

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

ELEVENTH ANNUAL REPORT

TO THE

GOVERNOR AND THE LEGISLATURE

FOR CALENDAR YEAR 1996



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

JAMES PAUL GEARY
Chair

DAVID L. WHITE
Member

RONALD WRIGHT
Director

CECIL H. UNDERWOOD
Governor

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

THE HONORABLE CECIL H. UNDERWOOD
Governor, State of West Virginia
and
MEMBERS OF THE LEGISLATURE

Dear Governor and Members of the Legislature:

It is my honor and privilege to submit the Eleventh Annual Report of the West Virginia Education and State Employees Grievance Board for calendar year 1996.

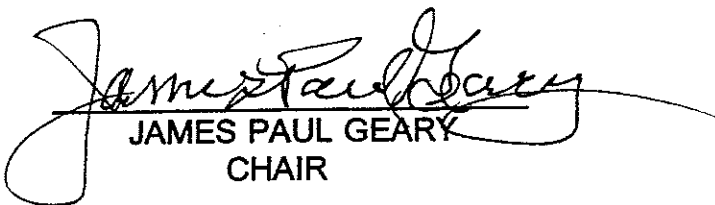

JAMES PAUL GEARY
CHAIR

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History, Basic Facts and Mission

The Legislature created the West Virginia Education Employees Grievance Board in 1985, and charged it with the duty of administering the fourth level of a grievance procedure thereby established for educational employees. W. Va. Code §§ 18-29-1, et seq. The aims of this innovative law were to maintain good morale, enhance job performance, and improve the educational system to better serve the citizens of this State. The law established a procedure that was intended to provide a simple, expeditious and fair process to resolve grievances at the lowest possible administrative level.

In 1988, the Legislature enlarged the Grievance Board's jurisdiction by enacting a Grievance Procedure for State Employees and changed the agency's name to the West Virginia Education and State Employees Grievance Board. W. Va. Code §§ 29-6A-1, et seq. This legislation covers most state employees.¹

Both grievance procedure laws contain a broad definition of what can be grieved, permitting employees to grieve about any employer action affecting their compensation, hours, terms, and conditions of employment, including allegations of discrimination, favoritism and harassment. W. Va. Code §§ 18-29-2(a)(1985) & 29-6A-2(l)(1988).² For example, the Board exercises jurisdiction over claims based upon alleged violations or

¹ Employees of constitutional officers are not covered, unless they are in the classified service, and apparently none of these employees are in the classified service. Employees of the Legislature and uniformed members of the State Police are also expressly excluded.

² Pension, retirement and medical insurance matters, however, are expressly excluded, and are therefore not grievable.

misinterpretations of federal and state wage hour laws, as well as claims that may also be filed under the West Virginia Human Rights Act.

West Virginia's two grievance procedure laws cover approximately sixty-four thousand, nine hundred four (64,904) public employees. The grievance procedure for educational employees covers about forty-four thousand two hundred (44,200) professional and service employees. The West Virginia Division of Personnel recently reported that the state employee grievance procedure is available to approximately nineteen thousand six hundred nine (19,609) state employees, not counting some six hundred forty (640) state employees who work for the State Department of Education. 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., 192 W. Va. 202, 451 S.E.2d 768 (1994). The Division of Personnel also advised that local health departments employ about one thousand ninety-five (1,095) people.

Because the Board's jurisdiction was increased substantially in 1988 by the legislation providing coverage to most State employees, the number of Administrative Law Judges (hereinafter "ALJs")³ was increased from four to six in 1988, and a Director,

³ The Board employs full-time attorneys to hear and decide grievances which reach Level Four of the grievance procedure. The Board requires its ALJs to be licensed to practice law in West Virginia, and they are not permitted to have an outside law practice. These attorneys are designated as "hearing examiners" in the grievance procedure statutes, but in recognition of the nature of their duties and responsibilities, the Board refers to them as Administrative Law Judges (ALJs).

who also serves as an ALJ and a mediator, was employed in 1989.⁴ 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. These higher education grievances are commonly referred to as the "Mercer" grievances, a label taken from the name of the human resources consulting firm, William M. Mercer, Inc., which, in cooperation with the higher education governing boards, developed a new classification and compensation system for classified higher education employees. Two additional ALJs and a Secretary were hired in November 1995 to work on these higher education grievances, and a Morgantown office was opened in December 1995.

The Board presently employs seventeen (17) people in a flat organizational structure. See Appendix A. The Director, an Administrative Officer, five ALJs and a Secretary⁵ are assigned to the Charleston office; two ALJs and a Secretary are based in the Morgantown office; one ALJ and a Secretary are assigned to each of the three remaining branch offices located in Beckley, Elkins and Wheeling.

⁴ 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.

⁵ The Department of Administration eliminated a secretarial position in the Charleston office to assist in meeting its staffing reduction goals. As a consequence, the Director and the ALJs in the Charleston office must perform much of their own clerical work.

The Board, in accordance with the Administrative Procedures Act, adopted new Procedural Rules, effective February 1, 1996, governing the practice and procedure for handling grievances at Level Four, pursuant to the authority granted it under W. Va. Code §§ 18-29-5(a) & 29-6A-5(a). These Rules are codified at 156 Code of State Regulations 1 (156 C.S.R. 1).

The Board's **mission statement**, based upon its statutory purpose, is: To equitably and consistently resolve employment disputes involving employees of county boards of education, higher education institutions, and state agencies in order that good morale may be maintained, effective job performance may be enhanced and the citizens of this state may be better served.

Annual Open Meeting

The Board, after proper notice, conducted its annual open meeting in Charleston on January 29, 1997, 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, along with 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 1996, 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 about seven hundred twenty (720) notices of the open meeting.

Six grievance participants testified during the public hearing about their experiences with the grievance process, both at Level Four and at the lower levels. As

in prior years, most of the testimony was critical in nature. Twenty-eight (28) written comments were received. Twenty grievants whose cases were decided in 1996 submitted written comments. Two union representatives filed comments, as did three employers and one lawyer who represents school boards.

