

FOURTH ANNUAL REPORT

TO THE

GOVERNOR AND THE LEGISLATURE

February 17, 1989

Submitted by:

WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD



Members
James Paul Geary
Chairman
Orton A. Jones
David L. White

**WEST VIRGINIA EDUCATION AND
STATE EMPLOYEES GRIEVANCE BOARD**
GASTON CAPERTON
Governor

Offices
240 Capitol Street
Suite 515
Charleston, WV 25301
Telephone 348-3361

February 17, 1989

TO THE GOVERNOR AND THE LEGISLATURE

In accordance with W.Va. Code §§18-29-5
and 29-6A-1, et. seq., it is my honor to
submit to you the fourth annual report of the
West Virginia Education and State Employees
Grievance Board for the calendar year 1988.

Respectfully yours,

A handwritten signature in cursive script that reads "James Paul Geary".

James P. Geary
Chairman

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FOREWARD

In July 1985 the Legislature created the West Virginia Education Employees Grievance Board, the hearing examiner level of the four-step grievance procedure to serve approximately fifty-five thousand (55,000) employees of the state education system. W.Va. Code §§18-29-1, et seq.¹ Subsequently the agency hired four (4) hearing examiners, secretarial staff and opened offices in Charleston, Elkins, Beckley and Wheeling. During the next three (3) years over one-thousand one-hundred (1,100) grievances were received from employees of the West Virginia Board of Regents, West Virginia Board of Education, the various county boards of education, regional educational service agencies (RESA) and multi-county vocational centers. Decisions were rendered in approximately seventy-five percent (75%) of those cases and the remainder were either remanded or dismissed.

¹ Level one contemplates an informal conference with the employees' immediate supervisor and thereafter the filing of a written grievance with a written decision from the supervisor; level two provides for an evidentiary type hearing with the county superintendent or chief administrator or their designees and level three provides for a discretionary hearing before the county board of education. W.Va. Code §18-29-4. The Board is only responsible for the administration of level four where a decision is rendered following an evidentiary hearing or submission of the case on the record of lower level proceedings. Either party may appeal that decision within thirty (30) days to the Circuit Court of Kanawha County or the Circuit Court of the County in which the grievance arose.

In July 1988, pursuant to an enactment of W.Va. Code §§29-6A-1, et seq., a similar grievance procedure for approximately thirty thousand (30,000) state employees was established and the title of the agency was changed to West Virginia Education and State Employees Grievance Board (Board). The new legislation empowers the Board to receive and issue decisions on grievances by employees of any department, governmental agency or independent boards or commissions with the exception of employees of the Board of Regents, state institutions of higher education, the Legislature, members of the Department of Public Safety and employees of any constitutional officer unless they are covered under the civil service system. W.Va. Code §29-6A-1. Two (2) additional hearing examiners were employed in July and August, 1988 pursuant to the requirements of W.Va. Code §29-6A-5 and both were assigned to the Charleston office. Currently all five (5) hearing examiners are assigned both state and education employee cases.²

In accordance with the requirements of W.Va. Code §§18-29-5 and 29-6A-5, the Board conducted an open hearing in Charleston on January 6, 1989 and invited all education institutions, county school superintendents, employee organizations, all state agencies and all grievants who had

² A resignation in January, 1988 created a vacancy in the chief hearing examiner's position which has just recently been filled.

participated in level four proceedings in 1988 to attend or submit written comments concerning their experience(s) with the proceedings. The purpose of the meeting and solicitation of comments was to receive input concerning the operation of the agency and the performance of the hearing examiners in preparation for this Evaluation and Report as required by law.

Over five hundred (500) notices were mailed and, in response thereto, thirteen (13) written statements were received and four (4) persons attended the open meeting: two (2) representatives of employee organizations and two (2) members of the Attorney General's staff. Of the thirteen (13) written responses six (6) were critical, six (6) were complimentary and one (1) concerned recommendations to improve the grievance procedure. Of those persons appearing at the open hearing and offering comment, one representative of an employee organization (West Virginia Education Association) voiced concerns that the Board should take a more active role in establishing rules for county boards of education to follow in levels one through three. He also stressed the importance of the narrative portion of the written decisions and noted that past decisions dealing with certain aspects of education law are now being used to decide if other grievances will be filed. The two (2) representatives of the Attorney General's office explained the recent establishment of a division within that office which would deal exclusively with state agencies and Board

of Regents grievances. Another spokesperson of an employee organization (Communication Workers of America) voiced concerns over the inequity in requiring grievants, who are not familiar with legal jargon, to submit briefs or other legal memoranda following the conclusion of level four hearings.

