

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

**FISCAL YEAR 2004**



**EDUCATION AND STATE EMPLOYEES  
GRIEVANCE BOARD**



**MEMBERS**  
Debra Kilgore  
Lowell Witters

**DIRECTOR**  
Ronald Wright

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

**BOB WISE**  
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December 6, 2004

**THE HONORABLE BOB WISE  
GOVERNOR, STATE OF WEST VIRGINIA**

and

**MEMBERS OF THE LEGISLATURE**

Dear Governor and Members of the Legislature:

On behalf of the Grievance Board, I am pleased to submit the Grievance Board's Annual Report for Fiscal Year 2004. This report contains detailed information concerning grievances and mediation, including the number of grievances filed against each employer, the number of hearings scheduled and held, the number of grievances settled without mediation, a synopsis of grievance decisions and orders in which the grievance was granted, an evaluation of the grievance process at Level Four and the performance of the Board's administrative law judges.

The Board is making five legislative recommendations this year, one of which includes many amendments to improve the grievance procedure.

Respectfully submitted,

*Ronald Wright*  
RONALD WRIGHT

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## **Administrative Highlights of Fiscal Year 2004**

As part of its strategic planning, the Board changed its annual schedule of major activities. Beginning this year the Board held its Annual Public Meeting in October, rather than in January. This schedule change benefits customers who will not have to travel in the winter to attend the annual meeting. Also, the Board will now prepare its annual report on a fiscal year basis. This change will eliminate time spent by administrative staff in compiling and reporting data on both a calendar year and fiscal year basis, and will enable the Board to submit the report in December before the Legislature convenes each year. Because the last annual report covered calendar year 2003, we have duplicated some information contained in that report.<sup>1</sup>

One of the Board's primary responsibilities is to provide suitable office space for its Administrative Law Judges (ALJs) and support staff. Unfortunately, one highlight this year was the Board's Charleston Office was flooded twice, forcing the agency and its staff to move out of its office for over a month. While these disruptions were handled well, many work hours were spent handling these events, and the agency incurred expenses that were not reimbursed. Although the landlord improved the facility and undertook remedial measures to prevent future flooding, the threat of flooding remains. Moving the office remains a distinct possibility. However, because the Board's hearing offices must be in a neutral location, the agency does not have the option of moving into the State Capitol Complex or into a state office building. See, W. Va. Code § 29-6A-5(a)(1985). On a positive note concerning office space, the Board's staff, as part of the agency's continuing efforts to reduce operating expenses, negotiated a new lease for the Wheeling Office that will cut costs by more than 50% a year.

The Board continued to work on outreach and education activities, while striving to improve customer and employee satisfaction. Again this year the agency's director, in cooperation with the Division of Personnel, made presentations to managers and supervisors in State government. The presentations emphasize mediation and the need for everyone to act in good faith in handling grievances. In January 2004, the Director and

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<sup>1</sup> Prior annual reports are available on the Board's home page.

the Board's Chair appeared on The Law Works, a West Virginia Public Television Program, to discuss the agency's operations. More recently the Director made two presentations on mediation at the 2004 State EEO/Higher Education Training Conference at Stonewall Resort.

The Board amended its Procedural Rules that govern procedural matters at level four and at the lower levels. Representatives from employee organizations regularly attended Board meetings this year and made suggestions concerning the amended rules. Their participation led the Board to begin including a public comment topic on its meeting agendas, and to add a feature to its web site enabling interested persons to receive email notice when the Board schedules meetings.

The Board completed a long-term goal of converting all agency databases to one program or application for such matters as docketing grievances, case management, grievance reports, employee and agency performance, inventory and records management. Equipment was upgraded, communication systems were improved, and security was increased in two offices. The agency entered into a less expensive flat rate contract for legal research with LexisNexis, which led it to begin publishing Board Decisions. The Board also continued to review all agency practices and expenditures looking for ways to reduce operating expenses and improve services.

During the 2003 legislative session, the Board's staff drafted and worked on legislation, prepared fiscal notes and appeared before legislative committees. The Board is making additional legislative recommendations this year. All of the Board's legislative recommendations are briefly outlined later in this report.

### **Legislative History, Mission and Operations**

The Grievance Board was created in 1985 when the Legislature established a grievance procedure for educational employees. W. Va. Code §§ 18-29-1, et seq. In 1988 the Legislature expanded the Board's jurisdiction by enacting a Grievance Procedure for State Employees.<sup>2</sup> W. Va. Code §§ 29-6A-1, et seq. The intended purpose of these laws

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<sup>2</sup> Employees of constitutional officers are not covered, unless they are in the classified service. Employees of the Legislature and uniformed members of the State Police are also  
(continued...)

was to create a simple, expeditious and fair process for resolving employee grievances at the lowest possible administrative level, and to establish a procedure for the equitable and consistent resolution of these disputes. The goals of the legislation are to maintain good morale, enhance job performance, and better serve the citizens of this State.

Ten years later in 1998, the Legislature made several changes to the law governing grievances by state employees. A new default provision was added by which an employee may obtain the relief requested in a grievance, if the grievance evaluator at Level One, Two or Three fails to respond to the grievance in the time required by law. The Board was also given jurisdiction over procedural matters at Levels Two and Three of the procedure. Until then the Board's authority was limited to administering Level Four of the procedure. In addition, the Board was empowered to require mediation at the request of any party in grievances by state employees. W. Va. Code § 29-6A-12 (1998).<sup>3</sup> Finally, in 2001, the Legislature changed the law for higher education employees so that all grievances filed after July 1, 2001, must be processed under the Grievance Procedure for State Employees. See W. Va. Code § 18B-2A-4(k).

Employees covered by the grievance procedure laws can grieve nearly 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 (1992) & 29-6A-2 (1988).<sup>4</sup> The Board has jurisdiction over claims based upon alleged

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<sup>2</sup>(...continued)  
expressly excluded. W. Va. Code § 29-6A-2(e). County health department employees covered by a merit system are entitled to use 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).

<sup>3</sup> The Board first made this recommendation to the Legislature in 1992. The law was also amended to make it clear that ALJs can require the parties in a state employee grievance to participate in settlement conferences. W. Va. Code § 29-6A-6 (1998).

<sup>4</sup> "Grievance" is defined by W. Va. Code § 29-6A-2(i) (1988) as:  
"Any claim by one or more affected state employees alleging a violation, a misapplication or a misinterpretation of the statutes, policies, rules, regulations or written agreements under which such employees work, including any violation, misapplication or  
(continued...)"

violations or misinterpretations of federal and state wage and hour laws, and claims that may also be filed under the West Virginia Human Rights Act. The most common types of grievances concern promotion and hiring decisions, disciplinary actions, classification and compensation matters.

In accordance with the State Administrative Procedures Act, the Board adopted amended Procedural Rules governing the practice and procedure for handling grievances at Level Four effective December 4, 2004, under the authority granted by W. Va. Code §§ 18-29-5(a) & 29-6A-5(a). The Rules are codified at 156 Code of State Rules 1 (156 C.S.R. 1). In 2002 the Board adopted a Procedural Rule to satisfy the requirements of the Open Governmental Proceedings Law, W. Va. Code §§ 6-9A-1 et seq., commonly called the Open Meetings or "Sunshine" law. 156 C.S.R. 2 (Aug. 11, 2002). This law specifies the manner in which governing bodies must give notice to the public of meetings, and provides general rules for conducting meetings.

The Board's mission is to equitably, consistently and quickly resolve employment disputes between employees and county boards of education, higher education institutions, and state agencies.

The grievance procedure laws cast the Board in the role of protecting the rights of covered public employees. The Board consists of the three members appointed by the Governor, with the advice and consent of the Senate, for three year terms. The Board has two vacancies currently. In December 2001, Governor Bob Wise appointed Walt Auvil, Esq., a Democrat from Wood County, to a term expiring July 1, 2004. During the last year of his term, he served as the Chair of the Board. Mr. Auvil, whose term has now expired, advised the Governor in writing that he would not continue to serve as a member of the

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<sup>4</sup>(...continued)

misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application of unwritten policies or practices of their employer; any specifically identified incident of harassment or favoritism; or any action, policy or practice constituting a substantial detriment to or interference with effective job performance or the health and safety of the employees."

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

Board, and he requested another Board member be promptly appointed. On January 24, 2003, Governor Wise appointed Debra A. Kilgore, Esq., a Democrat from Mercer County, to a term ending July 1, 2005. Ms. Kilgore is now the Chair of the Board and will serve in that role for one year. The third member of the Board is Lowell Witters, a Republican from Kanawha County. He is continuing to serve as a Board member but his term expired July 1, 2003.