The Director of the West Virginia Division of Personnel and the Acting Chairperson of the State Personnel Board also filed comments. Personnel made several suggestions for legislative action, a number of which are "clean up" amendments to the grievance procedure statute for state employees. In the interest of brevity, those written comments are attached as Appendix B. The State Personnel Board noted its strong objection to a 1996 decision ordering the creation of a new job classification.

Although a few written comments were favorable, most comments, as in prior years, were negative in nature. Much of the testimony and written comments were directed at the lower levels of the grievance procedure over which the Board has little or no control. Unlike most prior years, delay in the processing of grievances at every level of the procedure, including Level Four, was not the most frequent criticism this year or last year. Although it is difficult to put the testimony and comments into precise categories, easily the most frequent complaint, as was the case last year, concerned ALJs being biased against employees or ruling unfairly or incorrectly in favor of employers. The second and third most frequent complaints were that the grievance process had become too formal and legalistic, and that ALJs were too slow in rendering their decisions.

Another common theme in the testimony and comments was that the lower levels

are a waste of time, and cases should be permitted to go directly to Level Four. Again this year, a few grievants expressed the opinion that the process is unfair because management is almost always represented by an attorney.⁶ Other complaints or concerns included: employees cannot afford counsel like employers; back pay is limited in misclassification grievances; ALJs should be authorized to dismiss cases and assess costs against employees who file frivolous grievances; employees must adhere to the time limits on filing grievances or their cases may be dismissed, but employers, who frequently do not comply with the time frames, suffer no penalty.

Because of its role as the neutral third party, the Board is constrained to limit its comments to simply reporting the suggestions, comments and criticism received through the annual public meeting process.

1996 Adjudication Data in Non-Mercer Cases and Major Activities

The number of grievances reaching Level Four has remained relatively constant for the last several years, with the exception of 1994 when classified higher education employees filed five hundred forty-six (546) grievances challenging their classification and/or pay grade after the Mercer Project was implemented.⁷ Although the number of

⁶ A review of decisions rendered in 1996 revealed that grievants represented themselves in only fifteen percent (15%) of the cases, and they prevailed in about ten percent (10%) of those cases.

⁷ A detailed breakdown of grievance activity for the last five years is contained in Appendices C and D. Appendix C shows the number of grievances filed at Level Four against higher education institutions and county boards of education in calendar years 1996, 1995, 1994, 1993 and 1992. Appendix D is an alphabetical listing by state agency showing the number of grievances filed at Level Four during the same five calendar years.

grievances filed with the Board in 1996 decreased from last year, grievance activity was similar to calendar years 1993 and 1992. Much of the decline in 1996 was due to a decrease in the number of State employee grievances reaching level four.⁸ Over half of that decline was due to reclassification grievances which declined from 65 in 1995 to 30 in 1996. The table below shows the number of cases reaching the Grievance Board during the last five years, not counting the Mercer cases that were all filed in 1994.

	<u>1996</u>	<u>1995</u>	<u>1994</u>	<u>1993</u>	<u>1992</u>
State	200	265	276	252	217
Higher Education	57	38	57	48	30
County Boards of Educ.	<u>277</u>	<u>283</u>	<u>277</u>	<u>243</u>	<u>261</u>
Totals	534	586	610	543	508

The Board issued two hundred ninety-seven (297) written decisions and disposed of another two hundred three (203) cases by dismissal or remand orders.⁹ These dispositional figures do not include Mercer cases which will be discussed separately later in this Report. Despite turnover in ALJ positions and the unprecedented demands placed on the agency by the Mercer litigation, cases were processed almost as quickly

⁸ The number of grievances filed at Level Four represents less than one percent (1%) of all public employees who have the right to invoke the grievance procedure.

⁹ Dismissal orders are often entered when grievances have been prematurely appealed to Level Four without a required lower level hearing having been held, or when cases are settled and the grievant requests the grievance be dismissed. Occasionally, however, these rulings involve complicated procedural or substantive issues.

as in 1995, a year when cases were heard and decided much more quickly than ever before. In 1996, the average disposition time for mature¹⁰ cases was about forty-four (44) working days, compared to thirty-nine (39) working days in 1995, and sixty-seven (67) in 1994. In 1996 thirty-eight percent (38%) of all decisions were rendered within thirty (30) working days after the case was mature for decision, compared to forty percent (40%) in 1995, and only seventeen percent (17%) in 1994. Furthermore, in dismissal cases, forty-one percent (41%) of decisions were issued within thirty (30) working days after the maturity date, compared to sixty percent (60%) in 1995, and only twelve percent (12%) in 1994.¹¹

Seventy-three (73) decisions issued in 1996 were appealed to circuit court, a percentage of about twenty-two percent (22%). This compares with a appeal rate of seventeen percent (17%) in 1995, twenty percent (20%) in 1994, twenty-six percent (26%) in 1993, and twenty-eight percent (28%) in 1992. Ten of these appeals were in Mercer cases in which the appeal rate is about twenty-four percent (24%).

¹⁰ 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 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).

¹¹ 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. In the two hundred ninety-seven (297) cases in which a written decision was rendered in 1996, the average total processing time was about one hundred forty-five (145) working days, compared with one hundred thirty-six (136) working days in 1995, the Board's best year ever, and one hundred fifty-four (154) days in 1994. It took an average of about one hundred one (101) working days for these cases to become mature for decision.

The percentage of grievances granted in cases decided this year was also quite similar to prior years. The Board ruled in favor of the employee in approximately twenty-six percent (26%) of the grievances, compared to twenty-four percent (24%) in 1995 and twenty-seven percent (27%) in 1994.¹² A breakdown by category of employees is listed below:

	<u>Granted</u>	<u>Denied</u>
County Boards of Education:	31%	69%
State:	18%	82%
Higher Education:	22%	78%

The Board gives decision making priority to dismissal cases. The Board received sixty-one (61) dismissal cases in 1996 compared to seventy-three (73) last year, fifty-one (51) the year before and fifty-seven (57) in 1993. ALJs rendered decisions in twenty-one (21) of these cases, overturning the dismissals in six cases. The Board also received thirty-eight (38) suspension grievances, compared to thirty-nine (39) last year and twenty-nine (29) the year before. Eighteen (18) suspension cases were decided, with five of the suspensions being overturned. By Order, the Board disposed of an additional thirty-one (31) dismissal cases and nineteen (19) suspension cases, due to such factors as settlements, withdrawals and the like.