EVALUATION

The comments and criticisms at the open hearing, along with the written responses to the notices, indicate a general satisfaction with the level four grievance procedure in 1988. As in previous years, criticisms are still voiced regarding the time required to resolve a grievance. Those criticisms are directed toward delays in the first three levels, as well as level four. Normally, a written decision is issued thirty (30) to forty-five (45) working days from the date of the level four hearing. A number of factors can and have disrupted this process, including the desire of the parties to submit legal briefs in support of their positions, the complexity of issues and factual situations in a given case and fluctuating caseloads. The resignation of the chief hearing examiner in January, 1988 caused a substantial disruption in the process as other examiners were forced to assume additional cases and cover additional areas of the state.³ Nonetheless, in 1988, three-hundred sixty (360) grievances were received by the Board and disposition was made of two-hundred eighty-nine (289):⁴ two-hundred

³ The resignation also necessitated the assumption of certain administrative duties by another hearing examiner.

⁴ Seventy-four (74) state employee grievances were received in 1988.

seventeen (217) by written decision and seventy-one (71) by remand and dismissal.

The breakdown of activity of each office is as follows:

	<u>Decisions Issued</u>	<u>Level Four Hearings Scheduled</u>	<u>Held</u>	<u>Cases Submitted on Record</u>
Charleston	29	86	42	7
Elkins	64	126	45	9
Beckley	74	124	62	8
Wheeling	<u>50</u>	<u>80</u>	<u>33</u>	<u>7</u>
TOTAL	217	416	182	31

An average of twenty-five (25) grievances per month were filed in 1988 and the average caseload per hearing examiner is currently thirty (30) cases. IBM personal computers with word processing capabilities, which will greatly enhance the hearing examiner's ability to manage caseloads and render decisions in a more efficient manner, have recently been installed in each office. Plans are currently underway to categorize and index all of the more than six-hundred (600) decisions rendered since the formation of the Board in a comprehensive computer program in an effort to facilitate research of those cases and ensure consistency with future decisions.

Upon review of the statistics and the quality of the decisions rendered, the Board is pleased to report an overall satisfaction with the functioning of the level four grievance process and the performance of the hearing examiners in 1988. As was noted in the 1987 annual report, the majority of the criticisms received were those normally

expected of litigants involved in any type of adversarial proceeding. Similarly, complaints that the Board should assume more responsibility in the administration of school affairs and the converse complaint that the Board is encroaching upon the territory of school administrators are still received. Such comments are most likely a good indication that the Board has achieved the neutral stance intended by the legislation which created it.

APPEALS

Of the two-hundred seventeen (217) decisions rendered in 1988, approximately thirty-nine percent (39%) were in favor of the employee, fifty-four percent (54%) were decided in favor of the employer and seven percent (7%) were partially in favor of both. Approximately ninety (90) decisions were appealed to the circuit courts in 1988. A determination of how many of those have been affirmed or reversed is difficult due to the inconsistent and sporadic manner in which the Board is informed of those decisions.⁵

Since the Board's inception in 1985, one-hundred eighty-three (183) decisions have been appealed and the information currently available indicates the circuit courts have affirmed twenty-eight (28), reversed thirteen (13) and remanded three (3) with instructions. Nine (9) appeals were withdrawn due to out-of-court settlements. The Board continues to search for a viable method of determining the outcome of appeals but at present it appears that approximately seventy-five percent (75%) of the appeals result in affirmation by the circuit courts. To date five (5) of the Board's decisions have reached the West Virginia Supreme

⁵ There are no provisions in the education and state employees grievance procedures requiring a circuit court to notify the Board of such decisions.

Court of Appeals and of those five (5), the Court affirmed the decision of the hearing examiner three (3) times and affirmed one (1) in part and remanded it to the circuit court. One (1) appeal was apparently withdrawn because of a settlement.

