WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

TENTH ANNUAL REPORT

TO THE

GOVERNOR AND THE LEGISLATURE

WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD

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TO THE GOVERNOR AND THE LEGISLATURE

TENTH 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 Annual Report of the West Virginia Education and State Employees Grievance Board for calendar year 1995.

JAMES PAUL GEARY
CHAIR

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Background, Purpose and Overview

Effective July 1, 1985, the Legislature established a Grievance Procedure for education employees to provide a mechanism for the resolution of the employment problems that inevitably arise in the work place. This legislation created the West Virginia Education Employees Grievance Board and charged it with the duty to administer Level Four of the grievance process. 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 educational system to better serve the citizens of this State. The purpose of the procedure is to provide a simple, expeditious and fair process by which to resolve grievances at the lowest possible administrative level.

Effective July 1, 1988, the Grievance Board's jurisdiction was enlarged by the enactment of a Grievance Procedure for State Employees, with essentially the same public policy objectives, and the Board was renamed the West Virginia Education and State Employees Grievance Board. W. Va. Code §§ 29-6A-1, et seq. This legislation covers employees of any department, governmental agency or independent board or commission of State government, with limited exceptions.

West Virginia's grievance procedure laws cover approximately sixty-six thousand (66,000) public employees.[1] Because the Board's

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[1] The grievance procedure for educational employees covers approximately forty-four thousand two hundred (44,200) professional and service employees. Employees of constitutional officers are not covered, unless they are in the classified service and (continued...)

jurisdiction was increased substantially by the legislation providing a grievance procedure for State employees, the number of Administrative Law Judges (hereinafter "ALJs")[2] was increased from four to six in 1988, and a Director, who also serves as an ALJ and a mediator in a few cases, was employed in 1989.[3] 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 to begin working on five hundred forty-six (546) grievances filed by classified higher education employees that had reached Level Four. See p. 15. The Board's appropriation for Fiscal Year (FY) 1996 was

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[1](...continued)
protected by state personnel laws. Employees of the Legislature and uniformed members of the Department of Public Safety are also excluded. The West Virginia Division of Personnel recently reported that the state employee grievance procedure is available to over twenty-one thousand (21,000) state employees. The Supreme Court of Appeals of West Virginia has ruled that county health department employees covered by a merit system can utilize the grievance procedure. W. Va. Dept. of Admin. v. W. Va. Dept. of Health and Human Resources/Boone County Health Dept., 451 S.E.2d 768 (W. Va. 1994). The Division of Personnel also reported recently that local health departments employ about nine hundred thirty-eight (938) people.

[2] 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.

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

increased substantially because of the flood of grievances filed by higher education employees. Two additional ALJs and a Secretary were hired in November 1995 to work on the higher education grievances.

The Board presently employs seventeen (17) people. A Director, an Administrative Officer, five ALJs and a Secretary[4] are assigned to the Charleston office; two ALJs and a Secretary are based in a newly-opened Morgantown[5] office; one ALJ and a Secretary are assigned to each of the three remaining branch offices located in Beckley, Elkins and Wheeling.

Annual Meeting

The Board, after proper notice, conducted its annual open meeting in Charleston on January 12, 1996, as required by W. Va. Code § 18-29-5 (1985), and W. Va. Code § 29-6A-5 (1988). The purpose of the open meeting is to assist the Board in evaluating Level Four of the grievance process, including the performance of its ALJs, and to prepare this annual report to the Governor and the Legislature. All grievants whose cases were disposed of in 1995, state agencies, educational institutions, county superintendents, employee organizations, and the Director of the West Virginia

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[4] 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.

[5] About half of the classified higher education employees who filed grievances work in the Morgantown area. For that reason and other factors, the Board selected Morgantown as the site for a new office. The office was opened in December 1995, and Level Four hearings have already been held there.

Division of Personnel (Personnel) were invited to attend or to submit written comments. The Board mailed over seven hundred (700) notices of the open meeting to persons who participated in the grievance process in 1995.

Probably due to inclement weather, only two people attended the open meeting: a supervising attorney for the Higher Education Central Office and the Director of the West Virginia State Employees Union.[6] Twenty-six (26) written comments were received. An attorney for a state agency expressed the opinion the process worked well and the ALJs were competent.

An attorney who represents public employees complained about the lack of ready access to Grievance Board decisions and offered a number of suggestions for making the decisions more readily available. The Board agrees there is a need for improvement in this regard and it intends to make improvements in 1996, primarily by taking advantage of modern communication technology.

Twenty-four (24) written comments were filed by grievants, most of whom had lost their grievances at Level Four. Although some positive comments were made about the grievance process at level four and the performance of the ALJs, most of the comments were critical of the process or the conduct of ALJs, or both. The most frequent criticism was that the Level Four decision was incorrect or unfair. Only three complaints were received about ALJs taking too long to render decisions, a dramatic change from

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[6] Only counsel for higher education provided comment at the public hearing, and his remarks related almost entirely to the processing of higher education reclassification grievances.

prior years. Again this year, two or three comments were received expressing the opinion that the process is unfair because management is almost always represented by an attorney.[7] Two grievants expressed the view that the grievance process should be replaced with a mediation or arbitration panel. One former employee correctly noted that higher education employees who have been dismissed from employment cannot appeal directly to Level Four, whereas state and county board of education employees have a statutory right to do so.[8]

1995 Calendar Year

Operational Data and Major Activities

The number of grievances reaching Level Four of the grievance process has remained relatively constant for the last several years, with the exception of last calendar year when five hundred forty-six (546) grievances were filed by classified higher education employees, after they had been reclassified in the Mercer Project.[9] Again this year the number of grievances filed at Level

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[7] In view of this perception of a one-sided mismatch, grievances decided in 1995 were reviewed. This review revealed that in about sixty-nine percent (69%) of the cases granted, in whole or in part, the grievant represented himself or was represented by a non-lawyer representative. This percentage was about fifty (50%) for 1994.

[8] See W. Va. Code § 29-6A-4(e); W. Va. Code § 18A-2-8.

[9] A detailed breakdown of grievance activity for the last four years is contained in Appendix A and B. Appendix A shows the number of grievances filed at Level Four against higher education institutions and county boards of education in calendar years 1995, 1994, 1993 and 1992. Appendix B is an alphabetical listing showing the number of grievances filed at Level Four against state agencies during the same four calendar years.

Four represents about one percent (1%) of all public employees who have a grievance procedure available to them.

During calendar year 1995, five hundred eighty-six (586) grievances were filed at Level Four, twenty-four (24) fewer than last year, for an average of about forty-nine (49) a month. State employees filed two hundred sixty-five (265) grievances, eleven less than last year. County board of education employees filed two hundred eighty-three (283) grievances, six more than last year. Higher education employees filed thirty-eight (38) grievances, nineteen (19) fewer than last year, not counting the reclassification grievances filed in 1994.

The Board's primary goals for 1995 were to issue more decisions and to issue them more quickly. Substantial improvement was made in regard to both of these aims. The Board established a specific decision-making goal for 1995: to render at least three hundred thirty-six (336) decisions. The ALJs achieved that objective, and again in 1995 issued more opinions and disposed of more cases than last year. They issued three hundred forty-nine (349) written decisions, thirty-six (36) more than last year, for an increase of about eleven and one-half percent (11.5%). ALJs disposed of a total of six hundred fifteen (615) cases, about one hundred (100) more than last year, including the issuance of two hundred sixty-six (266) dismissal orders[10] and seventeen (17)

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[10] Dismissal orders are often entered when grievances have been prematurely appealed to level four without a required hearing having been held or when cases have been settled. Occasionally, however, these rulings involve complicated procedural or (continued...)

remand orders.