Seven hundred eighty-nine (789) hearings were scheduled, compared to nine

¹² Cases were counted as granted in this Report, if the grievance was granted in some part.

hundred eighty-eight (988) in 1995 and seven hundred twenty-five (725) in 1994. Three hundred and three (303) hearings were conducted, down from three hundred eighty-six (386) in 1995, and compared to two hundred sixty-eight (268) hearings in 1994.

Fifty-three (53) cases that were submitted for decision on the record made at the lower levels of the grievance procedure, without a hearing at Level Four, were decided in 1996. These cases were decided on the average within thirty-one (31) working days after the cases became mature for decision. This compares with seventy-three (73) such cases decided in 1995, with an average disposition time of twenty-seven (27) working days.

The Board's secretarial staff assembled and transmitted eighty-two (82) certified records, many of which were voluminous, to circuit courts in 1996. This was more than in any previous year. For example, sixty-six (66) certified records were prepared and delivered to circuit clerk's offices in 1995, compared to sixty (60) in 1994. The secretarial staff typed 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 circuit court Order requiring the Board to submit a certified copy of the record.¹³

It must be noted that the Board does not comply with its statutory duty under

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.

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 but are not ordinarily transcribed, unless the case is appealed to circuit court. ALJs thus must listen to audio tapes in most cases to draft their decisions.¹⁴ The Board, however, has equipped each office with a high-speed tape duplicating machine and provides audiotapes of the hearings, in lieu of a transcript, to any party upon request.

The Board, however, recently entered into an open-ended statewide contract for transcription services with a court-reporting company. The transcription contract provides that the transcription service will pick up the audio-tapes of the hearing and provide the Board with a certified transcript, both in paper and electronic form, within a certain number of days. The Board must pay ninety-two (92) cents a page for the original transcript, and any party to the grievance can obtain a copy of the transcript from the transcription service for fifty (50) cents a page. The Board has only used the transcription service to obtain transcripts in Mercer cases thus far.

The Board's staff created an electronic database, called Boardlaw, that contains case summaries and pertinent information on more than three thousand ninety (3,090)

¹⁴ 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 employer) would agree to employ a court reporter to prepare a transcript for the ALJ and the parties. On numerous occasions in 1996 and 1995, however, the ALJs transported recording equipment to hearing sites and magnetically recorded the hearing, thereby eliminating the need for a court reporter and reducing litigation costs to the parties.

decisions issued since 1985. The database is updated monthly with a summary of all decisions rendered the previous month, and is distributed on disks each month to thirty-seven (37) subscribers, up from twenty-six (26) in 1995 and fourteen (14) in 1994. The Board achieved its 1996 goal of increasing the number of subscribers by ten percent (10%), and believes the number of subscribers will continue to grow.

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, and helps to ensure consistent decisions. The Board's staff redesigned the database recently to make it easier to use and to provide more useful reports.

The Board is required by W. Va. Code § 18-29-11 (1992) to provide a statewide quarterly report to inform the members of both higher education governing boards and all county boards of education and employee organizations of current personnel-related issues. Rather than issue a quarterly report, the Board distributes the report on a monthly basis, providing information about all decisions rendered during the previous month. One hundred copies of this report are distributed each month. The report was recently revised to make it more informative and useful. The report now contains case topics and key words to assist subscribers in finding the information they need.

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 been providing the full text of its decisions to Technet since January 1994, in an effort 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 subscribe to this service. The full text of over one thousand (1000) decisions is now available and can be downloaded from Technet.

In 1996, the Board replaced some of the old equipment in all of its offices to provide its employees with the tools they needed to more efficiently and effectively perform their duties. The Board has also significantly improved the legal research capabilities of all offices by providing each office with Michie's West Virginia Law on CD-ROM. Two offices now have Internet research capability, and the remaining offices will have that ability in the near future. The Board has initiated a project to put its written decisions on the Internet, in an effort to make the decisions readily available to all interested persons.

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 implement a system establishing uniform classifications in all institutions of higher education within West Virginia. This reclassification is commonly called the "Mercer" project.¹⁵

¹⁵ As noted earlier, the name was derived from the name of the company which assisted higher education in developing the classification system, William M. Mercer, Inc.

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 Legislative Rules promulgated by the governing boards set forth identical procedures for a classified employee to seek review of the 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 the initial classification, the case then commenced at Level Three of the grievance procedure for educational employees.

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 advanced to Level Four at that time.

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 three additional ALJs and a Secretary to process these cases. Otherwise, the Mercer cases would have totally obstructed the proper and timely processing of its normal caseload. With the additional appropriation for FY 1995-1996, the Board has, as noted earlier, added three ALJs and a Secretary and opened a Morgantown office.

Morgantown was selected as the location for a new hearing office, primarily because approximately half of the Mercer grievances were filed by higher education employees who worked on the Morgantown campus of West Virginia University. That office was opened in December 1995, and it has been well received by everyone involved in the grievance process. Many grievance hearings, both Mercer and non-Mercer, that otherwise would have been conducted in Elkins, have been held there. From a cost-benefit analysis standpoint, this office may well pay for itself, in terms of reduced expenses associated with the grievance process. For example, in the past, grievance hearings in cases filed by West Virginia University employees were either held in Morgantown, with the university paying the costs of a court reporter, or were held in Elkins and electronically recorded. Hence, the Morgantown office saves the university a court reporter fee or travel expenses. Lost employee work hours are also reduced. Other public employers have also expressed a preference for holding hearings in Morgantown for similar reasons.

The Board will not undertake to present in this Annual Report a comprehensive discussion concerning the processing of Mercer cases. Only a few major points will be noted. The Board believes its staff has done a commendable job in handling the unprecedented and formidable challenge presented by the Mercer cases. The Board is

also of the opinion that the Mercer cases could not have been scheduled and heard more quickly than they were.

The Board experienced much more difficulty in processing these cases than other types of cases for several, often interrelated reasons. A major part of the difficulty was simply that the Board's ALJs, and about everyone else, were dealing with an entirely new and rather complicated classification and compensation system. It took the parties a long time to get prepared to present and defend these grievances, and employees believed they needed a certain amount of discovery before they could properly proceed to hearing. And, of course, no lower level grievance hearings were held in any of these cases, unlike most cases that reach the Grievance Board.