PUBLIC RESPONSE

Perhaps the most controversial decisions and the ones which draw a great deal of media attention are those involving the dismissal of school employees convicted of crimes. In such cases the hearing examiners must apply certain principles enunciated by the West Virginia Supreme Court of Appeals in Golden v. Board of Education of the County of Harrison, 285 S.E.2d 665 (W.Va. 1981). Those principles place the burden on county boards of education to establish a connection between the employees' conduct and job performance. That decision held that conviction of a crime is not immorality "per se" and is therefore not grounds for dismissal without a further showing of a "nexus" or connection between the crime and the employment. That decision may not be a popular one but must be applied until such time as the Court or the Legislature changes it. Hearing examiners may not make new law but must follow existing law in arriving at each decision. A number of cases in which a county board of education's failure to establish the legally required connection have resulted in orders to reinstate employees with backpay. Those decisions have drawn criticism in the media especially where the employee's criminal behavior has already received considerable attention.

The majority of the Board's decisions, however, have not been subjected to such criticism and the high rate of affirmation of the decisions in the circuit courts is a good indication that the hearing examiners have attained a knowledge of the law pertaining to employer-employee relationships and the ability to apply that law to the many factual situations posed in grievances.

PROCEDURAL RULES AND REGULATIONS

The procedural rules of the West Virginia Education and State Employees Grievance Board, promulgated in accordance with W.Va. Code §§29A-3-1, et seq., 18A-29-5 and 29-6A-5, were filed with the Office of the Secretary of State on January 6, 1989 and carry an effective date of February 6, 1989. The proposed draft of these rules was submitted to the Secretary of State on or before October 10, 1988, for publication in the state register; further, all state agencies, county boards of education, RESA's, employee organizations who have had dealings with the grievance board, and other interested parties were mailed a copy of the proposal. All parties were advised that this grievance board would be prepared to receive comments and suggestions on the proposed rules. Several were received, some of which formed the basis for amendments made to the proposed rules prior to their filing in final form. The purpose of these rules, as stated in Section 1.1 thereof, "is to inform parties to the grievances filed by certain West Virginia education and state employees as to certain facts about Level Four and related aspects of the grievance procedure... [and] shall be construed to allow the West Virginia Education and State Employees Grievance Board...to do substantial justice...." It is the Board's hope that these Procedural Rules will provide guidance and assistance to the parties

who appear before it, either in person or through submission of matters for resolution on the record of lower level proceedings.

RECOMMENDATIONS

As stated in last year's annual report, the Board is of the opinion that the existing process of selection of board members should be preserved in order to ensure the maintenance of the integrity, continuity and consistency of the operation of the level four grievance procedure. The Board also recommends that two (2) additional hearing examiners and two (2) secretaries be added to the existing staff bringing the total number of staff to seven (7) examiners, inclusive of the Chief Hearing Examiner, seven (7) secretaries and one (1) administrative assistant.⁶ At present it is difficult to estimate the number of grievances per year that will be received under the state employees grievance procedure but if the number of education employee grievances can be used as an indicator, approximately two-hundred (200) per year can be expected. It is hoped that with seven (7) examiners the average of 5.5 decisions per month per examiner can be maintained as the state employee grievances increase.⁷ Additionally, the amount of time required for a

⁶ The Chief Hearing Examiner must perform a number of administrative duties and therefore is available to conduct hearings and render decisions on a limited basis.

⁷ During the first six months of the new procedure, seventy-four (74) such grievances were received. Considering the fact that this is an entirely new procedure
(Footnote Continued)

decision following a level four hearing cannot be reduced without additional staff. The Board has always given preference in scheduling to cases of dismissal and suspension because of the possibility of backpay and this preference invariably causes delays in the disposition of other grievances. Two (2) additional hearing examiners would enable the Board to continue the preference without that disruption.

It is also recommended that another branch office be opened in an area to be determined by a study of the geographical distribution of state employee grievances. With the concentration of state employees in Kanawha County, there is the obvious need to assign one of the proposed additional examiners in Charleston but concentrations of state employees in other heavily populated areas of the state would make an office in one of those areas cost-effective.⁸

Finally, it is essential that the Board be given the discretion of increasing salaries of the hearing examiners to \$35,000.00 in order to attract and retain experienced personnel. As noted in the 1987 report, recruitment

(Footnote Continued)

and that some time elapsed before all employees were aware of it, this number appears inordinately high.