The Board employs attorneys to preside over grievances that reach Level Four of the grievance procedure and to serve as mediators. These employees are designated as "hearing examiners" in the grievance procedure laws, but the Board calls them ALJs because of the nature of their duties and responsibilities.<sup>5</sup> The Board requires its ALJs to be licensed to practice law in West Virginia, and does not permit them to have an outside law practice.<sup>6</sup>

As of November 15, 2004, the Board employed only ten people: a Director, an Administrative Officer, five ALJs, and three Secretaries in a flat organizational structure.<sup>7</sup> See Appendix A. The Board's principal office is in Charleston, and it maintains hearing offices in Beckley, Elkins, Westover, and Wheeling. All but one of the agency's employees work in the Charleston or Westover Office. The Beckley and Wheeling offices are not staffed with employees, but ALJs conduct hearings and mediation sessions at these locations.

The Board's primary activities are as follows: (1) scheduling and conducting Level Four hearings and prehearing conferences in public employee grievances; (2) issuing

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<sup>5</sup> The West Virginia Division of Personnel has placed these positions in the class title of ALJ II in its classified-exempt plan.

<sup>6</sup> For many years the Board has required its ALJs to adhere to certain provisions of the Code of Judicial Conduct, although this code only applies to judicial officers in the judicial branch, not ALJs in the executive branch.

<sup>7</sup> As recently as 1997, the Board employed seventeen people, but through attrition had reduced its staff to eleven positions by 2001. The Director performs administrative duties also functions as the chief administrative law judge. After an ALJ resigned in August 2003, the Board was not able to fill that position due to the impending 9% budget cut for FY05. Another ALJ resigned in January 2004, leaving the Board with only four ALJs.



binding, written decisions with findings of fact and conclusions of law; (3) providing mediation services to actively assist employers and employees in identifying, clarifying and resolving issues anytime before a Level Four hearing; (4) administering Level Four of the grievance procedure and handling procedural matters at Level Two and Three; and (5) preparing transcripts and certifying records to circuit courts when decisions are appealed.

The Board has established the following customer-service goals and objectives: (1) issue timely and prompt decisions; (2) issue decisions within thirty working days after the cases are ready for decision; (3) process grievances fairly, according respect and courtesy to all parties; (4) assist the parties in settling grievances through prehearing conferences and mediation; (5) issue readable decisions based upon a consistent application and interpretation of law and policy; and (6) publish decisions and case summaries promptly on the Internet for all interested persons.

### **Annual Public Meeting and Customer Satisfaction Survey**

The Board, after proper notice, conducted its annual public meeting at its Charleston Office on October 28, 2004. The purpose of the open meeting is to help the Board evaluate the functioning of the grievance process at Level Four, the performance of its ALJs, and to prepare an annual report to the Governor and the Legislature. See W. Va. Code § 18-29-5(a) (1998), and W. Va. Code § 29-6A-5(a) (1998)

The Board mailed seven hundred ninety (790) notices of the meeting, along with a Customer Satisfaction Survey form, to Grievants whose cases had been completed between December 1, 2003 and June 30, 2004. State agencies, educational institutions, county superintendents, employee organizations, union representatives, attorneys, and the Director of the West Virginia Division of Personnel (Personnel) were notified of the meeting. In addition, the meeting was announced on the Board's web site and the customer satisfaction survey form was made available online. Eight people attended the public meeting and several made brief presentations. A representative of the Communication Workers of America submitted a handout to the Board.

The Board began using a Customer Satisfaction Survey form in 1997 to help in the evaluative process, identify areas that may need improvement, and serve as a benchmark for future evaluations. (Appendix B). The Board will meet with staff and review and

consider the annual meeting testimony and exhibit, and the responses to the customer satisfaction survey, to find ways to improve the agency's performance.

#### **Grievances Filed at Level Four and Adjudication Activities in FY 2004**

The number of grievances filed at Level Four has been steady during the last three fiscal years, as shown in the following table.<sup>8</sup>

<b>Grievances filed at Level Four</b>	<b>FY 2004</b>	<b>FY 2003</b>	<b>FY 2002</b>
<b>State</b>	288	213	219
<b>Higher Education</b>	32	31	41
<b>County Boards of Education</b>	178	190	187
<b>Totals</b>	498	434	447

The number of hearings scheduled and the number of hearings held is shown below. One or more continuances were granted upon request of the parties in more than 50% of the cases scheduled for hearing.

<b>Hearing Activity</b>	<b>FY 2004</b>
<b>Hearings Scheduled</b>	580
<b>Hearings Held</b>	268
<b>Prehearing Conference Calls Conducted</b>	96

Grievances submitted on the record made at the lower levels of the procedure, without a Level Four hearing, are processed more quickly than cases in which a Level Four hearing is held. The percentage of cases submitted on the record developed below has averaged about 18% during the last ten years. This year thirty-six (36) cases, or 14% of the grievances decided, were submitted on the record the parties made before appealing to Level Four.

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<sup>8</sup> The number of grievances filed in 2004, included six cases remanded to the Board by the courts. Appendices C, D and E provide a breakdown of employers against whom grievances were filed.

The total number of Decisions and Orders issued is shown in the next table.

<b>All Decisions and Orders</b>	<b>FY 2004</b>
<b>Decisions Issued</b>	233
<b>Default Orders</b>	29
<b>Dismissal Orders</b>	122
<b>Total</b>	384

The law requires decisions to be issued within thirty working days. As shown in the next table, ALJs issued decisions promptly, often in less time than required by law. Indeed, average decision-making time was only sixteen working days. Furthermore, 97% of the decisions were issued within sixty working days of becoming mature for decision.

<b>Grievance Processing Time in Working Days</b>	<b>FY 2004</b>
<b>Decision-Making Time</b>	16
<b>Total Processing Time</b>	120
<b>Percentage of Cases Decided within 30 Working Days</b>	89%

A breakdown of decisions issued by type of employment is set forth in the table below.

<b>FY 2004 DECISIONS</b>	<b>DECISIONS ISSUED</b>	<b>GRIEVANCES GRANTED</b>	<b>PERCENT GRANTED</b>
<b>Higher Education</b>	18	3	17%
<b>State</b>	110	11	10%
<b>Boards of Education - Professional Personnel</b>	40	8	20%
<b>Boards of Education - Service Personnel</b>	62	12	19%
<b>State Department of Education</b>	3	1	33%
<b>TOTAL</b>	233	35	20%

Appendix F contains a synopsis of all grievances granted in 2004, and four grievances in which employers were found to have defaulted by not processing the grievances in the time limits set by law.<sup>9</sup>

ALJs issued one hundred twenty-two (122) Dismissal Orders in 2004. An employee may withdraw a grievance at any step in the grievance procedure by written notice. W. Va. Code §§ 18-29-3(d) & 29-6A-3(d). This is the most frequent reason grievances are dismissed from the Board's docket at Level Four. Fifty-two (52) grievances were dismissed upon the grievant's written request, with no explanation for the withdrawal. In another forty (40) grievances, including seven cases resolved through mediation, employees reported that a settlement had been reached as the reason for withdrawing their grievance. One grievance was withdrawn because the employer was found to have defaulted. Eleven (11) grievances were dismissed for failure to pursue, and sixteen (16) cases were remanded to the proper level of the procedure. The table below shows the number of grievances known to have been settled by type of employer.

<b>Grievances Settled at Level Four</b>	<b>FY 2004</b>
<b>State</b>	23
<b>Higher Education</b>	1
<b>County Boards of Education</b>	16
<b>Totals</b>	40

### **Administrative Support Activities and Use of the Internet**

The workload of the Board's limited secretarial staff remained steady in 2004. The secretarial staff assembles and mails certified records to circuit courts when grievance decisions are appealed to circuit court. Secretarial staff transmitted eighty-three (83) certified records to the courts this year, which is more than the average for the previous three calendar years.

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<sup>9</sup> Cases are counted as granted if the grievance was granted in any part. Cases are counted as denied even if the grievance was dismissed or denied without reaching the merits of the grievance, including grievances dismissed on jurisdictional grounds and cases denied on procedural grounds, such as being untimely filed.

<b>Records Certified to Circuit Court</b>	<b>FY 2004</b>
	83

They typed the transcripts of the Level Four hearings in about 90% all of the decisions appealed to circuit court. The Board contracts out for transcription services when its secretarial staff becomes backlogged and cannot meet court deadlines. Producing transcripts and certifying records to circuit court continues to be a primary task of the secretarial staff. They normally transmit the certified record to circuit court within thirty (30) days of receipt of the court order notifying the Board of the appeal.