In addition to deciding and processing more cases than ever before, the ALJs also issued their rulings much faster than in prior years. For example, in 1995 the average disposition time for mature cases was about thirty-nine (39) working days, compared to about sixty-seven (67) working days in 1994.[11] Similarly, in 1995 over forty percent (40%) of all decisions issued were rendered within thirty (30) working days after the case was mature for decision. In 1994, however, only seventeen percent (17%) of decisions were rendered within thirty (30) working days. Furthermore, in dismissal cases, over sixty percent (60%) of the decisions were issued within thirty (30) working days after the maturity date, compared to only twelve percent (12%) in 1994.[12]

At the same time, the percentage of decisions appealed to circuit court continued its steady decline. Fifty-nine (59) of the

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[10](...continued)
substantive issues. According to our records, only one dismissal order entered in 1994 was appealed to circuit court.

[11] A case is considered mature for decision on the date when the ALJ has everything he or she needs to render a decision. For example, if at the conclusion of a Level Four hearing the parties have presented all their evidence and waive their right to file proposed findings of fact and conclusions of law, the case becomes mature for decision on that date. Both grievance procedure statutes require the hearing examiner to render a decision in writing within thirty (30) working days following the level four hearing. W. Va. Code § 18-29-4(d)(2); W. Va. Code § 29-6A-4(d)(2).

[12] Partly because the ALJs were more productive in 1995, average total processing time was reduced by about eighteen (18) working days in 1995. Total processing time is the number of working days between the date the grievance was filed at Level Four and the date the decision was rendered. Total processing time in 1995 was about one hundred thirty-six (136) working days.

decisions rendered in 1995, or about seventeen percent (17%), were appealed to circuit court. In contrast, about twenty percent (20%) of the Board's decisions in 1994 were appealed, down from twenty-six percent (26%) in 1993, and twenty-eight percent (28%) in 1992.

The percentage of grievances granted in all types of cases decided this year was quite similar to last year. The Board ruled in favor of the employee in approximately twenty-four percent (24%) of the grievances, versus twenty-seven percent (27%) in 1994.[13] A breakdown by category of employees is listed below:

	Granted	Denied
County Boards of Education:	25%	75%
State:	21%	79%
Higher Education:	29%	71%

The Board gives priority to dismissal cases. More dismissal cases were filed and decided in 1995 than in either of the last two years. The Board received seventy-three (73) dismissal cases, compared to fifty-one (51) last year and fifty-seven (57) in 1993. ALJs issued decisions in thirty-nine (39) dismissal cases, an increase of ten over last year. ALJs overturned fourteen (14) of these dismissals (only three last year), and upheld twenty-three (23). Two of these dismissal cases were settled by the parties and were dismissed from the docket.

The Board also received and decided more suspension cases than last year. Thirty-nine (39) suspension grievances were filed,

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[13] In making the percentage determinations, cases were counted as having been granted if the grievant prevailed only in part.

compared to twenty-nine (29) last year. Fifteen (15) suspension cases were decided, five more than last year, and four of the suspensions were overturned. The Board issued Orders dismissing an additional twenty-six (26) dismissal cases and fourteen (14) suspension cases from the docket.

More hearings were scheduled and conducted in 1995 than last year, or any prior year. Nine hundred eighty-eight (988) hearings were scheduled, compared to seven hundred twenty-five (725) in 1994. Three hundred eighty-six (386) hearings were conducted, compared to two hundred sixty-eight (268) hearings last year. Eighty (80) cases were submitted for decision on the record made at the lower levels of the grievance procedure, compared to forty-four (44) cases last year.

One of the Board's projects for 1995 was to revise its procedural rules governing the practice and procedure for processing grievances at Level Four, which were originally adopted in 1989 and had not been modified since that time. After a written comment period and approval of the Board, the Procedural Rules were filed with the Secretary of State's office on December 28, 1995. The Procedural Rules, which repeal and replace the former rules of procedure, will become effective on February 1, 1996, and are codified at 156 Code of State Regulations 1 (156 C.S.R. 1).[14]

The Board's secretarial staff assembled and transmitted sixty-six (66) certified records, some of which were voluminous, to

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[14] The Board is expressly authorized to adopt rules and regulations, in accordance with the Administrative Procedures Act, by W. Va. Code §§ 18-29-5 and 29-6A-5.

circuit courts in 1995, six more than last year. 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 (30) days of receipt of the appeal petition.[15]

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. Hearings held at the Grievance Board's offices are mechanically recorded and are not ordinarily transcribed, unless the case is appealed to circuit court, and thus the ALJs must listen to audio tapes in most cases to draft their decisions.[16] The Board, however, has equipped each office with a high-speed tape

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[15] 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.

[16] Upon request the Board's ALJs traveled more in 1995 to conduct hearings at locations more convenient to the parties and their witnesses. The Board's general practice in the past had been that an ALJ could agree to conduct a hearing at a location other than at one of the Board's hearing offices, if the parties (generally the public employer) would agree to employ a court reporter to prepare a transcript for the ALJ and the parties. On numerous occasions in 1995, however, the ALJs transported the Board's recording equipment to hearing sites and magnetically recorded the hearing, thereby eliminating the need for a court reporter and reducing litigation costs.

duplicating machine and provides audiotapes of the hearings, in lieu of a transcript, to any party upon request.

For the past two years, the parties in two or three grievances have gone to circuit court seeking a writ of mandamus or a writ of prohibition against the Board. In 1995, the Board was made a party respondent in a prohibition proceeding brought by a State agency challenging an Order requiring the agency to provide the grievant with information the agency contended was privileged from disclosure. This case was settled, and the grievant received the information ordered disclosed, subject to a protective order. One of the Board's ALJs has been made a party respondent in a mandamus proceeding filed in the Circuit Court of Ohio County by a higher education faculty member. In that pending proceeding, the employee claims he is entitled to a default judgment because the college's grievance evaluator at Level Two did not render a decision within the five-day period required by W. Va. Code § 18-29-4(b).[17] The Board was forced to obtain representation from the Attorney General's Office to defend itself in both these cases. The University of West Virginia Board of Trustees is also seeking a writ of prohibition against the Board to prevent the enforcement of a ruling requiring the taking of an evidentiary deposition. The Circuit Court of Kanawha County denied the request for a writ of

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[17] The Grievance Procedure for educational employees was amended in 1992 to provide that an employee can win a grievance if the employer does not comply with the time periods for responding to the grievance or conducting a hearing. W. Va. Code § 18-29-3(a); see Martin v. Randolph County Bd. of Educ., No. 22680, Slip Opinion filed Nov. 17, 1995, at 10-15.

prohibition, and the Board of Trustees has filed a petition for appeal with the Supreme Court of Appeals of West Virginia.

The Board's staff created an electronic database, called Boardlaw, several years ago that contains case summaries and pertinent information on more than two thousand seven hundred and fifty (2,750) decisions rendered since the creation of the agency. The database is updated monthly with a summary of all decisions rendered the previous month, and the Board's staff distributes the database on disks each month to twenty-six (26) subscribers, up from fourteen (14) at the end of 1994. 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 the extensive body of personnel laws and regulations applicable to public employees. The database facilitates the research of precedent and helps to ensure consistent decisions.

The Board is required by W. Va. Code § 18-29-11 (1992),[18] to provide a statewide quarterly report to, among others, both higher education governing boards, every county board of education and all employee organizations to inform them of current personnel-related issues. Rather than issue a quarterly report, the Board distributes the report monthly to make information about new decisions available as soon as possible. The Board distributes about one hundred (100) copies of this report each month. The most recent report is contained in Appendix C.

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[18] 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.

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. The Board has provided the full text of every new decision to Technet since January 1994, to provide better access to its decisions. Technet is an electronic database and bulletin board service operated by the West Virginia State Bar. Over six hundred (600) lawyers in West Virginia subscribe to this service. The full text of over five hundred (500) decisions are now available on Technet.

Higher Education Reclassification Grievances (Mercer Project)

In 1993, the Legislature amended W. Va. Code § 18B-9-4 to provide, among other things, "an equitable system of job classifications" for classified employees of the University System of West Virginia Board of Trustees ("BOT") and the Board of Directors of The State College System of West Virginia ("BOD") (collectively "the governing boards"). As amended, W. Va. Code § 18B-9-4 required the governing boards to establish by rule and to implement a system establishing uniform classifications in all institutions of higher education within West Virginia. This reclassification is commonly called the "Mercer" project.[19]

On March 28, 1994, the Legislative Rule promulgated by the BOD to implement W. Va. Code § 18B-9-4 became final (131 C.S.R. 62). On May 5, 1994, the Legislative Rule promulgated by the BOT to implement this Code Section became final (128 C.S.R. 62). The

[19] This name is derived from the name of the company which assisted higher education in developing the classification system, William M. Mercer, Inc.