Scheduling and logistical difficulties were common, primarily because the governing boards initially had only two attorneys to appear and defend the claims, and they had only a very limited number of knowledgeable human resource personnel available to testify in defense of the claims. The Board was, therefore, limited in both the number of hearings it could schedule each month, and in scheduling multiple hearings on the same date at different locations.

Hearings in the Mercer cases lasted much longer than hearings in other types of grievances. Hearings frequently lasted several days, and the hearings had to be scheduled over a period of weeks and months. One Mercer case alone produced thirty-one (31) ninety minute audio tapes, equaling approximately forty-seven (47) hours of testimony. As of the end of January, Mercer hearings had consumed well over two hundred fifty-four (254) ninety minute tapes, totalling about three hundred eighty-one

(381) hours of testimony.

The Board's plan for processing these cases in an effective and efficient manner included several basic elements. One of the key steps was to consolidate those Mercer cases which appeared to present common questions of law and/or fact and then hear and decide a few of these consolidated cases. The Board had to create a database in order to analyze the cases for consolidation and related purposes. Another component of the plan was to issue very detailed decisions in the first few cases to serve both as precedent and as a format for future opinions. The ALJs also encouraged or required the parties to file written, pre-filed testimony to minimize the length of hearings and to assist the parties in being better prepared for hearing. This was a useful technique that the Board had never employed before in other cases.

During this initial processing period, the Board considered and rejected a two-phase proposal for hearing and deciding the cases. The Board also ordered the taking of evidentiary depositions upon motion of Mercer grievants in order for them and their counsel to learn more about the Mercer classification system. The governing boards unsuccessfully challenged this discovery ruling in circuit court, and the Supreme Court of Appeals refused their appeal.

As of February 18, 1997, the Board had completed the hearings in a large percentage of the Mercer cases. Most of the cases that had not yet been heard had been scheduled for hearing and continued upon request of the parties. Several cases were being held in abeyance to allow the parties time to work out possible settlements of the matters in dispute.

The Board's goal for 1996 was to complete seventy-five (75%) percent of the Mercer cases by December 31, 1996. The Board nearly achieved that important aim, and by February 18, 1997, the ALJs had issued fifty-seven (57) lengthy Mercer decisions, directly affecting one hundred seventy-one (171) higher education employees. The Board ruled in favor of the employees in five of those cases and awarded back pay to January 1994, and in seven other cases the grievance was granted, in part. The remainder of the cases were denied, except for one case that was dismissed. One hundred forty-two (142) Dismissal Orders had also been issued, directly affecting two hundred forty-two (242) other higher education employees.¹⁶ By February 18, the Board had thus completed processing the cases of about seventy-six percent (76%) of all the Mercer grievants. The Board should complete the remaining Mercer cases within the next few months.

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. The Board recommended in that report that the grievance procedure laws be

¹⁶ Dismissal Orders were entered for several reasons, including many cases in which employees decided not to pursue their grievances, but did not notify the Board until shortly before the scheduled hearing.

revised to give ALJs the authority to compel the parties to participate in settlement conferences. Under current law, ALJs can conduct settlement conferences only with the consent of the parties. W. Va. Code §§ 18-29-6 & 29-6A-6.

The Board continued to offer mediation services in 1996 in every case in which a hearing is requested. 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, of course, involves a trained, impartial third party¹⁷ 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 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.

Five mediation sessions were conducted in 1996, one more than last year, and all five cases were eventually settled and then dismissed from the docket. Although mediation services were only provided in a small number of cases, the Board continues

¹⁷ All but the three most recently hired ALJs have received either one or two days of intensive mediation training sponsored by the United States District Court for the Northern District of West Virginia and/or the West Virginia State Bar.

to believe 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.¹⁸ No negative consequences have been experienced by the Board's utilization of mediation.

The ALJs have agreed upon two initiatives for 1997. The first initiative is to do more to encourage the use of mediation. The second one is to conduct more prehearing conferences to achieve the same purposes for which mediation is used.

Evaluation of Level Four and ALJ Performance

The Board is generally satisfied with the functioning of the grievance process at Level Four and the performance of its ALJs during 1996. Although the Board did not meet its goals of issuing more decisions in non-Mercer cases, and issuing them more quickly than in 1995, this result was not totally unexpected. In the Annual Report last year, the Board stated that making these additional improvements in its adjudication services would be extremely difficult to achieve in 1996, given the increased workload

¹⁸ 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 respective needs.

related to the Mercer grievances and significant improvements made in 1995 and 1994. The two most important negative factors were turnover in three ALJ positions, combined with a need to assign an additional ALJ to work exclusively on Mercer cases, rather than other types of cases.¹⁹ Turnover in ALJ positions and hiring difficulties adversely affected the agency's overall performance this year.

The Board believes its ALJs have maintained the neutral and impartial role envisioned by the Legislature and are providing fair hearings and issuing high quality decisions. One of the perennial complaints has been that the Board rules too frequently in favor of the employer. The Board remains convinced 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, absent legal error, unless he can prove the employer's decision was arbitrary and capricious or there was a significant flaw in the selection process.

Second, as stated in several previous annual reports, 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

¹⁹ Turnover in ALJs is related to the inadequate and uncompetitive compensation authorized for persons holding these positions.

be made with regard to such percentages for several reasons. One important reason is 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. As a result, legally marginal cases or grievances that may be difficult or impossible to prove are screened out and not pursued to arbitration.

The high percentage of decisions affirmed by the Courts is an excellent indicator that the ALJs are properly applying the law to the assorted factual situations presented and are rendering legally sound and fair decisions. Although it is difficult to determine the outcome of appeals due to the inconsistent and sporadic manner in which the Board is informed of the circuit court decisions, the Board estimates that circuit courts have affirmed the ALJs at least eighty percent (80%) of the time based upon the available information.²⁰ Grievance Board decisions have also fared well in the Supreme Court of Appeals of West Virginia, which has affirmed the ALJs in about seventy-five percent (75%) of the sixty-five (65) cases it has decided on appeal from Board rulings. Appendix E contains a brief summary of five opinions rendered by the Supreme Court of Appeals in 1996, four of which affirmed the ALJ's ruling.