The agency mechanically records hearings held at its offices on four-track audio tapes or digitally on a computer hard drive. A transcript is not normally prepared unless the decision is appealed to circuit court. However, upon request the Board promptly supplies the parties with copies of the hearing tapes, or a CD containing an audio file of the hearing testimony, instead of a transcript. When a decision is appealed and the transcript is prepared in-house, the agency provides the parties a copy of the transcript in electronic form upon request.<sup>10</sup> When transcripts are prepared by a transcription service, the parties may purchase a copy from the service.

During the last two years the Board has purchased a digital recording system called FTR Gold for two of its five hearing rooms. Digital recording systems have several advantages over traditional analog tape-recording systems, including improved sound quality and electronic storage. A CD will hold up to twenty hours of testimony, and the parties can listen to the hearing on a personal computer using free player software.

The Board has created a large body of law or precedent covering many areas of public employment law. The Board has long recognized the value of consistency in grievance decisions. It also quickly realized that making precedent readily available would serve the interests of both management and labor and promote the resolution of disputes. The Board readily embraced the Internet for this purpose. Since 1997 the Board has used

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<sup>10</sup> The Board's staff has devised a method of preparing electronic transcripts that enables the parties to cite to the page numbers where testimony appears in the official, paper transcript certified to the circuit court. This innovative technique has been well received by attorneys who handle grievance appeals.

its web site to provide public employers and employees with access to its decisions and to improve its services. The web site is now the Board's primary method of distributing information. New decisions are published twice a month. Customers can download all decisions by calendar year in Rich Text Format, a format compatible with most word-processing applications. The agency also provides the Secretary of State's office with copies of all decisions twice a month in electronic form.<sup>11</sup>

The Board's staff uses a Microsoft Access database, called Boardlaw, containing case summaries and pertinent information on more than five thousand five hundred (5,500) decisions issued since 1985. This database is a valuable research tool for the ALJs and all interested persons who need to be aware of precedent. The Board updates the database every month with summaries of the new decisions rendered and with information received about court rulings in decisions that were appealed. The information in the database is published on the web site, and it can be quickly and easily searched. In addition, the database can be downloaded in a compressed form for use with Microsoft Access.

The law requires the Board to provide a statewide quarterly report to inform higher education governing boards, county boards of education and employee organizations of current personnel-related issues. W. Va. Code § 18-29-11 (1992). The Board issues the report on a monthly basis to make the information available more quickly. In accordance with W. Va Code § 18-29-11 (2000), the Board also sends an annual report to each county board of education within thirty days of the end of each school year. This report lists the number of grievances granted, denied, or otherwise disposed of during that school year. This report is available on the Board's web site for the last five school years.

### **Grievance Mediation Services**

The Board has been a leader in the use of mediation in state government. It began an experimental mediation project in 1991. The Legislature endorsed that project and passed W. Va. Code § 18-29-10 (1992), which required the Board to engage in mediation

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<sup>11</sup> Final decisions are filed with the Secretary of State's office in accordance with W. Va. Code § 29A-2-9.

and other dispute resolution techniques to actively help the parties in identifying, clarifying and resolving issues before the Level Four hearing, to the extent feasible with existing personnel and resources.<sup>12</sup>

The Board continued to encourage and to promote the use of mediation early in the grievance process, emphasizing that it will provide a mediator, without charge, before an evidentiary hearing is held at the lower levels. ALJs also hold prehearing conferences frequently, typically by a recorded telephone conference call, to identify and clarify issues, to resolve discovery disputes, to encourage settlement discussions and many other purposes.

The Board conducted twenty-three (23) mediation sessions in 2004, more than in any prior calendar year, and continued to experience a high success rate, as shown in the table below.

<b>Mediation Sessions Conducted</b>	<b>FY 2004</b>
<b>Grievances Mediated after Reaching Level Four</b>	13
<b>Percentage Resolved after Mediation at Level Four</b>	54%
<b>Grievances Mediated while pending at a Lower Level</b>	10
<b>Percentage Resolved while pending at a Lower Level</b>	70%

Although the percentage of grievances mediated after reaching Level Four remains small, it is important to recognize that employers and employees frequently settle disputes on their own, without the need or assistance of a mediator. One hundred twenty-two (122), or 31%, of all grievances processed in 2004 were closed by issuance of a dismissal

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<sup>12</sup> The ALJs serve as mediators and are generally able to schedule mediation sessions so as not to delay the processing of the case. All 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 or the West Virginia State Bar. The Board has also held in-house mediation training for its ALJs, focusing on recent trends in workplace mediation. Individual ALJs have pursued additional training in conflict management, problem-solving and mediation.

order.<sup>13</sup> As noted earlier at least forty (40) of these grievances were dismissed from the docket due to settlements. Likewise, many grievances are resolved before being appealed to the Board. These settlements are encouraged and made possible because the Board is holding hearings and issuing decisions in a prompt fashion, as intended by the Legislature. Nonetheless, many grievances cannot be settled through mediation or otherwise.

The Board believes its efforts to encourage the use of mediation have helped foster a climate in which the parties discuss problems and engage in settlement activity frequently.

### **Level Three of the Grievance Procedure for State Employees**

In 2002 the Board's staff began gathering information about the grievance procedure at the lower levels, especially Level Three, to find out how well the process was working. The Board understood that the legislature intended to provide a procedure for the equitable and consistent resolution of employment grievances. What we found out was that not only were employers and employees settling grievances below, but the procedure was essential for resolving grievances by state employee that involved back pay. For example, if a state agency inadvertently fails to obtain the approval for a planned merit salary increase or other type of salary increase from all necessary persons and offices, the agency is not at liberty simply to correct the payroll error. The State Auditor and the State Budget Office of the Department of Administration, based on constitutional and statutory provisions, take the position that retroactive salary increases are illegal and will not approve such payments.

The Auditor will approve such payments, but only if the payroll is accompanied by a Level Three or Level Four grievance award, or a written settlement agreement between the employer and the employee to resolve the grievance, provided the agreement has been approved by the Office of the Attorney General. See Memorandum on Retroactive Pay (Dec. 7, 1998).

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<sup>13</sup> This number includes seven cases resolved through mediation after reaching Level Four.



The Grievance Board does not possess payroll records to determine the number and total amount of back pay awards made at Level Three of the grievance procedure, or to determine the amount of back pay paid to state employees who were granted relief at Level Four. The Division of Personnel, however, has compiled data on back wage payments covering twelve fiscal years and provided it to the Board. The Division of Personnel reported that state agencies made at least 3,930 back wage payments July 1, 1991 through June 30, 2003, totaling \$9,031,376.45, and paid interest on 1,797 of these payments. Many of these back wage payments were due to settlements made at Level Three.

#### **Evaluation of the Grievance Procedure at Level Four and ALJ Performance**

The Board believes it is fulfilling its mission of equitably and consistently resolving grievances, and of providing a simple, expeditious and fair process for resolving employee grievances. The Board believes the grievance procedure at Level Four continued to function well in 2004. The Board is providing prompt hearings and timely decisions, and is thereby encouraging the settlement of many grievances. The Board's continuing efforts to encourage the use of mediation has produced beneficial results to all parties and the public. Furthermore, from the information the Board obtained from the Division of Personnel, it appears state agencies are settling many claims before they reach Level Four.

The Board also believes its ALJs performed well this year. They issued decisions more promptly than last year, despite ALJ turnover and the flooding problems at the Charleston Office. The Board also believes the ALJs are deciding the cases properly, fairly and impartially. The Board must point out that the 10% budget cut in fiscal year 2004, combined with the proposed 9% budget reduction for fiscal year 2005, interfered with the agency's ability to fill a vacant ALJ position for several months and impaired the agency's performance in fiscal year 2004. The hiring delay increased the workload of the remaining ALJs and caused delay.

As reported in the Board's last annual report, the courts uphold grievance decisions most of the time. The Board's records show that about 27% of all decisions issued since 1985 have been appealed, and only about 13% of those cases have been reversed. This

low reversal rate is an indicator that ALJs are properly applying the law and rendering legally sound and fair decisions.

### **Fiscal Summary**

The Board is frugal with its limited resources. At the same time, the Board earnestly strives to comply with its legal duties and responsibilities. The Board's actual expenditures are shown in the table below.

<b>FY 2004</b>	<b>FY 2003</b>	<b>FY 2002</b>	<b>FY 2001</b>	<b>FY 2000</b>	<b>FY 1999</b>	<b>FY 1998</b>
<b>\$864,539</b>	<b>\$878,476</b>	<b>\$849,883</b>	<b>\$861,443</b>	<b>\$920,469</b>	<b>\$938,611</b>	<b>\$913,483</b>

The Board does not charge for its services and generates no revenue.