Legislative Rules promulgated by the governing boards set forth identical procedures for a classified employee to seek review of his initial classification under the new system.

The review procedure in these cases, as set forth in the Legislative Rules at §18, began with the employee filing a request for review form with the president of the institution. The president's recommendation on the employee's request for review was made to the Job Evaluation Committee ("JEC"). If the JEC failed to act on the employee's request for review by June 30, 1994, or if the employee disagreed with the JEC decision and wished to pursue a challenge to his initial classification, he then proceeded through the grievance procedure of W. Va. Code §§ 18-29-1, et seq., beginning at Level Three.

The grievances of those employees who did not waive the statutory period for hearing before the respective governing board, moved immediately from Level Three to the Grievance Board at Level Four. At meetings held during the first week of October 1994, both governing boards passed resolutions waiving the right to decide any Mercer grievances at Level Three, placing all remaining grievances arising from W. Va. Code § 18B-9-4 before the Grievance Board, without any lower level hearings. Five hundred forty-six (546) Mercer grievances[20] advanced to Level Four.

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[20] This figure represents the number of grievances filed at Level Four by higher education employees, not the number of employees who filed grievances. The Board's staff has not attempted an exact count of the number of higher education employees who filed grievances, as many of the cases involve multiple grievants.

Because of this unprecedented influx of cases involving a new classification system, the Board requested an increase in funding to open an additional hearing office and employ additional personnel to process these cases. The Board was concerned that the new cases would prevent the proper processing of its normal caseload. With the additional appropriation for FY 1996, the Board has, as noted earlier, added three ALJs and a Secretary and opened a Morgantown office.

The Board's strategy has been to begin to consolidate those Mercer cases that appeared to present common questions of law and/or fact and then to proceed cautiously to hear and decide a few of these cases. The Board has experienced more difficulty in moving these cases forward than other types of cases, partly due to scheduling and logistical difficulties attendant to cases involving a large number of parties. As of December 31, 1995, the Board had completed the hearings on and written four detailed decisions. In addition, the Board has entered Orders dismissing nearly fifty (50) employees from the Mercer litigation. Hearings have begun in numerous other cases, and by the end of January 1996, hearings will have been set in literally dozens of other consolidated cases through at least June 1996.

The Board's goal is to complete seventy-five percent (75%) of the Mercer cases by the end of 1996. This is a formidable challenge, but the Board intends to do everything reasonably possible to achieve that aim, while providing the parties with fair evidentiary hearings and proper decisions.

Mediation

W. Va. Code § 18-29-10 (1992), requires the Board 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, to the extent feasible with existing personnel and resources. After the enactment of this provision in 1992, 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.

In every case in which a hearing is requested, the Board continued to offer mediation services in 1995, except for Mercer cases. The Board sends a Notice of The Availability of Mediation Services to all parties explaining what mediation is and the circumstances in which the Board will provide a mediator. The ALJs also held prehearing conferences more frequently, typically by a recorded conference call, in an effort to identify and clarify issues and to encourage settlement discussions.

Mediation involves a trained, impartial third party[21] 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

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[21] All but the three most recently hired ALJs have 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.

Board does not view mediation as an additional step in the 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.

Four mediation sessions were conducted in 1995, one fewer than last year, resulting in two settlements. Although mediation services have only been provided in a small number of cases, 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 what is most important, preserve the integrity of ongoing working relationships.[22] No negative consequences have been experienced by the Board's utilization of mediation to resolve public employment disputes.

Evaluation of Level Four and ALJs

The Board is pleased to report that it is generally satisfied

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[22] 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 reach agreements or understandings meeting their needs.

with the functioning of the grievance process at Level Four and the performance of its ALJs in 1995. The Board's ALJs have reduced substantially the time it takes them to render decisions, while the percentage of cases appealed by the parties declined. 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 Board believes Level Four of the grievance process is functioning well. There is room for more improvement, but it will be difficult to make much, if any, improvement in 1996 given the increased workload created by the Mercer grievances and the improvements made in recent years.

The Board believes that its ALJs have maintained the neutral and impartial role envisioned by the Legislature. The Board thinks that its ALJs are providing fair hearings and are issuing well-reasoned, well-written decisions.

One of the perennial complaints has been that the Board rules too frequently 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; the percentage of grievances granted or denied simply 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 to prevail. For example, in a case in which the grievant contends he should have been selected for a position rather than the successful applicant, the grievant cannot prevail

The Board continues to be concerned about any unnecessary[24] delay and particularly about unreasonable delay by its ALJs in issuing decisions after cases have become mature for decision. The Board will continue to track the processing of grievances, keep detailed information about decisional delay, and consider such information to be important in evaluating the performance of its ALJs.

The Board remains committed to improving Level Four of the grievance process and will continue to strive to meet its important statutory duties and responsibilities.

Fiscal Summary

The Board's actual expenditures for FY 1995 were $716,008. This was an increase over the prior fiscal year, designed primarily to improve ALJ salaries in order to reduce turnover, to permit the hiring and retention of qualified attorneys, and to employ an ALJ to begin working on the influx of higher education reclassification grievances.

The Board's budget was substantially increased for FY 1996 to $997,016, because of the flood of reclassification grievances filed by classified higher education employees. These grievances were filed directly at Level Four or the governing boards waived them to Level Four without conducting any hearings, unlike most grievances

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[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 a limited staff.

unless he can prove the employer's decision was arbitrary and capricious, absent legal error or a significant flaw in the selection process.

Second, neither the Governor nor the Legislature should be misled by statistics about how arbitrators 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

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[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.

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 sixty (60) cases it has decided. Appendix D is a brief summary of fourteen (14) opinions rendered by the Supreme Court of Appeals in 1995 involving the Grievance Board.

Unlike prior years, the most frequent criticism was not 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 process. The fact that decision-making time was substantially reduced in 1995 has apparently not gone unnoticed by public employees or public employers.

In a few instances in 1995, 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. ALJs also now advise the parties at the Level Four hearing in some cases whether 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. Some cases therefore become mature for decision immediately after the 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).

that reach Level Four.

Recommendations

First, the Board is of the opinion that the existing process of selecting Board members should be preserved 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 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. 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 adjudicating public employment disputes quickly.

Conclusion

The Board's accomplishments demonstrate the wisdom of the legislation establishing a grievance procedure for education and state employees. The existence of the grievance procedure helps to resolve disputes and prevent improper actions involving a broad range of personnel matters, including questions of discipline, reduction in force, promotion, transfer, compensation, discrimination and favoritism.

Many employment disputes have been resolved fairly and quickly 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 to circuit court has steadily declined.

The Board has established through its decisions a body of employment law that should serve to improve public personnel management. Public employers frequently look to Grievance Board decisions for guidance in making personnel decisions, and employee organizations likewise consult these decisions in advising

employees about whether to file and/or to pursue grievances to higher levels in the process.

The Board would like to take this opportunity to express its appreciation to the Legislature and the Caperton administration for the support and assistance they have provided this agency, especially during the last three years. The Board also wants to emphasize that the efforts of the Caperton administration, and specifically its requirement that state agencies utilize "total quality management" principles, have played a significant role in helping the Board's staff to continuously improve the services it provides.

It is, therefore, with a great deal of pride and a sense of accomplishment that the West Virginia Education and State Employees Grievance Board respectfully submits its Tenth Annual Report to the Governor and the Legislature.