²⁰ There is no provision in either the education or the state employees grievance procedure statute requiring the parties or the circuit court to notify the Board of the decision on appeal. Although parties are asked to provide the Board with a copy of the circuit court's decision, this has not proven to be a reliable way to obtain this information.

ALJs now advise the parties how they are inclined to rule at the conclusion of the hearing, where they feel 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 former Governor Gaston Caperton. See Report of Blue Ribbon Personnel Commission (1992).

The Board continues to be concerned about unnecessary delay in the processing of grievances at the lower levels. The Board has limited information available to it about that issue, and only limited options to address delay problems at the lower levels. The Board's statutory responsibility is to administer the grievance process at Level Four, and accordingly, it has directed its efforts primarily to problems at that level.

The Board will continue to focus its efforts on unreasonable delays²¹ at Level Four, and particularly unreasonable delay by its ALJs in issuing decisions after the cases are ready to be decided. The Board will continue to track the processing of grievances, keep detailed information about decisional delay, and consider such information to be

²¹ 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.

a critical factor in evaluating the performance of its ALJs.

The Board remains committed to improving Level Four of the grievance process. The Board will continue to strive to meet its important statutory duties and responsibilities, and to improve the quality of the adjudication services and all other services and products it provides.

Fiscal Summary

The Board's was appropriated \$997,016 for FY 1995-96, and its actual expenditures were \$910,796. The Board's appropriation for FY 1996-97 was increased to \$1,005,836. The Board does not charge for any of its services and generates no revenue.

Recommendations

First, the Board is of the opinion that the Legislature should consider revising the grievance procedure laws to help insure its neutrality. The Board's role is that of a neutral and impartial third party to resolve employment disputes. 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. For example, the Board must hear and decide grievances filed by employees who work for agencies that are within the Department of Administration. Some of these cases involve personnel decisions made by the Secretary of this Department, who has substantial control over the Board budget.

The Board's view is that from a structural or organization standpoint, it should be

in a more autonomous position. Consequently, the Board recommends that Chapter 5F of the West Virginia Code be amended to take the Board out of the Department of Administration, and perhaps put it under the auspices of the Governor's office. It should be made clear, however, that no attempt has been made by anyone in authority to exert any influence or to exact any retribution from the Board or its ALJs for rulings that have been made.

The Board also recommends the Legislature increase the salaries of all its ALJs to at least \$45,000 to permit it to recruit and retain well qualified and competent attorneys. As noted in previous annual reports, experience has demonstrated that most experienced lawyers will not consider full-time ALJ positions at the current salary levels. Turnover is particularly troublesome because of the time required to recruit and train new ALJs who do not ordinarily reach full performance level for several months. Clearly, the lack of adequate compensation for these positions is the most significant negative factor affecting the Board's ability to process public employee grievances in an effective and efficient manner.

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. The existence of this procedure assists in preventing costly litigation involving current and former employees.

The Board, through its decisions, has established 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.

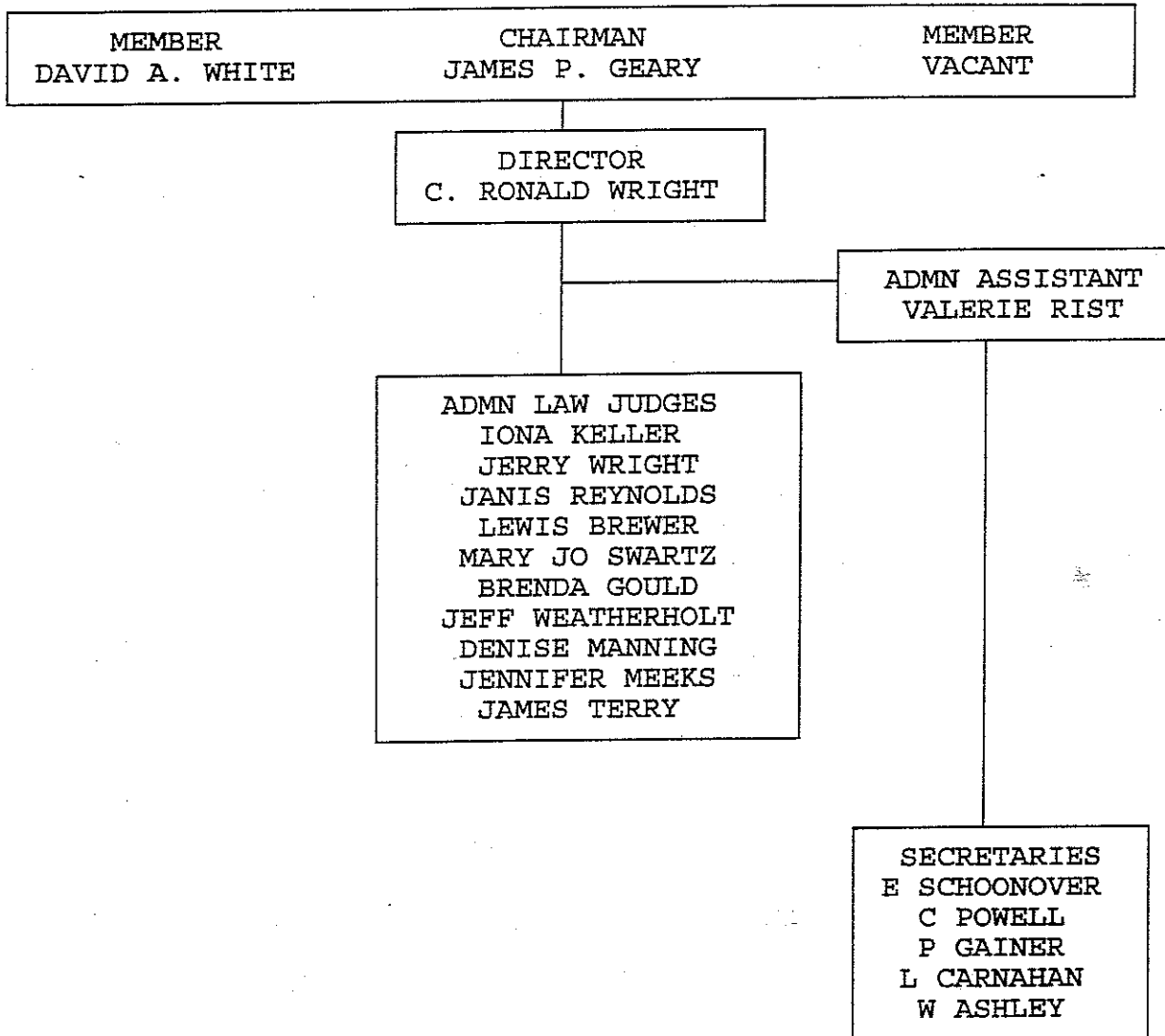
In conclusion, the Board would like to take this opportunity to express its appreciation to the Legislature and the Caperton administration for the support and assistance they have provided this agency, especially during the last three years.