⁸ A level four hearing often involves a number of grievants and large numbers of witnesses, including supervisors and administrators. The cost of lost work time and transportation can be very high when those persons must travel.

experience has clearly demonstrated that a majority of experienced lawyers will not consider these positions except on a part-time basis. This inadequacy has seriously handicapped the Board in recruitment efforts and continues to be a disincentive to the examiners presently carrying the burden of the day-to-day operations of the agency.

CONCLUSION

The Board's accomplishments during 1988 demonstrate the wisdom behind the enactment of the legislation creating an equitable and comprehensive grievance procedure for education employees throughout the state. The extensive body of education law developed through past decisions of the Board provides both employees and administrators a tremendous resource in personnel matters and the guidance with which to reach dispositions of conflicts at the lower levels of the procedure. Circuit courts no longer have to conduct the extensive evidentiary hearings necessary in a great many cases and are now able to render decisions on appeal upon the record developed by the hearing examiner.

The transition from a Board which dealt solely with education employees to one which will now also perform the same functions for a majority of state employees has progressed smoothly and there are no reasons why the same success cannot be achieved in the Board's new area of responsibility. It is, therefore, with a sense of pride

that the West Virginia Education and State Employees Grievance Board respectfully tenders its 1988 Annual Report to the Governor and the Legislature.

Respectfully,

JAMES PAUL GEARY
Chairman

ORTON A. JONES
Member

DAVID L. WHITE
Member

A P P E N D I X

FISCAL SUMMARY

The agency requested a \$282,977.00 appropriation for fiscal year 1988-89 and because of the recent enactment of legislation creating the new grievance procedure for state employees and the corresponding need for additional staff, office space and equipment, an appropriation of \$509,894.00 was awarded. In December the agency assumed the cost of Social Security matching funds for its personnel and in January 1989 conformed to Governor Caperton's mandate that expenditures be reduced by five percent (5%) of the agency's gross appropriation. These cuts were possible because the position of Director, for which funds were appropriated, has not been filled. The expenditures at all office locations has, as in previous years, been closely scrutinized and the agency will be able to complete this year of operation within its appropriation and maintain an acceptable level of performance.

A request for \$645,616.00 has been made for fiscal year 1989-90, which includes salaries for a total staff of one (1) Director, one (1) Chief Hearing Examiner, seven (7) hearing examiners, one (1) clerk, one (1) administrative assistant and seven (7) secretaries. Expenditures for Social Security contributions were not anticipated at the time and were not included at the time the request was made.

While it is difficult to predict the number of grievances by state employees that will be received, if the

number of such cases received during the first six months since the new grievance procedure was initiated and the number filed by education employees in the past are reliable indicators, approximately two hundred (200) a year can be expected. This would bring the total number of the cases the Board must process and render decisions in to nearly five hundred and fifty (550). The additional two (2) hearing examiners and secretarial staff would enable the agency to continue its current rate of disposition of grievances and prevent a backlog of cases.