APPENDIX A

GRIEVANCES FILED AT LEVEL FOUR IN CALENDAR YEAR 1995, 1994, 1993 AND 1992 AGAINST COUNTY BOARDS OF EDUCATION AND THE GOVERNING BOARDS OF HIGHER EDUCATION

	1995	1994	1993	1992
Board of Directors:				
Bluefield State College	0	1	6	2
College of Graduate Studies	0	0	3	0
Concord State College	2	4	0	2
Fairmont State College	1	0	3	3
Glenville State	1	2	0	0
Potomac State College	0	1	0	1
Shepherd College	3	6	7	2
West Liberty State College	5	0	5	1
W. Va. Institute of Technology	0	4	1	2
W. Va. Northern Community College	2	4	1	2
W. Va. Southern Community College	2	1	2	1
W. Va. State College	4	3	2	1
Board of Trustees:				
Marshall University	5	11	10	4
W. Va. University	13	19	8	8
W. Va. University Hospitals	0	0	0	1
W. Va. University/Charleston	0	0	0	0
W. Va. School of Osteopathic Medicine	0	1		
	38	57	48	30
County Boards of Education:				
Barbour County Board	3	12	5	3
Berkeley County Board	1	3	2	2
Boone County Board	10	4	7	1
Braxton County Board	1	0	1	2
Brooke County Board	4	2	7	7
Cabell County Board	9	4	7	11
Calhoun County Board	0	0	0	1

Clay County Board	1	0	0	1
Doddridge County Board	0	0	0	0
Fayette County Board	5	4	9	4
Gilmer County Board	4	0	1	2
Grant County Board	2	1	0	1
Greenbrier County Board	5	3	0	1
Hampshire County Board	1	0	2	2
Hancock County Board	10	15	16	6
Hardy County Board	1	0	0	2
Harrison County Board	4	1	1	1
Jackson County Board	3	1	1	1
Jefferson County Board	3	1	2	2
Kanawha County Board	17	33	25	28
Lewis County Board	0	0	4	6
Lincoln County Board	9	9	15	10
Logan County Board	21	12	13	12
Marion County Board	5	7	22	10
Marshall County Board	0	0	5	2
Mason County Board	7	19	8	4
McDowell County Board	7	4	6	10
Mercer County Board	8	25	8	16
Mineral County Board	3	2	6	5
Mingo County Board	67	20	16	12
Monongalia County Board	4	10	5	10
Monroe County Board	5	4	1	9
Morgan County Board	1	1	2	2

Nicholas County Board	2	0	4	2
Ohio County Board	3	1	4	5
Pendleton County Board	4	1	2	1
Pocahontas County Board	0	0	1	1
Preston County Board	4	3	2	4
Putnam County Board	4	4	4	4
Raleigh County Board	9	29	4	9
Randolph County Board	4	6	2	2
Ritchie County Board	0	0	1	0
Roane County Board	0	0	2	0
Summers County Board	5	8	3	9
Taylor County Board	2	0	0	0
Tucker County Board	0	2	0	4
Tyler County Board	0	2	3	1
Upshur County Board	1	2	0	0
Wayne County Board	4	3	2	4
Webster County Board	2	3	3	11
Wetzel County Board	2	5	1	2
Wood County Board	4	1	1	6
Wyoming County Board	5	4	5	10
Multi-County Vocational Centers James Rumsey Technical Institute (2) Calhoun-Gilmer Career Admn. Council (1)	3	1	2	0
Regional Education Service Agency	0	1	0	1
W. Va. Board of Education* * previously reported as a state agency	4	4	3	1
	283	277	246	262

APPENDIX B

GRIEVANCES FILED AT LEVEL FOUR AGAINST STATE AGENCIES IN CALENDAR YEARS 1995, 1994, 1993, AND 1992

	1995	1994	1993	1992
Adjutant General	2	0	0	0
Administration	5	1	5	4
Alcohol Beverage Control Commission	0	1	1	1
Board of Examiners for Registered Nurses	1	0	1	0
Bureau of Employment Programs	6	10	20	16
Clarksburg Public Library	1	0	0	0
Commerce, Labor, Economic Resources	1	0	3	4
Consolidated Public Retirement Board	0	1	0	0
Corrections	34	29	13	18
Culloden Public Service District	1	0	0	0
Culture and History	1	0	3	1
Development Office	0	1	0	0
Economic Development Authority	0	0	1	0
Educational Broadcasting Authority	0	1	2	0
Employment Security* *1994 - consolidated into Bureau of Employment Programs	0	0	0	1
Energy	0	0	0	1
Environmental Protection	12	3	3	0
Farm Management Commission	0	0	1	0
Fire Commission	1	0	1	0
Forestry	3	0	0	0
Health and Human Resources	85	100	130	83

Highways	52	44	24	32
Human Rights Commission	0	0	0	1
Labor	0	0	2	1
Library Commission	0	1	0	0
Lottery Commission	0	1	0	0
Miners' Health, Safety & Training	0	1	2	0
Motor Vehicles	1	19	7	1
Natural Resources	6	5	0	6
Parkways, Economic Dev. & Tourism	3	5	1	4
Personnel	3	4	1	1
Public Safety	6	2	1	1
Public Service Commission	4	6	2	5
Racing commission	1	0	0	0
Railroad Maintenance Authority	1	0	0	0
Real Estate Commission	0	1	0	0
Regional Jail Authority	14	13	3	8
Rehabilitation Services	6	10	11	7
Solid Waste Management	0	0	0	1
Tax & Revenue	8	10	3	5
Tourism & Parks	1	5	4	2
Transportation	0	0	0	3
Veterans' Affairs	0	2	0	0
Workers' Compensation Fund*	0	0	0	3

*1993 - consolidated into Bureau of Employment Programs

County Health Departments

Barbour County Health Department	1	0	0	1
Boone County Health Department	1	0	0	2
Grant County Health Department	0	0	0	2
Jackson County Health Department	0	0	1	0
Mason County Health Department	1	0	0	0
Monongalia County Health Department	2	0	1	0
Morgan County Health Department	1	0	0	0
	265	276	247	215

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, 1995

APPENDIX C

GRIEVANT	RESPONDENT	DOCKET No.	DEC. DATE	SYNOPSIS
BLANKENSHIP	LOGAN COUNTY BOARD OF EDUCATION	95-23-314	12-29-95	Respondent transferred Grievant in a realignment of positions following a reduction in force, because it thought W. Va. Code, 18A-4-7a required them to transfer a person teaching one grade level above certification (Grievant), before looking to other persons to transfer, such as those less senior than Grievant. The classification area in which Grievant was teaching was not the area being reduced, therefore that part of W. Va. Code, 18A-4-7a which requires a person teaching on a temporary permit to be released first, was not applicable to this situation. This was simply an W. Va. Code, 18A-2-7 transfer. Respondent chose to transfer Grievant based upon a mistaken belief that it had to do so. Therefore, Respondent's action was arbitrary and capricious. This case was REMANDED to Logan County Board of Education to determine which person should have been transferred.
BYERS	MARION COUNTY BOARD OF EDUCATION	94-24-388	12-29-95	Grievant established that school board's policy and practice of giving RIFed secretaries and aides on preferred recall list priority for any substitute work of five days or more was unlawful under W. Va. Code, 18A-4-15, and not warranted under W. Va. Code, 18A-4-8b. School board must abandon policy and not take substitute workers out of rotation for such work in the future. However, Grievant failed to establish any specific instances when she was adversely affected by MCBOE's policy; thus, she is not entitled to back wages. Grievance GRANTED IN PART.
CLUTTER	WEBSTER COUNTY BOARD OF EDUCATION	95-51-439	12-29-95	Grievant and another more-senior teacher, RIFed and placed on a recall list, applied for a posted position prior to beginning of the new school year. The posting required two distinct certifications/teaching disciplines. Because neither applicant was certified

GRIEVANT	RESPONDENT	DOCKET No.	DEC. DATE	SYNOPSIS
				in both areas, Respondent awarded the job to the most senior teacher on the recall list, despite the fact that Grievant was certified in one area and the successful applicant was not certified in either area. Grievant was eventually assigned the job, but claimed back wages and benefits. Record established that Grievant was the proper candidate for the job, under both the hiring and recall provisions of W. Va. Code, 18A-4-7a, because she was the most qualified applicant and because she was certified and had previously taught in one of the posted certification areas. Grievance GRANTED.
COOK	RANDOLPH COUNTY BOARD OF EDUCATION	95-42-238	12-27-95	Grievant was employed by Randolph County Bd. of Educ. classified as a Computer Operator, when she assumed accounting duties at her supervisor's request. Board declined to approve the superintendent's recommendation that Grievant be reclassified to Computer Operator/ Accountant III. Grievant was granted reclassification, subject to passing a competency test, to Computer Operator/Accountant III in the level two decision. Board had not administered a test to Grievant prior to level four hearing. Grievant proved that Board failed to reclassify her consistent with the duties of her position. A board of education may require an employee pass a competency test as a prerequisite for reclassification; however, the board may not change an employee's duties and then withhold or delay reclassification by failing to promptly administer the test. Grievance was GRANTED and Board was ordered to administer the competency test for Accountant III to Grievant within thirty days. Upon her successful completion of the test, Grievant shall be reclassified.