### **Recommendations**

Because of its role as the neutral third party, the Board usually makes few legislative recommendations. The Board decided, however, to make five recommendations to the Governor and the Legislature this year. First, the Board recommends, as it has consistently done, the Legislature revise the grievance procedure laws to help insure the agency's complete neutrality and the appearance of impartiality. When the Legislature reorganized the Executive Branch of State government in 1989, the agency was placed within the Department of Administration, along with the West Virginia Division of Personnel. The Board objected to this change at the time. The Board continues to believe this organizational structure creates a conflict of interest. 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 Cabinet Secretary, who has substantial control over the Board's budget. Because of this structural problem, the Board favors an amendment to Chapter 5F of the West Virginia Code removing the Board from the Department of Administration, and making it an independent agency within the Executive Branch of government, as it was before 1989.

Second, the Board recommends the Legislature pass legislation creating a special revenue fund for operation of the agency. See House Bill 4005 and Senate Bill 142. Passage of this legislation would reduce the state's general revenue obligations and provide a stable funding source so the agency can meet its legal duties and

responsibilities. The Board will not be able to continue functioning properly without adequate funding.

Third, the Board recommends the Legislature raise the compensation paid to its members by passing House Bill 2076. The per diem of seventy-five dollars per meeting has not been changed since 1985. The bill provides that Board members would be paid the same amount as currently paid to legislators for interim duties, that is, one hundred fifty dollars per meeting. The bill would not remove the existing cap of seven hundred fifty dollars per fiscal year.

Fourth, the Board urges the passage of legislation to "clean up" both grievance procedure statutes to accurately designate the public employers and employees subject to these laws. See the Grievance Board's Resolution attached as Appendix G.

Fifth, the Board recommends many amendments to the grievance procedure laws of this state. These recommendations have been conveyed in writing to Subcommittee C of the Joint Committee on Government Organization.

#### **Effective Grievance Procedure**

The Board believes a properly functioning grievance procedure is vital to any organization, and it may be especially important in the public sector. This State's grievance laws are well designed to facilitate the settlement of grievances when possible after they arise. This is important because grievances become magnified in importance and more difficult to settle as they progress through the steps in the process. See F. Elkouri, *How Arbitration Works* 157 (4<sup>th</sup> ed. 1985) Good grievance procedures are important but they alone do not ensure the goals of these procedures will be achieved. The good faith attitude of everyone handling grievances is of paramount importance. The Legislature has recognized this by expressly requiring both employers and employees to act in good faith at all times and make every possible effort to resolve disputes at the lowest possible level. W. Va. Code § 29-6A-7.

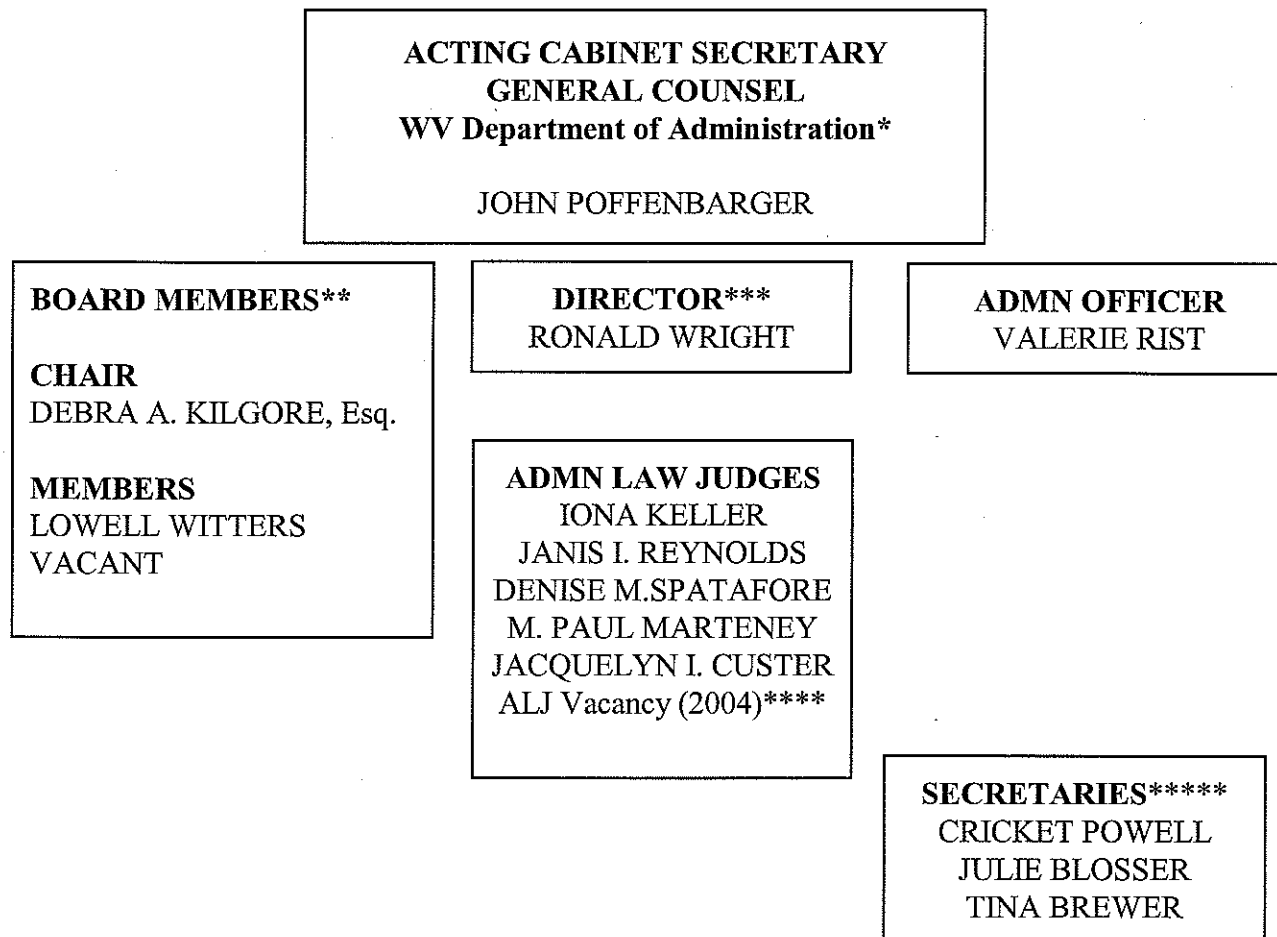
For the grievance procedure to be effective at the lower levels, public employers, employees, unions, and employee organizations, and all interested persons should keep certain guiding principles firmly in mind. First, they must clearly understand that the basic objective of the grievance procedure is not "winning" grievances, but resolving disputes

fairly and equitably. Second, supervisors and managers at all levels should consider grievances as aids to discovering, eliminating, or reducing the underlying causes of discontent whenever possible. Third, when wrong decisions have been made, these mistakes should be acknowledged and corrected promptly. Fourth, everyone involved must be willing to devote adequate resources, time and attention to the handling and disposition of grievances. Fifth, if grievances are to be handled properly, everyone must be thoroughly familiar with the governing personnel laws and regulations and Board decisions. See F. Elkouri, *How Arbitration Works* 154-155 (recommendations of the President's National Labor-Management Conference of 1945).

In conclusion, the Board will continue to focus on prompt decision making at Level Four, and will strive to improve the quality of its decisions and the fairness of its hearings. It will promote the use of mediation early in the grievance process. It will continue to engage in outreach and education activities and work to make the process as simple as possible, especially for employees who represent themselves.

**APPENDIX A**  
**ORGANIZATIONAL CHART**

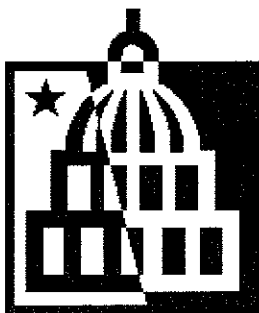
**EDUCATION AND STATE EMPLOYEES  
GRIEVANCE BOARD**



- \* Grievance Board included in DOA, W. Va. Code § 5F-2-1 (a) (7).
- \*\* Board members appointed by Governor, W. Va. Code § 18-29-5 (a).
- \*\*\* No statutory provision for a Director.
- \*\*\*\* One vacant ALJ position was eliminated in Oct. 2000 to provide for merit increases. Another ALJ position was eliminated in December 2002.
- \*\*\*\*\* Two Secretary II positions eliminated in recent years, one in the Beckley Office and the other in the Wheeling Office.