The West Virginia Education and State Employees Grievance Board therefore respectfully submits its Eleventh Annual Report to Governor Cecil H. Underwood and the Legislature.

Appendix A

ORGANIZATIONAL CHART

WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD





Gaston Caperton
Governor

STATE OF WEST VIRGINIA
DEPARTMENT OF ADMINISTRATION
DIVISION OF PERSONNEL

STATE PERSONNEL
BOARD

John A. Canfield, Chairman
Rev. Paul J. Gilmer, Member
Sharon H. Lynch, Member
Robert M. Wright, Member
Hilbert S. Thompson, Member

BG (Ret) Robert L. Stephens, Jr.
Director

January 24, 1997

RECEIVED

JAN 27 1997

Ronald Wright, Director
Education and State Employees
Grievance Board
808 Greenbrier Street
Charleston, WV 25311

W.Va. Education & State
Emp. Grievance Board

Dear Mr. Wright:

In response to your December 23, 1996, notice, the Division of Personnel respectfully submits the following comments regarding the grievance process. We would appreciate your consideration of our comments in the context of your annual evaluation of the process.

- W. Va. Code § 29-6A-4(d)(1) provides for the grievant, only, to appeal to level four the level three decision of the agency head or designee. Consequently, the Division of Personnel is virtually powerless to prevent implementation of relief awarded at level three which is, for any number of reasons, clearly wrong.

We suggest amending § 29-6A-4(d)(1) to provide the State Personnel Board with standing to appeal a level three decision to level four. This right to appeal is consistent with the Supreme Court of Appeals' ruling in Joyce Triggs v. Berkeley County Board of Education 188 W.Va. 435, 425 S.E.2d 111 (April 2, 1992). Though Code § 18-29-1 et seq. does not vest any party other than the grievant with standing to appeal a grievance decision at level two, the Triggs Court found, in pertinent part, that "... a county board of education or its superintendent may appeal a grievance decision made by the superintendent's designee at level two. . . ." Syl. Pt. 2. The Court found this interpretation to be consistent with the statute's intent to provide a simple, expeditious and fair process for resolving problems. Such an amendment would be in harmony with § 29-6A-1, which states, in pertinent part, that "[t]he purpose of this [grievance procedure] is to provide a procedure for the equitable and consistent resolution of employment grievances. . . ." The unfortunate alternative is potentially protracted litigation of mandamus actions and writs of prohibition.

Ronald Wright
January 24, 1997
Page 2

- W. Va. Code § 29-6A-6, Hearings Generally, refers to "[l]evel one, level two and level three hearings." This language conflicts with § 29-6A-4(a), which refers to a level one "informal conference" and with § 29-6A-4(b), which refers to a level two "conference." The wording of § 29-6A-6 implies that the statute requires a full evidentiary hearing at levels one and two (as described in § 29-6A-6).

We suggest amending § 29-6A-6, by deleting references to levels one and two.

- Code § 29-6A-6 provides that "[t]he employer that is party to the grievance shall produce prior to such hearing any documents, not privileged, and which are relevant to the subject matter involved in the pending grievance, that have been requested by the grievant, in writing." This provision arms the grievant with a broad form of discovery which is not provided the employer or third party (e.g. State Personnel Board).

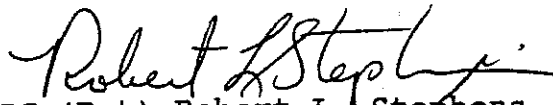
We suggest amending § 29-6A-6 to arm the employer and any third party with the same power of discovery provided the grievant.

- Code § 29-6A-1 et seq. makes reference to the Civil Service Commission which was abolished and replaced by the State Personnel Board, effective July 1, 1989. These inappropriate references appear in §§ 29-6A-4(c), 29-6A-4(d)(1), 29-6A-4(e), 29-6A-5(a) and 29-6A-7.

We suggest amending Code § 29-6A-1 et seq. to substitute State Personnel Board for Civil Service Commission in the above-cited sections.

We would also like to take this opportunity to compliment your agency on its responsiveness and professionalism. Please let me know if you have any questions.

Sincerely,



BG (Ret) Robert L. Stephens, Jr.
Director
WV Division of Personnel

BG(Ret)RLSjr:SF

cc: Chuck Polan
Assistant Directors

APPENDIX C

GRIEVANCES FILED AT LEVEL FOUR AGAINST GOVERNING BOARDS OF

HIGHER EDUCATION AND COUNTY BOARDS OF EDUCATION

CALENDAR YEAR 1996 THROUGH 1992

Board of Directors:

	<u>1996</u>	<u>1995</u>	<u>1994</u>	<u>1993</u>	<u>1992</u>
Bluefield State College	1	0	1	6	2
College of Graduate Studies	1	0	0	3	0
Concord State College	2	2	4	0	2
Fairmont State College	2	1	0	3	3
Glenville State	0	1	2	0	0
Potomac State College	1	0	1	0	1
Shepherd College	4	3	6	7	2
West Liberty State College	3	5	0	5	1
W. Va. Institute of Technology	0	0	4	1	2
W. Va. Northern Community Coll.	3	2	4	1	2
W. Va. Southern Community Coll.	2	2	1	2	1
W. Va. State College	2	4	3	2	1

Board of Trustees:

