seniority, whereas the person assigned to that position had not applied for it, and the Grievant had not applied for the position she was assigned.
Berry v. Kanawha County Bd. of Educ.	446 S.E.2d 510 (1994)	The ALJ denied the grievance and the circuit court affirmed. Grievant had worked as a Clerk for twelve years in the central office. A reduction if force occurred and the least senior Clerks were terminated. In addition, two Clerk positions in the central were eliminated, one of which was Grievant's position, which had a 261 day term. Both Clerks were terminated pursuant to 18A-2-6 and placed on a transfer list. Later, Grievant bid on an was awarded another Clerk position, but this position had an employment term of only 225 days. Grievant contended that reducing her employment term while allowing a less senior clerk retain a 261-day contract violated 18A-4-8b. The Court rejected the argument that Hunley and Lucion were controlling in this case, and, in the sole syllabus, ruled that "if a board of education decides to reduce the number of jobs for service personnel, the board must follow the reduction in force procedures of W. Va.Code, 18A-4-8b (1990). The Court rejected the BOE's argument that Grievant's termination was not a reduction in force, reasoning that a reduction if force had occurred because Grievant's position had been eliminated. The Court ruled that the least senior Clerk, not the Grievant, should have been released.
Lucion v. McDowell County Bd. of Educ.	446 S.E.2d 487 (1994)	In April 1989, the BOE terminated the employment contracts of 57 service personnel and issued new contracts for the 1989-1990 school year with reduced employment terms and proportional decreases in salary. The purpose of this action was to reduce costs because the BOE anticipated a reduction in funds due to declining enrollment. The ALJ denied their grievance but the Circuit Court of McDowell County reversed, ruling that the only way to reduce costs was to eliminate positions. The SCT reversed the lower court, concluding that W. Va. Code, 18A-4-8 [1990] does require a BOE to eliminate jobs rather than modify the employment terms of the existing jobs. If a board of education decides to reduce the number of jobs for service personnel, the board must follow the reduction in force procedures in 18A-4-8b. If a board decides to reduce the employment terms for particular jobs, the board must terminate the existing contracts by following the procedures of 18A-2-6 [1989], and second fill the job vacancies by following the procedures and requirements of 18A-4-8b [1990](this latter holding about posting was nullified by passage of 18A-2-19 [1994]. The Court also reaffirmed Bd. of Educ. of County of Fayette v. Hunley, despite the argument that had been nullified

Style	Citation	Case Summary
		by subsequent legislation.
W.Va. Dept. of Natural Resources v. Myers	443 S.E.2d 229 (1994)	Myers had been employed as a conservation officer for over ten years. In 1989 she was reprimanded for insubordination and grieved that action. Ultimately, the case was settled; DNR removed the reprimand from her personnel file and she withdrew her grievance. In 1990 she became pregnant and she was subsequently fired on the grounds that she had abandoned her position. She appealed her dismissal directly to level four alleging she was fired in retaliation for her grievance activity. The ALJ concluded that the grievant established reprisal by a preponderance of the evidence; the Circuit Court of Upshur County reversed concluding that Grievant had abandoned her position. The SCT reversed, citing Scalia for the limited scope of judicial review, and agreed that the evidence supported a finding of fact that the chief administrator involved had engaged in a series of retaliatory actions, culminating in Grievant's dismissal, immediately following an incident relating to a prior grievance. The SCT concluded the ALJ's decision was not clearly wrong under the substantial evidence test. The SCT also rejected contention that Grievant was not entitled to back pay under the Mason County Bd. of Educ. rule. The SCT found Grievant was not entitled to interest on the back pay award because she was not entirely without fault. (Neely dissent)
Jones v. Monroe County Bd. of Educ.	441 S.E.2d 367 (W.Va. 1994).	The grievant contended that he should have been selected for the position of director of curriculum and instruction. He asserted that he was better qualified and had greater seniority than the successful applicant and that he was denied the position because he had publicly opposed the BOE's school consolidation plan. The BOE admitted that the grievant's opposition to school consolidation cost him the position. The ALJ denied the grievance and the Circuit Court of Kanawha County affirmed. The Supreme Court affirmed and ruled in the syllabus points as follows: (1) Under W. Va. Code 18-4-7a [1990], in hiring an assistant superintendent of schools for curriculum and instruction, seniority is not a required consideration, nor does the date that respective doctorates were awarded create any precedence among competing candidates. (2) In general, the higher the governmental position to which a candidate for employment aspires in terms of its policy-making authority, the more legitimate that candidate's positions on public issues become as criteria for employment. The Court, after a brief discussion, concluded that the grievant's First Amendment rights had not been violated by the BOE.
Snider v. W.Va. Dept. of Commerce	441 S.E.2d 363 (W.Va. 1994)	This case involved the proper civil service pay rate for an employee whose salary was reduced from $24,816 to $17,316, upon his transfer from an unclassified

Style	Citation	Case Summary
		position to a classified position within the Department of Commerce. The grievant was transferred from a position at the Blennerhassett Historical Park to a position in the Department of Commerce. The ALJ denied the grievance and the Circuit Court of Wood County reversed, finding that no authority existed for reducing the grievant's salary. The Supreme Court concluded that the salary reduction was so great that the grievant had been constructively fired in violation of W. Va. Code, 29-8-2 [1990]. That statute provides that a transferred employee shall not be "severed, removed or terminated prior to his entry into the classified service." Based upon this conclusion regarding the application of the transfer statute, the Court concluded that the ALJ's decision was clearly wrong. The sole syllabus states that "[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syl. Pt. 1, Smith v. State Workmen's Compensation Commission, 159 W.Va. 108, 219 S.E.2d 361 (1975). The Court concluded that "the transfer statute does not provide a clear directive concerning the transferred employees' salaries."