Revised: Nov. 23, 2004

## APPENDIX B



# State of West Virginia Education and State Employees Grievance Board

[www.state.wv.us/admin/grievanc/grievanc.htm](http://www.state.wv.us/admin/grievanc/grievanc.htm)

## Customer Satisfaction Survey

We would appreciate your help in telling us how we can improve the services provided by the Education and State Employees Grievance Board. Please respond to the questions below and mail your completed survey to: Customer Survey; 808 Greenbrier Street, Charleston, WV 25311. **All surveys must be postmarked no later than October 19, 2004.** You may also fax this information by that date to (304) 558-1106. If you have any questions regarding this survey, please feel free to contact Ron Wright of the Grievance Board at (304) 558-3361 or toll-free at 866-747-6743.

### I. Adjudication Services: Administrative Law Judge Performance

	Excellent	Good	Fair	Poor	Very Poor	Not Applicable
1. Promptness in deciding cases	5	4	3	2	1	N/A
2. Quality of written decisions, e.g., readability, proper discussion of legal and factual issues	5	4	3	2	1	N/A
3. Ability to conduct orderly and fair hearings	5	4	3	2	1	N/A
4. Knowledge of law applicable to the hearing	5	4	3	2	1	N/A
5. Conscientiousness in finding facts and interpreting the law without regard to public criticism	5	4	3	2	1	N/A
6. Courtesy to parties and witnesses	5	4	3	2	1	N/A
7. Please rank the top three (3) qualities, by question number listed above, which you find most important. For example, if promptness in deciding cases is the most important, you would place a "1" in the first blank space. (most important) _____ (second most important) _____ (third most important) _____						

### II. Level Four of Grievance Procedure: Administrative and Secretarial Staff

8. Simplicity of forms utilized to file grievance	5	4	3	2	1	N/A
9. Simplicity of procedure	5	4	3	2	1	N/A
10. Promptness in obtaining a hearing date	5	4	3	2	1	N/A
11. Promptness in responding to requests for information about the grievance procedure	5	4	3	2	1	N/A
12. Accuracy of information provided	5	4	3	2	1	N/A
13. Courtesy of staff	5	4	3	2	1	N/A

See Reverse Side for Continuation of Customer Survey

### III. General Comments:

14. Circle the percentage of your overall satisfaction in doing business with the Grievance Board      100% 90% 80% 70% 60% 50% 40% 30% 20% 10% 0%
15. During fiscal year 2004 (July 1, 2003 - June 30, 2004), has your overall satisfaction with the Grievance Board:  
☐ Increased      ☐ Decreased      ☐ Remained the Same      ☐ Not Applicable
16. What are your top three (3) recommendations to improve the services provided by the Grievance Board?
- 
- 
- 
- 
- 
- 
- 
- 
- 
- 
17. Is there anything else you want to tell us?

### IV. Customer Information

Please check the box that best describes your role in the grievance procedure:

- |                                                  |                                   |
|--------------------------------------------------|-----------------------------------|
| <input type="checkbox"/> Grievant                | <input type="checkbox"/> Employer |
| <input type="checkbox"/> Employee Representative | <input type="checkbox"/> Counsel  |
| <input type="checkbox"/> Other _____             |                                   |

(Completing the information below is *optional*, although it may assist us in following up on your comments or complaints)

Name: \_\_\_\_\_

Agency: \_\_\_\_\_

Address: \_\_\_\_\_

*Thank You for Your Response*

**APPENDIX C**

**GRIEVANCES FILED AT LEVEL FOUR AGAINST COUNTY BOARDS OF EDUCATION, THE STATE DEPARTMENT  
OF EDUCATION AND OTHER EDUCATIONAL ENTITIES  
FISCAL YEAR 2004**

<b>County Boards of Education:</b>	<b>FY 2004</b>
Barbour County Board	4
Berkeley County Board	0
Boone County Board	4
Braxton County Board	0
Brooke County Board	1
Cabell County Board	7
Calhoun County Board	4
Clay County Board	0
Doddridge County Board	1
Fayette County Board	5
Gilmer County Board	2
Grant County Board	3
Greenbrier County Board	3
Hampshire County Board	5
Hancock County Board	2



Hardy County Board	0
Harrison County Board	0
Jackson County Board	7
Jefferson County Board	7
Kanawha County Board	14
Lewis County Board	0
Lincoln County Board	4
Logan County Board	7
Marion County Board	1
Marshall County Board	1
Mason County Board	2
McDowell County Board	12
Mercer County Board	3
Mineral County Board	1
Mingo County Board	7
Monongalia County Board	15
Monroe County Board	2
Morgan County Board	0
Nicholas County Board	5
Ohio County Board	3

Pendleton County Board	1
Pleasants County Board	1
Pocahontas County Board	2
Preston County Board	2
Putnam County Board	4
Raleigh County Board	6
Randolph County Board	0
Ritchie County Board	0
Roane County Board	0
Summers County Board	2
Taylor County Board	0
Tucker County Board	0
Tyler County Board	0
Upshur County Board	1
Wayne County Board	5
Webster County Board	2
Wetzel County Board	3
Wirt County Board	0
Wood County Board	7
Wyoming County Board	1

Multi-County Vocational Centers	4
Regional Educ. Serv. Agencies	0
W. Va. Department of Education	5
<b>Totals</b>	<b>178</b>

Reports for several prior school years are available on the Board's Home Page.

**APPENDIX D**

**GRIEVANCES FILED AT LEVEL FOUR AGAINST HIGHER EDUCATION INSTITUTIONS**  
**FISCAL YEAR 2004**

<b>STATE COLLEGES</b>	<b>FY 2004</b>
Bluefield State College	0
Concord State College	1
Fairmont State University	1
Glenville State College	2
Potomac State College	1
Shepherd University	1
West Liberty State College	3
W. Va. Univ. Institute of Technology	1
W. Va. Northern Community College	0
W. Va. Southern Community & Technical College	0
<b>STATE UNIVERSITIES</b>	
W. Va. State University	2
Marshall University	10
W. Va. University	10
W. Va. University Hospitals/W.Va. University Medical Corporation	0
W. Va. University School of Dentistry	0

W. Va. School of Osteopathic Med.	0
WVNET	0
Higher Education Policy Commission	0
<b>Totals</b>	<b>32</b>

**APPENDIX E**

**GRIEVANCES FILED AT LEVEL FOUR AGAINST STATE AGENCIES**  
**FISCAL YEAR 2004**

	<b>FY 2004</b>
<b>Administration, Department of</b>	
General Services	3
Information Services and Communications	1
Public Employees Insurance Agency	1
Purchasing	1
<b>Commerce, Bureau of</b>	
Forestry	1
Labor	1
Natural Resources	2
<b>Education &amp; the Arts, Department of</b>	
Culture and History	3
Rehabilitation Services	4
<b>Employment Programs, Bureau of</b>	5
<b>Environmental Protection, Department of</b>	12
<b>Health and Human Resources, Department of</b>	114
<b>Military Affairs &amp; Public Safety, Department of</b>	

Adjutant General	1
Corrections	23
Juvenile Services	13
Public Safety	1
Regional Jail Authority	6
<b>Public Service Commission</b>	
<b>Senate</b>	1
<b>Senior Services, Bureau of</b>	
<b>Tax &amp; Revenue, Department of</b>	34
<b>Transportation, Department of</b>	
Highways	33
Motor Vehicles	8
Parkways, Economic Dev. & Tourism Authority	4
<b>Workers' Compensation Commission**</b>	11
<b>County Health Departments</b>	
Hampshire County	1
Kanawha-Charleston	1
Monongalia County	2
Morgan County	1
<b>Totals</b>	288

**\*\* Created by the Legislature as an independent agency in 2003.**

**This table reflects the current organizational structure of State government. Please note that although employees of constitutional officers occasionally file grievances, the Board does not have jurisdiction over grievances filed by such employees. See Footnote 1 of this report. Please also note that the agency's docketing system does not always enable the Board to identify the specific division or organizational unit within a department or bureau from which the grievances arose.**



## APPENDIX F

### 2004 Grievances Granted and Defaults Found

**Topics** 12-HOUR SHIFTS; OVERTIME; MEAL BREAKS; REST BREAKS; PAY; LEAVE USE; HOLIDAY TIME

**Docket No.** 03-RJA-188

**Synopsis** Grievants raised a number of issues related to Respondent's change-over to a 12-hour workday. Grievants failed to prove they were entitled to compensation for lunch periods or to rest breaks during the day. Grievants did prove they were improperly required to use more than 40 hours of leave to cover a work week; but not that they should not have 4 hours of annual leave deducted when taking an alternate holiday. Grievance GRANTED, IN PART and DENIED, IN PART.