GRIEVANT	RESPONDENT	DOCKET No.	DEC. DATE	SYNOPSIS
ELKINS	BOONE COUNTY BOARD OF EDUCATION AND CAROL HAGER, INTERVENOR	95-03-415	12-28-95	Grievant alleged he should have been selected for this middle school principal position because ha was the most senior, had experience at the junior high level, and because he was as qualified as the successful applicant. DECISION: Grievant failed to demonstrate he was the most qualified applicant. Additionally, boards of education have broad discretion when filling administrative positions. Grievance DENIED.
FITZWATER	JAMES RUMSEY TECHNICAL INSTITUTE	95-MCVTC-427	12-29-95	Grievant, seeking reimbursement for mileage, alleged other employees have been reimbursed mileage for similar training updates. Respondent argued Grievant failed to prove that he is similarly situated to other employees who may have received reimbursement for mileage. DECISION: Grievant failed to prove by a preponderance of the evidence that he was entitled to reimbursement for mileage as a matter of law. Grievance DENIED.
GWILLIAM	PRESTON COUNTY BOARD OF EDUCATION	95-39-255	12-22-95	Grievant, employed as a guidance counselor with .50 of her duties at South Preston Junior High School and .50 of her duties at West Preston Junior High School, alleged the .40 counselor position posted should be combined with her half-time counselor position at West Preston Junior High School because she is the most qualified. Respondent argued that the 50-50 positions at South and West Preston Junior High Schools constitute a single position which can not be split and since Grievant did not want the .40 position alone, it was given to the only other applicant. DECISION: Grievant failed to show a violation, misapplication or misinterpretation of any statute, policy, rule, regulation or written agreement relative: (1) to the posting of the .40 guidance counselor

GRIEVANT	RESPONDENT	DOCKET No.	DEC. DATE	SYNOPSIS
				position at Bruceton School; or (2) to Respondent's refusal to split the South and West Preston Junior High School guidance counselor positions. Grievance DENIED.
HALL	LOGAN COUNTY BOARD OF EDUCATION	94-23-611/ 95-23-012	12-21-95	Grievant was laid off in 1990 and filed a grievance contending he should not have been. Grievance was denied and he appealed to circuit court. Ultimately, this decision was affirmed and case was remanded to this Board to determine Grievant's status as result of RIF. DECISION: Grievant's status should be that of laid off employee on preferred recall. Grievant also claims that board has failed to post positions that became vacated and that he would have obtained one of these positions based upon seniority. Grievant failed to prove that any positions were required to be posted. Grievance DENIED.
HIGGINS	RANDOLPH COUNTY BOARD OF EDUCATION	94-42-1111	12-27-95	Grievant was classified as a Secretary III and is one of two secretaries assigned to Elkins Middle School. Principal Roth divided the duties of the school secretaries. One maintains school records while the Grievant engages in financial duties. Grievant utilities in excess of 50% of the work day completing accounting duties. By memo, the Principal recommended that Grievant be reclassified as Sec III/Accountant. Superintendent advised her that he could not recommend the requested classification. Board requires that employees successfully complete a competency test prior to reclassification. Grievant argues that the Board is required to annually review her position and classify her according to her duties. Board responded by approving her reclassification to Secretary III/Accountant II, effective upon her passage of the Accountant competency test. Board argues

GRIEVANT	RESPONDENT	DOCKET No.	DEC. DATE	SYNOPSIS
				Grievant does not meet the qualifications for Accountant III because she does not possess a college degree. Grievant established she had been misclassified in excess of two years and accordingly the grievance was GRANTED and the Board was ordered to administer the competency test within 30 days and upon her successful completion, to reclassify Grievant as a Secretary III/Accountant II.
JOHNSON	MONROE COUNTY BOARD OF EDUCATION	95-31-354	12-22-95	Grievant filed this complaint alleging that she has been performing the duties of a supervisory aide and seeks the additional pay as provided by W. Va. Code, 18A-5-8. The Grievant was employed as a "regular aid" and was appointed to her present special education aide position and assigned to a classroom at Union Elementary School. Board does not dispute that Grievant, on at least nineteen occasions, spent from five to forty-six minutes with the students when Mr. Czaja was not present. The principal at Union Elementary has never designated the Grievant as "supervisory." Neither W. Va. Code, 18A-4-8a nor W. Va. Code, 18A-5-8 mandates that an aide who performs supervisory duties on any occasion for any length of time receive the supervisory designation and additional compensation. Since the record supports that the supervisory duties performed by Grievant during the period identified were incidental to her position as a special education aide and consumed a minute part of her total work time, she has failed to show entitlement to the extra compensation. Grievance DENIED.
LANEHART	LOGAN COUNTY BOARD OF EDUCATION	95-23-235	12-29-95	Grievant was suspended for two days for "grabbing" two students after they had gone outside the classroom without permission. The teacher had not been threatened in any way, and had told the superintendent

GRIEVANT	RESPONDENT	DOCKET No.	DEC. DATE	SYNOPSIS
				that he had indeed grabbed the students and then had hollered at them. At hearing he changed his story and stated he had merely lightly touch the boys to get their attention. DECISION: The Grievant's story did not ring true and did not match with the story he had previously told his principal and the superintendent. Grievance DENIED.
MUNCY	MINGO COUNTY BOARD OF EDUCATION	95-29-336	12-21-95	Grievant contends that based upon his overall seniority that he should have been chosen to teach a summer school class for which he applied. DECISION: W. Va. Code, 18-5-39 requires that summer school positions be based upon seniority earned during summer sessions only. In this case, another applicant for the position had greater summer school seniority. Grievance DENIED.
POLING	TAYLOR COUNTY BOARD OF EDUCATION	95-46-444	12-29-95	Grievant, employed as a custodian, alleged Respondent permitted substitute custodians to perform an extra duty assignment in violation of W. Va. Code, 18A-4-8b. Respondent argued its response was proper due to the "emergency" nature of the situation of accumulation of dust resulting from a renovation project. DECISION: Grievant proved beyond a preponderance of the evidence that he is entitled to compensation for three days of cleaning which Respondent failed to offer him. W. Va. Code, 18A-4-8b does not contain an exception as was claimed. Grievance GRANTED.

GRIEVANT	RESPONDENT	DOCKET No.	DEC. DATE	SYNOPSIS
HARDY	BOARD OF DIRECTORS/ WEST VIRGINIA INSTITUTE OF TECHNOLOGY	94-MBOD-963	12-21-95	Any person reclassified in accordance with W. Va. Code, 18B-9-4, as amended, who did not submit a request for review by Jan. 1, 1994, for the Job Evaluation Committee's review of the initial classification may not file a grievance. Grievance DISMISSED.
KILBURN	BOARD OF DIRECTORS/ WEST VIRGINIA STATE COLLEGE	94-BOD-1064	12-29-95	Grievant was denied tenure. She alleged multiple reasons why this decision was wrong. This long decision identifies each argument and addresses it. The various issues addressed are identified in the key word area. DECISION: Grievant was discharged for failure to meet the requirements of her job description. Although Grievant had accomplished many things during her time at State, she had not performed her identified responsibilities. It must be noted that academic institutions have much discretion in matters of promotion and tenure, and the standard of review is whether the decision was against applicable policy or arbitrary or capricious. Grievance DENIED.
ZARA, ET AL.	BOARD OF TRUSTEES/ WEST VIRGINIA UNIVERSITY	94-MBOT-817	12-12-95	Grievants, employed by West Virginia University to supervise operations of the Personal Rapid Transit system (PRT), failed to demonstrate by a preponderance of the evidence that the employer's Job Evaluation Committee abused its discretion and improperly evaluated their positions to such an extent that they should be assigned to a higher pay grade. Although Grievants demonstrated that they should have received the same rating for the Impact of Actions element of Factor 5, Scope and Effect, under the Mercer Job Evaluation Plan, as their peers who serve as Supervisor/PRT Maintenance, the Respondent adequately demonstrated that the additional points generated by correcting this error did not equate to the minimum

GRIEVANT	RESPONDENT	DOCKET No.	DEC. DATE	SYNOPSIS
				required for assignment to the next higher pay grade. Grievance DENIED.