Marshall University	6	5	11	10	4
W. Va. Graduate College	1	0	0	0	0

W. Va. University	27	13	19	8	8
W. Va. University Hospitals	0	0	0	0	1
W. Va. University/Charleston	0	0	0	0	0
W. Va. School of Osteopathic Med.	<u>1</u>	<u>0</u>	<u>1</u>	<u>0</u>	<u>0</u>
	<u>56</u>	<u>38</u>	<u>57</u>	<u>48</u>	<u>30</u>

County Boards of Education:

Barbour County Board	2	3	12	5	3
Berkeley County Board	5	1	3	2	2
Boone County Board	5	10	4	7	1
Braxton County Board	1	1	0	1	2
Brooke County Board	3	4	2	7	7
Cabell County Board	9	9	4	7	11
Calhoun County Board	0	0	0	0	1
Clay County Board	1	0	0	0	1
Doddridge County Board	0	0	0	0	0
Fayette County Board	8	5	4	9	4
Gilmer County Board	0	4	0	1	2
Grant County Board	2	2	1	0	1
Greenbrier County Board	7	5	3	0	1
Hampshire County Board	1	1	0	2	2
Hancock County Board	11	10	15	16	6
Hardy County Board	1	1	0	0	2

Harrison County Board	5	4	1	1	1
Jackson County Board	2	3	1	1	1
Jefferson County Board	2	3	1	2	2
Kanawha County Board	19	17	33	25	28
Lewis County Board	3	0	0	4	6
Lincoln County Board	7	9	9	15	10
Logan County Board	15	21	12	13	12
Marion County Board	5	5	7	22	10
Marshall County Board	0	0	0	5	2
Mason County Board	9	7	19	8	4
McDowell County Board	5	7	4	6	10
Mercer County Board	3	8	25	8	16
Mineral County Board	2	3	2	6	5
Mingo County Board	49	67	20	16	12
Monongalia County Board	8	4	10	5	10
Monroe County Board	6	5	4	1	9
Morgan County Board	4	1	1	2	2
Nicholas County Board	3	2	0	4	2
Ohio County Board	3	3	1	4	5
Pendleton County Board	0	4	1	2	1
Pocahontas County Board	0	0	0	1	1
Preston County Board	0	4	3	2	4

Putnam County Board	3	4	4	4	4
Raleigh County Board	12	9	29	4	9
Randolph County Board	7	4	6	2	2
Ritchie County Board	1	0	0	1	0
Roane County Board	0	0	0	2	0
Summers County Board	6	5	8	3	9
Taylor County Board	1	2	0	0	0
Tucker County Board	3	0	2	0	4
Tyler County Board	3	0	2	3	1
Upshur County Board	2	1	2	0	0
Wayne County Board	5	4	3	2	4
Webster County Board	4	2	3	3	11
Wetzel County Board	6	2	5	1	2
Wood County Board	6	4	1	1	6
Wyoming County Board	2	5	4	5	10
<u>Multi-County Vocational Centers</u>	2	3	1	2	0
James Rumsey Technical Inst. (2)					
Regional Educ. Serv. Agencies	1	0	1	0	1
W. Va. Board of Education*	<u>6</u>	<u>4</u>	<u>4</u>	<u>3</u>	<u>1</u>
* previously reported as a state agency	<u>276</u>	<u>283</u>	<u>277</u>	<u>246</u>	<u>262</u>

APPENDIX D

GRIEVANCES FILED AT LEVEL FOUR AGAINST STATE AGENCIES

CALENDAR YEARS 1996 THROUGH 1992

	<u>1996</u>	<u>1995</u>	<u>1994</u>	<u>1993</u>	<u>1992</u>
Adjutant General	0	2	0	0	0
Department of Administration	2	5	1	5	4
Agriculture	2	0	0	0	0
Alcohol Beverage Control Comm'n	0	0	1	1	1
Bd. of Examiners for Reg. Nurses	0	1	0	1	0
Bureau of Employment Programs	8	6	10	20	16
Clarksburg Public Library	0	1	0	0	0
Commerce, Labor, Econ. Resources	0	1	0	3	4
Consol. Public Retirement Bd.	4	0	1	0	0
(formerly Public Employees Retirement Bd)					
Corrections	46	34	29	13	18
Culloden Public Serv. Dt.	0	1	0	0	0
Culture and History	0	1	0	3	1
Development Office	0	0	1	0	0
Economic Development Authority	0	0	0	1	0
Educational Broadcasting Authority	3	0	1	2	0
Employment Security*	0	0	0	0	1

*1994 - consolidated into Bureau of Employment Programs

Energy	0	0	0	0	1
Environmental Protection	7	12	3	3	0
Farm Management Comm'n	0	0	0	1	0
Fire Commission	0	1	0	1	0
Forestry	0	3	0	0	0
Health and Human Resources	42	85	100	130	83
Highways	41	52	44	24	32
Human Rights Commission	0	0	0	0	1
Labor	0	0	0	2	1
Library Commission	0	0	1	0	0
Lottery Commission	0	0	1	0	0
Miners' Health, Safety & Training	0	0	1	2	0
Motor Vehicles	1	1	19	7	1
Natural Resources	2	6	5	0	6
Parkways, Economic Dev. & Tourism	9	3	5	1	4
Personnel	1	3	4	1	1
Public Safety	4	6	2	1	1
Public Service Commission	5	4	6	2	5
Racing commission	0	1	0	0	0
Railroad Maintenance Authority	0	1	0	0	0
Real Estate Commission	0	0	1	0	0
Regional Jail Authority	6	14	13	3	8

Rehabilitation Services	6	6	10	11	7
Solid Waste Management	1	0	0	0	1
Tax & Revenue	3	8	10	3	5
Tourism & Parks	0	1	5	4	2
Transportation	0	0	0	0	3
Veterans' Affairs	0	0	2	0	0
Workers' Compensation Fund*	0	0	0	0	3