**Topics** BACK PAY

**Docket No.** 02-BEP-391

**Synopsis** Grievant asserted he had been misclassified since 1997. At the Level III hearing, Respondent BEP supported Grievant's request to be reallocated. At that hearing, Grievant stated he was seeking back pay from January 2001. In his closing argument, Grievant's attorney requested back pay from 1997. The Grievance was granted at Level III, but back pay was limited to 10 days preceding the filing of the grievance, as Grievant was aware of the facts constituting a grievable matter and delayed filing. BEP asserted Grievant was not misclassified in 1997, and it was not on notice that Grievant was seeking back pay from 1997.

Grievant was given back pay from January 2001 forward because Respondent was on notice at the Level III hearing and did not contest this assertion. Grievance GRANTED, in part and DENIED, in part.

**Topics** BACK PAY

**Docket No.** 04-HEPC-061

**Synopsis** Grievant assumed the duties of Maintenance worker on July 1, 2003, and was reclassified effective September 1, 2003. Partial relief was granted at level two with back pay awarded to August 1, 2003. Grievant appealed seeking additional back pay. WVU argued that it has 30 days to review classification requests. DECISION: While higher education institutions are to approve or deny reclassification requests within 30 days, there is no mention of back pay. In this case, there is no dispute that Grievant began his new duties on July 1, 2003, and is entitled to appropriate compensation from that date. Grievance GRANTED.

**Topics** BACK PAY; CLASSIFICATION

**Docket No.** 01-HE-064

**Synopsis** Grievants filed level one complaints in January 2001, after co-workers prevailed on their original Mercer grievances, and were awarded back pay. Grievants argue that the inequitable compensation which resulted among the skilled trades results in discrimination. WVU denies that it engaged in discrimination, noting that it simply followed the Orders of the level four decisions and Circuit Court Orders. The grievance was held in abeyance for a prolonged period of time pending the results of a review of the Physical Plant job family. As a result, a number of positions were upgraded; however, no back pay was awarded. DECISION: Based upon a Court Order finding discrimination had occurred with Plumbers, and the subsequent Lambert decision, back pay was awarded to those Grievants who were upgraded as a result of the review. Other Grievants did not prove

they were misclassified or entitled to back pay. Grievance GRANTED in part and DENIED in part.

**Topics** CLASSIFICATION; BACK PAY

**Docket No.** 01-HE-132

**Synopsis** After this grievance was filed, the Job Evaluation Committee reviewed the entire Physical Plant Job Family, which took 2 years. This grievance was placed in abeyance during that time, at Respondent's request. Grievants completed new Position Information Questionnaires as part of the Job Family review. Effective July 1, 2003, Grievants were placed in the Trade Specialist Job Title, pay grade 13. They had previously been classified as Electricians, pay grade 12. Grievants were satisfied with their new classification, but felt they should receive back pay to a date in January 2001. One of the Grievants was deemed to have abandoned his grievance, and his grievance was dismissed. One of the Grievants was first classified as an Electrician on January 1, 1994, the date the Mercer classification system became effective. This was his initial classification. His duties had not changed significantly since that time. The applicable legislative rule provides that if an employee did not grieve his initial classification in 1994, he is thereafter precluded from filing a grievance challenging his initial classification. This Grievant's grievance was dismissed. Respondent's argument that this same legislative rule should apply to the remaining Grievants, precluding them from grieving because they did not first seek an internal review, was rejected. The legislative rule clearly applies only to the procedure to be followed to contest the employee's initial classification on January 1, 1994. Grievants were not required to submit a Position Information Questionnaire for internal review before filing a grievance. The remaining Grievants were awarded back pay to January 2001. Grievance GRANTED, IN PART, and DISMISSED, IN PART.

**Topics** COMPENSATION; EXTRACURRICULAR ASSIGNMENT

**Docket No.** 03-42-148

**Synopsis** Grievant's position as a bus operator included a mid-day vo-tech "shuttle" run, which was posted with the regular position. Grievant contended the vo-tech run should have been a separate extracurricular assignment with a separate contract, and that he was entitled to the "extra duty" rate of pay for it. Evidence established that, because Grievant had to return to work in the middle of the day on what would have otherwise been his "own time," this was an extracurricular run, which should have been contracted separately. Grievant was granted back pay at the extracurricular rate, and also given the option to resign only the vo-tech run, if he so chooses. Grievant was denied pay at the extra duty rate, because this run was extracurricular. Grievance GRANTED IN PART.

**Topics** DEFAULT

**Docket No.** 03-HHR-038D (DEFAULT ORDER)

**Synopsis** The Level III Grievance Evaluator did not schedule a Level III hearing or ask for an extension or waiver of the time limits, and the Level III hearing was not scheduled in a timely manner. Default GRANTED.

**Topics** DEFAULT REMEDY

**Docket No.** 03-HHR-167D

**Synopsis** Grievants prevailed in their claim that Respondent defaulted. Respondents claimed remedy of reclassification was clearly wrong, and successfully rebutted presumption that Grievants were entitled to that remedy. Grievants did prevail in their assertion that case assignments were detrimental to work, and were granted remedy of removal of those cases from their caseloads. Default GRANTED, IN PART and DENIED, IN

PART.

<b>Topics</b>	DEFAULT; EXCUSABLE NEGLECT
<b>Docket No.</b>	04-HHR-108D (DEFAULT ORDER)
<b>Synopsis</b>	Respondent failed to hold level two conference in a timely manner because supervisor counted days beginning with day he received appeal, not from when it was filed. Was not excusable neglect because he knew date it was filed and could have held conference at any time. Default GRANTED.
<b>Topics</b>	DEFAULT; EXCUSABLE NEGLECT; CERTIFIED MAIL
<b>Docket No.</b>	03-CORR-295D (DEFAULT ORDER)
<b>Synopsis</b>	Grievant sent his level three appeal by certified mail to the commissioner's office for the Division of Corrections. It was received in the central mail room at the state capitol complex and signed for by an unidentified individual. Mail room employees do not work for the agencies whose mail they receive. DOC claimed it never received the appeal and had no record of it, which was their reason for not scheduling a hearing. Although DOC cannot control mail room employees, this was not excusable neglect. It defeats the purpose of certified mail if the person who signs for the item is not employed by the recipient. Default GRANTED.
<b>Topics</b>	DEFAULT; EXCUSABLE NEGLECT; EXTENSION OF TIMELINES
<b>Docket No.</b>	03-DEP-235D (DEFAULT ORDER)
<b>Synopsis</b>	At level three hearing, Grievant agreed to a 30-day extension of the time limit for issuance of the decision. Although the hearing was not concluded that day, and reconvened two weeks later, Grievant made it clear to hearing examiner that he expected the decision within 30 days of the initial hearing. Respondent did not issue decision within that time limit. After hearing examiner completed it, it sat in the office of their human resources manager without action for several days. Respondent's delay was not the result of excusable neglect. Default GRANTED.
<b>Topics</b>	DEMOTION; SUSPENSION; UNPROFESSIONAL CONDUCT; MITIGATION
<b>Docket No.</b>	02-CORR-268
<b>Synopsis</b>	On June 17, 2002, Grievant was encountered with a random pat-down search upon arriving at work. He did not immediately comply, but did so after smoking a cigarette outside the facility. Shortly after this event, Grievant angrily slammed a door in the presence of his subordinate officers. Evidence established that Grievant's conduct was unprofessional, disruptive, and unacceptable, but mitigation was found appropriate. His demotion was reversed, and the suspension of 40 days was allowed to stand. Grievance GRANTED, IN PART and DENIED, IN PART.
<b>Topics</b>	DISCRIMINATION
<b>Docket No.</b>	03-HHR-410
<b>Synopsis</b>	Respondents implemented a new salary proposal for health care workers to bring their salaries in line with private sector. At Pinecrest, all direct patient care workers got raises except Health Service Associates. Grievants proved discrimination by proving they were not compared with private peers when all other classifications were. Respondents' given reason for salary discrepancy was pretextual. Grievance GRANTED.
<b>Topics</b>	DISMISSAL
<b>Docket No.</b>	03-52-191

**Synopsis** Respondent voted to terminate Grievant's employment after her performance did not improve following several plans of improvement. Grievant argued that the action was arbitrary and capricious given that she was absent due to illness nearly one-third of the school year.  
DECISION: Because the academic and behavioral problems presented in Grievant's classroom was likely due to her frequent absences, the fact that Grievant was requested not to leave the class after she had prevailed in a grievance to transfer to another position, and evidence that the Superintendent and principal both wanted her to resign, the dismissal was arbitrary and capricious. Grievance GRANTED.