GRIEVANT	RESPONDENT	DOCKET No.	DEC. DATE	SYNOPSIS
BEBO	DEPARTMENT OF HEALTH AND HUMAN RESOURCES AND DIVISION OF PERSONNEL	95-HHR-232	12-14-95	Grievant, classified as an Office Assistant I (OA I), claims her duties are complex and thus on a par with those of an Office Assistant II. Although Grievant's assignment requires her to independently schedule her work week among three separate office sites and to perform her primarily data-entry duties for a relatively small human services program under no direct supervision, the travel does not raise the complexity of her tasks, which are quite structured and fairly repetitious in nature. All OA's in the three-tiered office assistant series may perform similar clerical duties; however, when the breadth, scope and nature of Grievant's duties are compared with those of the other positions, her position best fits within the classification specification for OA I. Grievance DENIED.
DRAKE	REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY	95-RJA-442	12-12-95	Grievant, a correctional officer, requested that his present employer, Regional Jail Authority (RJA), bestow a salary enhancement for specialized training, the same as his former employer, the Division of Corrections (CORR), does for its officers in the classified service who have completed the training. As a classified-exempt state agency, RJA adopted a classification and compensation plan which differed from CORR's. When Grievant accepted employment with RJA, he knew RJA officers would work in close proximity with CORR officers, but that their employment situations would differ. Grievant failed to prove any legal entitlement to the raise in salary he requested. Grievance DENIED.
FARSON	DEPARTMENT OF HEALTH AND HUMAN RESOURCES/ COLIN ANDERSON	95-HHR-162	12-14-95	Grievant was employed at the Colin Anderson when she was laid off in 1993. Prior to this lay off, Grievant had complained that her supervisor was sexually

GRIEVANT	RESPONDENT	DOCKET No.	DEC. DATE	SYNOPSIS
	CENTER			harassing her. Ultimately, this alleged harassment lead to Grievant requesting and being transferred in 1992. Grievant was laid off from this position. Grievant contends that but for the transfer (which was necessitated by the Employer's lack of action) she would not have been laid off. DECISION: Grievant's complaint challenging her transfer was untimely filed. Further, Grievant failed to establish that her lay off was the result of a misapplication, misinterpretation or violation of some statute, policy, rule or written agreement. Grievance DENIED.
FRESHWATER	REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY AND DIVISION OF CORRECTIONS	95-RJA-371	12-12-95	To avoid possible unemployment when the old prison closed, Grievant resigned his job with CORR and accepted an officer position with RJA at a new correctional facility housing both CORR and RJA. Some less-senior CORR officers chose not to resign their positions; thus, their jobs ended when the old prison closed, and they were placed on a preferred hiring list. When CORR positions became available at the new facility, the displaced CORR workers were called back to work. No violation of W. Va. Code, 25-1-21 (CORR's mandate to hire displaced workers), or W. Va. Code, 31-20-27 (RJA's mandate to hire CORR workers), established in this case. Grievant's claim that he has preferred status for CORR vacancies, by virtue of either "recall" or "transfer," is unfounded, as he terminated his employment with CORR when he accepted employment with RJA, and no "forced" resignation was shown. Grievant cannot be hired by CORR as long as any displaced and unemployed CORR officers remain on the preferred hiring list. Grievance DENIED.
JACK	DEPARTMENT OF HEALTH	95-HHR-431	12-21-95	Grievant filed grievance contending that her salary is

GRIEVANT	RESPONDENT	DOCKET No.	DEC. DATE	SYNOPSIS
	AND HUMAN RESOURCES AND DIVISION OF PERSONNEL			not high enough for her position. Grievance was denied at lower levels but grievant did not appeal to level four until almost nine months later. DECISION: Grievance DISMISSED due to untimeliness.
KNIGHT, ET AL.	DIVISION OF CORRECTIONS	95-CORR-389	12-11-95	Grievants, all correctional officers, sought full reimbursement for travel, housing and meals after they were transported to a week-long assignment at a new prison, housed in less than comfortable quarters at the prison and directed to eat the prison's inmate-prepared meals (which they refused to do), unlike arrangements in the past when they worked at alternate sites due to an uprising or emergency. Other workers, not correctional officers, also assisted at the new prison, but they were permitted to drive their own vehicles, stay at a motel, eat their meals outside the prison, and, later, claim full, allowable reimbursement for their expenses. Discrimination and favoritism not established, because the workers were not similarly situated in terms of classification, duties or assignment. However, it was an abuse of employer's discretion to expect officers to eat inmate-prepared foods and to allow only a 60% meal allowance, given that fear of inmate-prepared food was felt strongly among all workers from old prison. No reimbursement warranted for travel or lodging, but Grievants are entitled to the full meal allowance. Grievance GRANTED IN PART.
MCLAUGHLIN	BUREAU OF EMPLOYMENT PROGRAMS	95-BEP-337	12-27-95	Grievant had been employed by BEP for 5 years. Grievant married to someone who had been employed at the same location as a Senior Interviewer for approximately 2 years. Prior to the marriage, the wife had been a designated employee in charge of the office during the absence of the main supervisor. After the

GRIEVANT	RESPONDENT	DOCKET No.	DEC. DATE	SYNOPSIS
				marriage, the primary supervisor advised the wife that she will no longer be in charge of the office in her absence in order to prevent the possibility of violating agency nepotism policy. The primary supervisor recommended by memo that Grievant be transferred to the first available job opening in the Elkins Unemployment Comp. Office. The basis of the recommended transfer was the BEP Policy 6000.50 "Nepotism". Grievant argued BEP exceeded its authority in adopting a nepotism policy contrary to the one adopted by the Division of Personnel. Grievant's second argument was the transfer was improper based on a claim that BEP has not enforced the nepotism policy in a consistent and impartial manner. Grievant cited a comparative situation in which the married couple were able to remain in their job positions. Grievant proved that the Respondent failed to apply its nepotism policy in a consistent and uniform manner. Grievance GRANTED.
MITIAS	PUBLIC SERVICE COMMISSION	95-PSC-029	12-14-95	In a lengthy decision, the ALJ concluded that the Grievant had been discriminated against in violation of W. Va. Code, 29-6A-2(d), in regard to the PSC's failure to promote and pay him. These discrimination claims were found to have been timely filed under Martin v. Randolph County Bd. of Educ., No. 22680, a very recent Supreme Court of Appeals decision, and another Supreme Court case. The ALJ also ruled that the (1) Respondent PSC had established that Grievant's claim that he should have received a particular promotion was not timely filed; (2) Grievant failed to prove by a preponderance of the evidence that his transfer was motivated by political reasons; (3) Grievant proved his transfer was motivated by another employee's desire to retaliate against him for applying for a specific promotion and the transfer was arbitrary and