*1993 - consolidated into Bureau of Employment Programs

County Health Departments

Barbour County Health Dept.	0	1	0	0	1
Boone County Health Dept.	0	1	0	0	2
Grant County Health Dept.	0	0	0	0	2
Jackson County Health Dept.	0	0	0	1	0
Kanawha-Charleston Health Dept.	1	0	0	0	0
Mason County Health Dept.	0	1	0	0	0
Mid-Ohio Valley Health Dept.	1	0	0	0	0
Monongalia County Health Dept.	6	2	0	1	0
Morgan County Health Dept.	0	1	0	0	0
Randolph County Health Dept.	<u>1</u>	<u>0</u>	<u>0</u>	<u>0</u>	<u>0</u>
	<u>202</u>	<u>265</u>	<u>276</u>	<u>247</u>	<u>215</u>

Appendix E

1996 Decisions by Supreme Court of Appeals of West Virginia on Appeal from Grievance Board Rulings

1. Putnam County Bd. of Educ. v. Andrews, No. 23288 (Dec. 19, 1996)

Ms. Andrews initiated a grievance seeking four years of administrative seniority for time she served in the central office as an educational diagnostician. She asserted her duties fell within the definition of 'central office administrator' or 'principal' rather than the definition of 'classroom teacher.' The ALJ ruled in her favor based upon an interpretation of the pertinent statutory definitions. The board of education appealed to the Circuit Court of Putnam County, which reversed the ALJ's ruling. Grievant appealed, and the Supreme Court affirmed the lower court. The Supreme Court, viewing this issue as one of law, not fact, analyzed the applicable definitions and how Grievant spent her time as a diagnostician and concluded the 'best fit' was that of a classroom teacher. The Court therefore affirmed the lower court and denied Grievant's request for attorney's fees under W. Va. Code § 18-29-8 [1994]. (Per Curiam)

2. Quinn v. W. Va. Northern Community College, 475 S.E.2d 405 (W. Va. 1996)

Grievant alleged she should have been selected as the Director of Financial Aid. The ALJ denied the grievance on the basis that Respondent had not acted arbitrarily and capriciously in not offering the position to her. The dispute concerned whether Grievant was qualified for the position; the selection committee had recommended Grievant but did so 'with reservations' relating to her qualifications for the position. The Circuit Court of Ohio County reversed the ALJ primarily on the basis that Grievant was qualified for the position, and ordered reinstatement and back pay. The Supreme Court reversed the lower court, and remanded the case for the entry of an order reinstating the ALJ's decision. The sole syllabus states: A final order of the hearing examiner for the West Virginia Education and State Employees Grievance Board, made pursuant to W. Va. Code § 29-6A-1 et seq., and based upon findings of fact, should not be reversed unless clearly wrong. The Court concluded that W. Va. Code § 18B-7-1(d)[1993] was not enacted until after the hiring decision at issue in this case and thus was inapplicable. Footnote 3 briefly discusses Grievant's detrimental reliance argument. (McHugh, J.)

3. Roach v. Regional Jail Authority, No. 23177 (Dec. 17, 1996)

Grievant, a Correctional Officer II who was suspended and later dismissed from employment, alleged that he was improperly dismissed from employment and that his due process rights were violated. He filed a grievance challenging his suspension, and he filed a second claim after he was dismissed alleging retaliation for exercising his grievance rights. The ALJ denied both grievances on their merits and also found Grievant was an at-will employee subject to termination at any time. On appeal, the

Circuit Court of Berkeley County affirmed. The Supreme Court granted an appeal and affirmed in a per curiam opinion. The Court, citing a Grievance Board decision relied on by the ALJ, ruled that an employee who, by statute, is in the classified-exempt service, is an 'at-will' employee. The Court agreed with the ALJ's conclusion that Grievant, as a classified-exempt employee, was given more procedural protection, in terms of notice and opportunity to be heard, than was constitutionally required. The Court also agreed that Grievant was not fired as an act of reprisal for filing a grievance. (Per Curiam)

4. **West Virginia Univ. Bd. of Trustees v. Fox**, 475 S.E.2d 91 (W. Va. 1996)

A classified employee was dismissed from employment after he was seen by two female witnesses in the women's locker room. He pled no contest in magistrate court to criminal trespass, a violation of W. Va. Code § 61-3B-3. Thereafter, he was banned from all buildings on campus, except for the building in which he was assigned primarily to work. He was then fired for a flagrant violation of University policy and because the ban significantly limited his ability to efficiently and effectively execute the full range of his duties and responsibilities. The employee filed a grievance. At the grievance hearings, the Respondent relied on police reports filed by the two witnesses and Grievant's no contest plea as proof of the misconduct. The ALJ reversed the dismissal on the basis of a lack of proof of any wrongful intent. The Circuit Court of Kanawha County affirmed. The Supreme Court also affirmed, ruling in syllabus points 3 and 4: (3) Although formal rules of evidence do not apply to grievance procedures under W. Va. Code § 18-29-6, we hold that nolo contendere pleas are unreliable as evidence of particular acts in a subsequent grievance or other administrative proceeding. (4) When a court or administrative body is asked to recognize a conviction as an admission of guilt of particular acts, the court must look behind the conviction to determine whether it was based upon a trial on the merits or upon a plea of no contest. Where the conviction was based upon a plea of no contest, it may not be considered an admission of guilt of particular acts. (Albright, J.)

5. **Wilhelm v. W. Va. Lottery**, No. 23056 (Nov. 14, 1996)

Mr. Wilhelm filed a grievance alleging he was improperly dismissed as a deputy director of the Lottery Commission. Respondent filed a motion to dismiss and the ALJ dismissed the claim without a hearing on the merits for failure to state a claim upon which relief could be granted under Procedural Rule 4.6, 156 C.S.R. 1. The ALJ reasoned that Grievant was an at-will employee and had not alleged any violation of public policy. Grievant appealed. The Circuit Court of Kanawha County reversed and remanded the case for a hearing on the question whether Grievant's 'liberty' interest had been infringed by the publicity that surrounded his termination. Upon the Lottery Commission's appeal, the Supreme Court reversed. Respondent's stated reason for the dismissal was a 'loss of confidence' in Grievant's abilities. W. Va. Code § 29-22-8(a)(1) provides that deputy directors serve at the will and pleasure of the director and are not eligible for civil service coverage under W. Va. Code § 29-6-4. The Court concluded the

reason given for the dismissal would not foreclose his employment opportunities or seriously damage his standing and associations in the community. No hearing was thus required. The Court also stated that Grievant had neither alleged nor proved any impermissible discrimination. (Per Curiam)