**Topics** DISMISSAL; DRUG TESTING

**Docket No.** 02-23-395

**Synopsis** Grievant was dismissed from his employment after he tested positive for marijuana in his system in a random drug test. Respondent's random drug testing policy applied to employees in safety sensitive positions. Grievant did not have to have a CDL for his job, nor did he transport students or other personnel. By definition, Grievant was not in a safety sensitive position, and was not subject to Respondent's random drug testing policy.  
In addition, Respondent did not prove Grievant had used any illegal drug. Grievant presented evidence that he had been in a small room for an extended period of time with a group of people who were smoking marijuana. Grievant demonstrated the exposure was so concentrated that it showed up in his system on the drug test even though he did not use marijuana, and that this was medically possible. Grievance GRANTED.

**Topics** DISMISSAL; IMMORALITY; INSUBORDINATION; CREDIBILITY; NOTORIETY; MITIGATION

**Docket No.** 03-22-326

**Synopsis** Grievant was dismissed for insubordination, poor performance and immorality. He had prior discipline for allowing girls to sit on his lap, and continued to do so after being advised not to. He was suspended, and case gained substantial notoriety, then he was fired. Respondent proved insubordination, but failed to prove Grievant's conduct was immoral. Other charges fell into unsatisfactory performance category, but there was no improvement plan. Insubordination was not enough to sustain termination, so dismissal was mitigated to suspension. Grievance GRANTED.

**Topics** EXTRACURRICULAR ASSIGNMENT

**Docket No.** 03-20-388

**Synopsis** Grievant asserted she should have been given another bus operator's run when hers was eliminated, and that she did not receive proper notice of the termination of her run.  
Pursuant to 18A-4-16(6) Grievant was not entitled to take over the extracurricular run of another employee. Grievant did not receive proper notice of the termination of this position. Grievance GRANTED.

**Topics** EXTRACURRICULAR ASSIGNMENT; EXTRA-DUTY ASSIGNMENT

**Docket No.** 03-50-178

**Synopsis** Respondent added students and a stop to Grievant's regular evening route, so that Grievant transported students who were not previously on her evening run, from the elementary school to a stop 6 to 8 blocks away, to attend an after-school program. The stop was located along Grievant's evening route. The stop added 5 to 7 minutes to the time it took Grievant to complete her route. Grievant argued this was an extracurricular assignment. This is not an extracurricular assignment, as it occurs during Grievant's regularly scheduled working hours, and does not extend her work day. Likewise, it was not an extra duty assignment. Grievant did demonstrate she was

entitled to a list of the names of the students she was transporting to the after school program, and that, on occasion, these added students resulted in overcrowding on her bus. Respondent was directed to prepare a list of the students attending the after school program who would be riding Grievant's bus, and when the addition of these students reached the point where there would be 90 students on the bus, no more students could be added to the list or to Grievant's bus. Grievance GRANTED, IN PART AND DENIED, IN PART.

**Topics** EXTRACURRICULAR ASSIGNMENTS; CONTRACT TERMINATION

**Docket No.** 03-19-319

**Synopsis** In order to alter the system for compensating operators for extracurricular bus runs, Respondent terminated Grievants' extracurricular assignments. It then gave Grievants the same assignments, but with altered compensation plans. This is specifically prohibited by the two statutes listed, along with the non-relegation clause as interpreted in Crock v. Harrison. Grievance GRANTED.

**Topics** HIRING; SELECTION; EXPERIENCE

**Docket No.** 03-41-161

**Synopsis** Grievant was not selected for a posted counselor's position. Respondent improperly calculated "years of experience within the required certification area." However, Grievant provided no evidence that she would have been successful had the correct criteria been used. Remanded to lower level for re-evaluation of candidates' experience, with order to instate Grievant if she is then successful. Grievance GRANTED, IN PART and DENIED, IN PART.

**Topics** MERIT RAISES; DISCRIMINATION; FAVORITISM

**Docket No.** 03-DNR-094

**Synopsis** Respondent's Conservation Officer 2's who were referred to as Regional Training Officers were given raises after they were assigned additional firearms training and armorer duties as compensation, for the added duties. Grievants, who were also classified as Conservation Officer 2's, but referred to by Respondent as Field Sergeants, with different duties than the Regional Training Officers, were not given these raises and grieved, claiming discrimination and favoritism. Grievants demonstrated the raises were not given for merit, and were improper, and amounted to discrimination and favoritism. Grievants requested as relief that they also be awarded raises. This relief would also be improper, as Grievants did not demonstrate they were entitled to merit raises. The relief granted was the rescission of the raises for the Regional Training Officers. Grievance GRANTED, IN PART and DENIED, IN PART.

**Topics** NON-SELECTION; CERTIFICATION

**Docket No.** 03-15-101

**Synopsis** Based upon prior practice, HCBE did not appoint Grievant to a position of bus operator because she did not hold a hard copy of her certification at the time the position was filled. Grievant asserts the certification had been issued and telefaxed to HCBE by the State Department of Education. HCBE argues there is no legal authority requiring that a telefax copy be accepted.

Because the telefax was from the State Department of Education, and it is a common practice of that agency, Grievant should have been awarded the position in December 2002. Grievance GRANTED.

**Topics** PAY INCREASE

**Docket No.** 04-HHR-018

**Synopsis** This grievance is based on the prior grievance of Sluss. Grievants asserted they should receive a pay increase like the ones received by other health care workers. Grievants demonstrated the study was flawed and they were not compared to similar workers in the surrounding area. Grievance GRANTED.

**Topics** PLAN OF IMPROVEMENT; REPRISAL

**Docket No.** 04-19-068

**Synopsis** Grievant was placed on a plan of improvement in September 2003, after she had accrued a high rate of absenteeism the prior school year. Grievant argues the plan was reprisal for her having filed prior grievances. JCBE asserted the plan was developed as a result of the undisputed number of days Grievant was absent the prior year.  
Decision: Grievant's evaluation for 2002-2003 was satisfactory, and did not mention absenteeism. Grievant was not advised any time during the school year that her absences were a problem. State BOE Policy 5300 requires that the deficiency be brought to the employee's attention. Grievant had filed several previous grievances within a short period of time, establishing a prima facie case of reprisal. Because JCBE had not denied Grievant any leave time, it could not rebut the prima facie case. Grievance GRANTED.

**Topics** POSTING; QUALIFICATIONS

**Docket No.** 03-30-249

**Synopsis** Respondent posted and filled a summer assignment for an Aide with a qualification that the individual be an LPN to provide care for a student whose doctor had requested the presence of medical personnel. Grievant argues that MCBE may not impose an LPN requirement for an Aide position. MCBE asserts that a trained aide, as provided for in W. Va. Code § 18-5-22(d) was not adequate for the needs of the child.  
DECISION: There is no statutory provision for employment of LPNs, and to include such a requirement for an aide circumvents the statute's requirement that health procedures be administered by an RN or by a "trained" aide. Grievance GRANTED.

**Topics** REMANDED BY CIRCUIT COURT; ORDER; ATTORNEY FEES AND COSTS

**Docket No.** 01-DOH-589R

**Synopsis** Grievance was remanded by the Circuit Court of Kanawha County to the Grievance Board for a determination of "the amount of attorney fees each of the [four Grievants] incurred in this matter." The Circuit Court further ordered "that each [Grievant] shall recover his or her attorney fees and costs expended." The Administrative Law Judge found that each of the four Grievants incurred \$811.26 in attorney fees and costs. Respondent objected to paying more than \$1500.00 total in attorney fees and costs, citing W. Va. Code Section 29-6A-10. That statute states that if "an employee" appeals to circuit court, or is required to defend an appeal to circuit court, and prevails, the adverse party is liable to "the employee" for reasonable attorney fees, court costs, and court reporter costs, not to exceed \$1500.00. Here there were four employees, each of whom incurred attorney fees and costs of less than \$1500.00. The statutory cap does not apply to the grievance, but to each employee. Respondent was ordered to pay \$811.26 to each of the four Grievants.

**Topics** RESIGNATION

**Docket No.** 04-MCHD-102

**Synopsis** After Grievant expressed her displeasure over the fact that she had no one to cover her home health care cases when she was absent, and found they had been rescheduled for her upon her return, she stated that she was going to resign. The Program Manager did not have the authority to accept a verbal resignation, but passed

the comment on to the Assistant Director, who did accept it. Grievant was provided a letter stating that her verbal resignation had been accepted. Grievant argued that she had not completed the resignation form, and had been preparing to complete her duties for the day, when her husband called her to come home to care for their sick child.

DECISION: While Grievant's behavior on the day in question was contentious, she did not verbally resign to an individual who had the authority to accept it. Further, her claim that she did not resign was supported by the fact that she was preparing the paperwork for her daily duties when her husband called. Grievance GRANTED.