GRIEVANT	RESPONDENT	DOCKET No.	DEC. DATE	SYNOPSIS
				capricious; and (4) Grievant failed to prove the PSC acted in bad faith in failing to schedule a level three hearing within the time required by the grievance procedure statute for state employees. The ALJ GRANTED the grievance in part and ordered the PSC to rescind Grievant's transfer and delete everything from his personnel file, including a reprimand, and to immediately promote Grievant to Utility Financial Analyst II, including a 5 percent salary increase effective fifteen days prior to the filing of the grievance.
REPHANN	OFFICE OF THE ADJUTANT GENERAL	95-ADJ-298	12-13-95	Grievant was an at-will employee for the Office of the Adjutant General. Grievant had been employed as a Security Police Leader since November 1986. In the position description, one of the mandatory job requirements is that the individual maintain membership in the W. Va. Air National Guard. Grievant was a member until May 19, 1995 when he was honorably discharged because he was determined to no longer be physically qualified due to the development of coronary artery disease. Grievant's physician states in a letter that because the Grievant has good exercise tolerance on the treadmill he believed he should be able to perform his duties with the military police without restriction. The doctor also states that the Grievant complains of minimal angina. Grievant also argued that another Security Police Officer was not a current member of the W. Va. Air National Guard but rather he is retired from the W. Va. Air National Guard. Grievant did not prove any due process violation. Unless an at-will employee alleges a "substantial contravention of public policy" such as exercising certain constitutional rights, his termination cannot be challenged through the grievance

GRIEVANT	RESPONDENT	DOCKET No.	DEC. DATE	SYNOPSIS
				procedure; therefore, the grievance was DISMISSED.
RUTTER	DEPARTMENT OF TRANSPORTATION/ DIVISION OF HIGHWAYS	95-DOH-087	12-28-95	Grievant is employed by DOH as a Transportation Worker III - Mechanic. Grievant has worked for DOH for 23-1/2 years. Secretary of DOH issued a memo stating that merit raises were to be given to "a specific number of your most meritorious employees in each of your subordinate organizations whose current annual salary is $20,000.00 or less." Eligibility was also limited to those employees who had not received a pay increase in the previous 12 months. During 1994, Grievant's annual salary was less than $20,000.00. Grievant did not receive a merit raise in 1994. Grievant was rated on his employee evaluation as "meets or exceeds expectations." A CDL is not required for mechanics at DOH but the minimum qualifications state that a CDL may be required in the areas of equipment repair, highway maintenance, bridge maintenance, and core drilling at the discretion of the appointing authority. DOH officials prefer that mechanics obtain a CDL. Of the 12 mechanics in the shop, 9 have CDL's. Grievant is one of three without. Merit raises for 1994 were based upon recommendations by supervisors and employee evaluations. Grievance DENIED.
SAYRE	MASON COUNTY HEALTH DEPARTMENT	95-MCHD-435	12-29-95	Grievant did not file her grievance at Level IV until 17 days after the effective date of her termination. Under the facts and circumstances established at a Level IV evidentiary hearing limited to the issue of timeliness, Grievant failed to demonstrate that her employer affirmatively misled or confused her so as to equitably toll the time limit for submission of her grievance or that she substantially complied with the requirements of the grievance procedure when her attorney submitted a letter to the supervisors who

GRIEVANT	RESPONDENT	DOCKET No.	DEC. DATE	SYNOPSIS
				notified her of their intention to dismiss her from employment. Grievance DISMISSED as untimely filed.

Appendix D

1995 Supreme Court Decisions Involving the Grievance Board

1. Akers v. W. Va. Dept. of Tax and Revenue, 460 S.E.2d 702 (1995).

This case involves the effect of a settlement agreement between two employees of the Tax Department (Akers and Boggs) and the Civil Service Commission. The ALJ ruled that, pursuant to the settlement agreement, he had jurisdiction to determine whether the grievants had worked out of classification and were entitled to back pay. The ALJ concluded on the merits that the grievants had not proven they had worked out of classification, and thus they were not entitled to the classification of Audit Clerk III. On appeal, the grievants argued that the issue of whether they had worked out of classification had already been decided by the Supreme Court in AFSCME IV and, hence, the ALJ erred in addressing that question. The Circuit Court affirmed the denial of the grievance, as did the Supreme Court. The Supreme Court determined that the settlement agreement, in clear and unambiguous language, permitted the ALJ to address the merits, and cited to Randolph County Bd. of Educ. v. Scalia, for the rule that Grievance Board decisions are subject to a limited scope of judicial review. (Per Curiam)

2. Bolyard v. Kanawha County Bd. of Educ., 459 S.E.2d 411 (1995).

Unsuccessful applicant for technology education teaching position filed a grievance claiming he was the best qualified applicant and should have been selected. Both Grievant and the successful applicant were long term employees of the BOE, but Grievant did have three more years of seniority than the applicant selected. The grievance was denied and the Circuit Court of Kanawha County affirmed. The Supreme Court also affirmed, finding that the BOE had reasonably exercised its discretion and had not violated W. Va. Code § 18A-4-8b(a)[1989]. Although the hearing examiner did confuse the educational background of Grievant and the successful applicant, the Court concluded that the hearing examiner had correctly decided the best qualified issue in favor of the BOE. The Court reiterated familiar syllabus points setting forth the standard of judicial review of a Grievance Board decision. It also noted that questions of law are reviewed de novo, citing numerous cases, including Butcher v. Gilmer County Bd. of Educ., 189 W. Va. 253, 429 S.E.2d 903 (1993). (Per Curiam)

3. Cahill et al. v. Mercer County Bd. of Educ., No. 22808, December 13, 1995.

This was a selection or promotion case under W. Va. Code § 18A-4-8b(a)(now 18A-4-7a) involving three positions. The ALJ concluded the Board had adequately reevaluated the qualifications of the applicants , on remand, and had properly retained the three candidates originally selected for the positions, and the grievants had not proven by a preponderance of the evidence that they were better qualified than the successful applicants. The ALJ also

refused to give expert witness status to a witness, who was claimed to be an expert. The Circuit Court of McDowell County reversed. The Supreme Court reversed and remanded to the circuit court for specific findings on why the circuit court had concluded the ALJ's decision was clearly wrong. The Court also ruled that the ALJ's rulings on the expert witness and the adequacy of the reevaluation process were correct. (Per Curiam)

4. Copley v. Mingo County Bd. of Educ., No. 22877, filed Dec. 8, 1995.**

The Supreme Court concluded that "[a] board of education that in good faith hires an employee is not subject to civil action for damages for breach of contract by that employee when it is thereafter determined as a result of the grievance process established by West Virginia Code," 18-29-1 to 11 that another individual should have been placed in that position. The Court affirmed the lower court in part, but remanded the case to the lower court to consider the plaintiff's quantum meruit claim. The facts in the case were that Copley was told in the summer that he had been selected to fill a coaching position the next school year. Later, an ALJ granted the grievance of another employee who had applied for that coaching position. Copley sued the county board of education on a breach of oral contract claim. Much of the opinion discusses the law of judgments on the pleadings. There is a reference to intervention, and in footnote 14 the statement is made that the right to intervene includes the right of appeal pursuant to W. Va. Code § 18-29-7. The quantum meruit issue involves a claim that Copley performed service under his written contract for which he was never paid prior to the grievance decision. The Court noted that the importance of the written employment contract requirement. (Workman)

** Not a decision on appeal from a Grievance Board decision.

5. Cowen v. Harrison County Bd. of Educ., No. 22704, filed December 13, 1995.

The BOE decided to convert junior high schools to middle schools, but informed Grievants they would be eligible for the positions with Elementary Education 1-6 certification, and would not be required to obtain Elementary Educ. 6-8 certification. The BOE also implemented a teaching approach requiring teachers to teach seventh and eighth grade students. The position were posted as requiring the higher certification. All but one of the grievants stated they could have obtained the additional certification in about three weeks, by filling out a form without taking any additional courses. The ALJ denied the grievance, and the circuit court reversed, concluding that the certification requirement was arbitrary, that the BOE was estopped by its representations to impose the requirement, and ordered the positions reposted. The Supreme Court found the certification requirement was not arbitrary, but found the BOE's refusal to give Grievants time to obtain it was arbitrary and capricious. The Court expanded the Dillon rule, holding in Syllabus Point 2:

"County boards of education have substantial discretion in matters... involving curricular programs and qualifications and placement of personnel implementing those programs." The Court found it unnecessary to address the estoppel issue. Reposting was ordered by February 1, 1996. (Recht)

6. Hartman v. Bd. of Educ. County of Mineral, 460 S.E.2d 785 (1995).

Teacher challenged the BOE's elimination of an attendance incentive policy (AIP), under which any teacher with an attendance rate of 97.5% or better at the end of the school year would receive a bonus. The ALJ concluded the AIP was a BOE policy that did not become an element of the teacher's continuing contract and could be eliminated without adhering to the requirements of W. Va. Code § 18A-2-2. The Circuit Court reversed, finding the AIP became a part of the continuing contract and could not be eliminated without complying with § 2. The Supreme Court, in reversing the lower court and reinstating the ALJ's decision, ruled as followed: 1 A bonus established by a county board of education under the provisions of West Virginia Code § 18A-4-10a can become a part of the teachers' continuing contracts of employment in only two ways: (1) by operation of statutory law manifesting a specific intent that the bonus become an element of the teachers' contract; or (2) by negotiation and subsequent mutual agreement of the BOE and the teachers. (Fox)

2. There was no legislative intent that a bonus created in conformance with West Virginia Code § 18A-4-10a become, by operation of statutory law, an element of the teachers' continuing contracts of employment.