**Topics** SELECTION

**Docket No.** 03-24-121

**Synopsis** In selecting an applicant for a special education teaching position, Respondent asserted that neither set of factors in W. Va. Code §18A-4-7a was applicable. However, because in this case, neither Grievant nor successful applicant were permanently employed, the first set of factors applied. Respondent failed to properly consider teaching experience in the subject area, course work in the relevant field, and specialized training. Therefore, case must be remanded to board of education for proper consideration of applicants' credentials pursuant to these criteria. Grievance GRANTED, IN PART and DENIED, IN PART.

**Topics** SELECTION

**Docket No.** 03-55-151

**Synopsis** Grievant had recently been placed in a regular half-time position because she had special skills needed by a hard-of-hearing student. (This skill allowed her "leap-frog" over many other more senior aides.) When a full-time position became available, Grievant applied, and she was not selected because the Board believed that Code Section 18A-4-5(d) allowed them to keep Grievant in the half-time position until she had served half of her employment term.

The ALJ found the Board had misapplied the above cited Code Section and Grievant should be eligible for the position because the duties of the position did not start until the beginning of the second semester. Grievance GRANTED.

**Topics** SELECTION; QUALIFICATIONS

**Docket No.** 03-06-269

**Synopsis** Grievant was not selected for an Assistant Principal's position even though she the most qualified. The BOE relied on factors not included in W. Va. Code §18A-4-7a in making their decision. Grievance GRANTED.

**Topics** SELECTION; RETALIATION

**Docket No.** 03-DOH-288

**Synopsis** Grievant asserted he was more qualified than the successful applicant, and also had greater seniority. Additionally, he averred he had been retaliated against for filing this grievance.

Grievant met his burden of proof on both counts. Grievance GRANTED.

**Topics** SELECTION; TIMELINESS

**Docket No.** 04-50-120

**Synopsis** Grievant claimed Respondent failed to properly post jobs, and that it should have selected him for job it did post. Respondent and Intervenor both claimed grievance was untimely, but failed to prove it was. Respondent had conceded it made error in selection process, so Grievant prevailed on that issue. Grievant failed to prove other

claims. Grievance GRANTED, IN PART and DENIED, IN PART.

**Topics** SPECIAL; LEVY; VOCATIONAL; INTERPRETATION; JURISDICTION

**Docket No.** 03-33-067

**Synopsis** Grievants alleged Board violated the language of the special excess levy when it failed to hold vocational classes at the Vocational Technical Center during the summer of 2002, but held academic classes there instead. All public agencies are responsible for the proper application of publicly mandated funds. When a levy election is held to raise money for a specific public purpose, the money must be applied towards that purpose. The language of the special levy, the historical practice of offering summer vocational programs at the Center, and the Board members' testimony that they intended vocational summer programs to be funded by the levy, all combine to demonstrate that the voters of McDowell County intended to fund summer vocational programs at the Center. The levy contained no language giving the Board or Superintendent discretion to use the special levy funds for a purpose other than offering summer vocational programs at the Center. Grievance GRANTED.

**Topics** SUMMER EMPLOYMENT

**Docket No.** 03-05-253

**Synopsis** When BCBE reduced the number of Aides needed for the Summer 2003 program, seniority was calculated by years of consecutive service. This method of determining summer seniority resulted in Grievant not being employed even though she had more total years of seniority than another employee.  
DECISION: BCBE was required by statute to reduce the number of employees in the summer program based upon the length of service time in the particular program or classification. There is no reference to consecutive years worked, and that criteria was improperly used. Because BCBE had no records for the early years involved in this matter, Grievant's representations were accepted as true. Grievance GRANTED.

**Topics** SUSPENSION; SEXUAL HARASSMENT

**Docket No.** 03-CORR-116

**Synopsis** Grievant received a three-day suspension after, on three separate occasions, he said to a coworker "Would you like to have sex?" Although Respondent argued Grievant was not disciplined for sexual harassment, the disciplinary letter specified that he was. In accordance with legal definition of sexual harassment, the victim must be intimidated or feel a hostile work environment has been created, and the evidence did not support this. Accordingly, mitigation was found appropriate, and the suspension was reduced to a verbal reprimand. Grievance GRANTED, IN PART and DENIED, IN PART.

**Topics** SUSPENSION; WILLFUL NEGLECT OF DUTY

**Docket No.** 03-45-377

**Synopsis** Grievants' school was evacuated during a flood situation in November of 2003. Grievants assisted in the evacuation process, then traveled to the middle school on a bus with other employees, including the principal. Due to their soiled and wet clothing, Grievants informed principal on the bus that they were going to have Grievant Kirkham's husband pick them up at the middle school, so they could go home and change. Principal did not respond, so Grievants assumed they had permission. Grievants were only gone 45 minutes, then returned to middle school and assisted with evacuation issues the remainder of the day. Although principal did not recall the conversation on the bus, he admitted the situation that day was chaotic. Grievants were suspended for willful neglect of duty, because they allegedly left school without permission.

Evidence did not support a finding that Grievants knowingly left without permission.



They believed the principal did not object to their leaving, and this was just a misunderstanding. This was not a knowing and intentional act, so it did not constitute willful neglect of duty. Grievance GRANTED.

**Topics** TRAINING; COMPENSATION

**Docket No.** 03-DOE-157

**Synopsis** Grievant's job description as a child care worker required that, within one year of employment, she become proficient in Braille. Shortly after her employment began, the superintendent sent her a letter, noting that she was not attending the Braille course offered free of charge to school employees, and reminding her that she must obtain these skills. Under FLSA, required training is considered compensable work time. Therefore, even though Grievant did not normally work during the hours the course was offered, she was entitled to compensation for time spent in the classes. Grievance GRANTED, IN PART and DENIED, IN PART.

**Topics** TRANSFER

**Docket No.** 03-41-175

**Synopsis** Grievant had been assigned as a special education "one-on-one" aide, assisting a particular student for several years. When the student moved out of the area, it was too late to transfer Grievant, so BOE allowed her to remain at the school and work as a special education aide, performing various duties. At the conclusion of that school year, Respondent transferred Grievant, claiming she was the least senior "one-on-one" aide in the department. This violated Respondent's policy, which requires that, when aides at a school must be reduced, the least senior aide in the program area will be transferred, and special education is one program area. There is no "subcategory" of one-on-one aides versus general aides, so Respondent's transfer of Grievant was arbitrary and capricious, there being two less senior special education aides at the school. Grievance GRANTED.

**Topics** TRANSFER; RESCISSION OF TRANSFER

**Docket No.** 03-54-302

**Synopsis** Grievant's Aide position was cut due to an expected decrease in Title I funds. Funds did not decrease, but instead of rescinding transfer, Board found a better use for the money. W. Va. Code § 18A-4-8b(k) requires board to rescind transfer when reason no longer existed, notwithstanding they have a better use for the money. It would have been unreasonable and arbitrary for board not to conclude reason for transfer no longer existed when money was not decreased. Grievance GRANTED, IN PART and DENIED, IN PART.



**MEMBERS**  
Debra Kilgore  
Lowell Witters

**DIRECTOR**  
Ronald Wright

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

**BOB WISE**  
Governor

**APPENDIX G**

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**RESOLUTION BY THE  
EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD  
REGARDING AMENDMENTS TO THE GRIEVANCE PROCEDURE LAWS  
OF WEST VIRGINIA**

**Whereas**, the Grievance Board is responsible for administering the fourth and final administrative level of the grievance procedure laws applicable to many public employees; and

**Whereas**, in 2001, the West Virginia Legislature amended W. Va. Code § 18B-2A-4(k), so as to require grievances filed by higher education employees after July 1, 2001, to be processed under W. Va. Code §§ 29-6A-1 et seq., the Grievance Procedure for State Employees, rather than W. Va. Code §§ 18-29-1 et seq., the grievance procedure applicable to public education employees; and

**Whereas**, through its amendment of W. Va. Code § 18B-2A-4(k), the Legislature altered the coverage of both W. Va. Code §§ 29-6A-1 et seq. and W. Va. Code §§ 18-29-1 et seq., but failed to amend either statute to reflect this change; and

**Whereas**, the Grievance Board voted at its meeting on June 30, 2004, to recommend both grievance procedure statutes be amended and directed that a resolution be drafted to convey its recommendation; now therefore be it

**Resolved**, that the West Virginia Legislature amend W. Va. Code §§ 29-6A-1 et seq., and W. Va. Code §§ 18-29-1 et seq., to accurately designate the public employers and employees subject to these statutes.