7. Martin v. Randolph County Bd. of Educ., No. 22680, filed Nov. 17, 1995.

This is an important case because the Court ruled on a number of recurring issues; this summary will not fully state the Court's rulings. The grievance was about alleged sex-based salary discrimination. The ALJ denied the grievance on alternative grounds, and the Circuit Court of Kanawha affirmed. The Supreme Court reversed in part and remanded for further findings and conclusions. The Court held that a salary disparity claim based upon a prohibited ground such as race or sex is a continuing violation that can be grieved at any time; that W. Va. Code § 18-29-2 (1992), allows an employee to contest a misclassification at any time, but, as with a salary dispute, any relief is limited to prospective relief and to back relief from and after fifteen days preceding the filing of the grievance; and, that interpretations of statutes by county boards of education should be given some deference by the Courts. The Court upheld the ALJ's credibility determination that the grievant had waived her default judgment claim under W. Va. Code § 18A-29-3(a)(1992), by agreeing that the hearing at level two could be delayed. The Court concluded that the term "respond" includes hearing, meaning that a default may be predicated on the failure to afford a hearing in the

time required by statute. (Cleckley)

9. Harrison County Bd. of Educ. v. Pamela Carson-Leggett, No. 22735, filed December 8, 1995.**

The Supreme Court, in reversing a Kanawha Circuit Court decision, ruled that a civil action filed under the West Virginia Human Rights Act is not precluded by a prior grievance decided by the Grievance Board arising out of the same facts and circumstances. The Court relied heavily on its prior decision in Vest v. Board of Educ. of Nicholas, 193 W. Va. 222, 455 S.E.2d 781 (1995), in which it held that because the Grievance Board does not have authority to determine liability under the West Virginia Human Rights Act, a Grievance Board decision has no preclusive effects on human rights act claims. (Per Curiam)

** Not a decision on appeal from a Grievance Board decision.

10. Ohio County Bd. of Educ. v. Hopkins, 457 S.E.2d 537 (1995)

Grievance Board decision that Grievant was entitled to position of Supervisor of Transportation reversed by Circuit Court of Ohio County. Supreme Court affirmed circuit court decision that Grievance Board decision was clearly wrong. The Supreme Court concluded that the successful applicant for posted Supervisor of Transportation position, a non-employee, was more qualified for the position than Grievant, a bus operator employed by the county board of education. Court applied Dillon "substantial discretion" standard, and interpreted W. Va. Code § 18A-4-8b to not give an employee absolute preference over a non-employee. Court also stated that "seniority alone is not the sole factor to be considered." County board had discretion to hire the most qualified person for the position, noting its decision in Cox v. Hampshire County Bd. of Educ., 355 S.E.2d 365 (1987), and the Court's emphasis that the management of a county school transportation system is for the welfare of the children. (Per Curiam)

11. Quintrell v. Lincoln County Bd. of Educ., No. 22796, filed Nov. 17, 1995.

Grievant, a school bus driver, alleged the board of education failed to post properly a notice of vacancy, as required by W. Va. Code § 18A-4-8b. The ALJ denied the grievance, the Circuit Court of Kanawha affirmed, and the Supreme Court affirmed, citing to Randolph County Bd. of Educ. v. Scalia, 182 W.Va. 289, 387 S.E.2d 524 (1989). The BOE posted a notice of vacancy at the central office and disseminated it to all schools, all BOE members, and the School Service Personnel Association. It was also mailed to several departments. Although there was evidence that such postings are ordinarily posted at the bus garage, the vacancy notice in this case was not so posted. Grievant alleged that because she was not aware of the vacancy she did not apply, and the evidence revealed that the successful applicant had less seniority than she. The ALJ found that the notice was posted in several locations, including some areas where Grievant had work duties, and

concluded that vacancy notices do not have to be posted at every work location. W. Va. Code, 18A-4-8b, requires vacancy notices be posted in "conspicuous working places" and not in any specified or particular working place. The Court concluded that the notice was posted in enough conspicuous places to meet the statutory requirement. (Per Curiam)

12. Surber v. Mingo County Bd. of Educ., No. 22915, Nov. 16, 1995.
Grievant filed a grievance contending she was more qualified for a Chapter One teacher's aide position than the successful applicant. The ALJ concluded that the BOE had violated W. Va. Code § 18A-5-8(d)(1988), by not hiring the grievant who was found to be better qualified for the position based upon her education and experience. The Circuit Court of Mingo County reversed, and without any explanation, concluded the ALJ's decision was "in error." The Supreme Court reversed the circuit court, and in affirming the ALJ's decision, cited the limited scope of judicial review announced in Syl. Pt. 1 of Randolph County Bd. of Educ. v. Scalia, 182 W. Va. 289, 387 S.E.2d 524 (1989). (Per Curiam)

13. Vest v. Nicholas County Bd. of Educ., 455 S.E.2d 781 (1995).** Certified questions from the United States District Court for the Southern District of West Virginia: 1. Does the Grievance Board have subject matter jurisdiction over claims alleging discrimination because of gender-based discrimination? 2. If so, is a civil action filed pursuant to the WV Human Rights Act precluded by a prior grievance proceeding involving the same parties and arising out of the same facts and circumstances, but which did not result in any findings of fact or conclusions of law regarding the discrimination claim? The Court answered the first certified question in the affirmative, stating, "[t]he Grievance Board does not have authority to determine liability under the Human Rights Act, W. Va. Code, 5-11-1, et seq.; nevertheless, the Grievance Board's authority to provide relief to employees for 'discrimination,' 'favoritism,' and 'harassment,' as those terms are defined in W. Va. Code, 18-29-2 (1992), includes jurisdiction to remedy discrimination that also would violate the Human Rights Act." The Court answered the second certified question in the negative, stating, "[t]he grievance procedures and the Human Rights Act provide enforcement mechanisms to accomplish different legislative purposes and neither preempts the other." (Cleckley)
** Not a decision on appeal from a Grievance Board decision.

14. W. Va. Dept. of Health and Human Serv./Div. of Human Serv. v. Watts, No. 22655, filed Dec. 8, 1995.
Grievants, Watts and McComas, alleged they were misclassified as SSWIs and should be reclassified as SSWIIs. The ALJ granted the grievance, in part, for a period prior to 1984. On appeal, Grievants sought back pay for a period after 1984. The Circuit Court of Cabell County reversed finding Grievants were entitled to the relief sought, and on appeal the Supreme Court affirmed the lower court's ruling. The key issue in the case involved the word

"generic," contained in the class specification for an SSWII, i.e., "[p]ositions providing generic social services are also allocated to this class." The circuit court concluded that the term generic must be given its common and ordinary meaning, and based on the evidence, Grievants were entitled to prevail. The Supreme Court concluded that the term "generic" was not ambiguous, and hence the ALJ had committed an error of law in giving it the special or unique meaning attributed to that term by the Division of Personnel. Because the issue presented a question of law, rather than fact, the standard of judicial review was de novo. (Per Curiam)