1989-90 APPROPRIATION REQUEST
SPENDING UNIT ACCOUNT SUMMARY

EDUCATION AND STATE
EMPLOYEES GRIEVANCE BOARD
SPENDING UNIT

6015
APPROPRIATED STATE ACCOUNT NUMBER

APPROPRIATED FEDERAL ACCOUNT NUMBER

	FY 1987-88		FY 88-89 LEG		FY 1988-89 BUDGETED			FY 1989-90 CURRENT-LEVEL REQUEST			RECOMMENDATION	
	ACTUAL STATE	DIGEST STATE	STATE	FEDERAL	OTHER	TOTAL	STATE	FEDERAL	OTHER	TOTAL	FEDERAL	STATE
NUMBER OF POSITIONS	12		14.00			14.00	21		21			
PERSONAL SERVICES	187,886	351,476	351,476			351,476	447,672		447,672			
INCREMENT POSITIONS	XXXXXXXXXXXX	XXXXXXXXXXXX	12.00			12.00	9		9			
ANNUAL INCREMENT		5,500	5,500			5,500	2,196		2,196			
TOTAL PERSONAL SERVICES	187,886.39	356,976	356,976			356,976	449,868		449,868			
CURRENT EXPENSES	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX
10-CIV SER. PUB EMP INS & RET FEES												
11-SOCIAL SECURITY MATCHING												
12-PUB. EMPLOYEE INSURANCE PREMIUM												
13-OTHER HEALTH INSURANCE												
14-WORKERS COMPENSATION	490.94		1,214			1,214	1,530		1,530			
15-UNEMPLOYMENT COMPENSATION												
16-PENSION & RETIREMENT CONTRIB.												
20-OFFICE EXPENSES, POSTAL & FREIGHT	13,363.30		20,000			20,000	21,000		21,000			
21-PRINTING & BINDING	98.86		3,000			3,000	1,000		1,000			
22-RENTAL EXPENSES (BUILDING)	24,516.96		45,253			45,253	52,640		52,640			
23-UTILITIES												
24-TELEPHONE & TELEGRAPH	15,545.12		18,000			18,000	18,500		18,500			
25-CONTRACTUAL & PROFESSIONAL			3,000			3,000	2,000		2,000			
26-TRAVEL	6,994.64		18,000			18,000	14,000		14,000			
27-ISSD												
28-CONSULTANTS AND CONSULTING FEES												
29-VEHICLE RENTAL	53.30											
30-RENTAL (MACHINE & MISCELLANEOUS)	3,446.39		3,503			3,503	6,036		6,036			
31-ASSOCIATION DUES												
32-FIRE, AUTO, BONDING, & OTHER INS												
33-FOOD PRODUCTS												
34-CLOTHING & HOUSEHOLD SUPPLIES												
35-ADVERTISING	250.88											
36-VEHICLE MAINTENANCE EXPENSE												
37-RESEARCH, EDUCATIONAL & MEDICAL												
38-MAINTENANCE CONTRACTS			8,000			8,000	2,000		2,000			
39-MANUFACTURING SUPPLIES												
40-MERCHANDISE FOR RESALE												
41-SECURITY SERVICE												
42-HOSPITALITY	129.00		250			250	500		500			
43-EDUCATIONAL TRAINING (STIPENDS)												

1989-90 APPROPRIATION REQUEST
SPENDING UNIT ACCOUNT SUMMARY

EDUCATION AND STATE
EMPLOYEES GRIEVANCE BOARD
SPENDING UNIT

6015
APPROPRIATED STATE ACCOUNT NUMBER

APPROPRIATED FEDERAL ACCOUNT NUMBER

	FY 1987-88	FY 88-89 LEG	FY 1988-89 BUDGETED				FY 1989-90 CURRENT-LEVEL REQUEST				RECOMMENDATION	
	ACTUAL STATE	DIGEST STATE	STATE	FEDERAL	OTHER	TOTAL	STATE	FEDERAL	OTHER	TOTAL	FEDERAL	STATE
44-PROMOTIONAL												
45-FARM EXPENSE												
46-SUBSISTENCE												
47-DEBT SERVICE												
48-DISCHARGE & PAROLE ALLOWANCE												
49-MISC. REPAIR & ALTERATIONS												
50-RECREATIONAL SUPPLIES												
51-MISCELLANEOUS												
TOTAL CURRENT EXPENSES	64,889.39		120,220			120,220	119,206			119,206		
REPAIRS & ALTERATIONS	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX
60-LABOR (CONTRACTUAL)												
61-OFFICE EQUIPMENT REPAIRS												
62-RESEARCH, ED. & MED EQUIP REPAIR												
63-BLD. HOUSEHOLD & COMM. EQUIP REP												
64-BUILDING REPAIRS & ALTERATIONS												
65-VEHICLE REPAIRS												
66-GROUND IMPROVEMENTS												
67-FARM & CONSTRUCTION EQUIP REPAIR												
68-OTHER REPAIRS & ALTERATIONS												
TOTAL REPAIRS & ALTERATIONS												
EQUIPMENT	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX
70-OFFICE & COMMUNICATION	13,982.40		27,000			27,000	61,542			61,542		
71-MEDICAL												
72-RESEARCH & EDUCATIONAL												
73-HOUSEHOLD EQUIP. & FURNISHINGS												
74-BUILDING												
75-VEHICLES												
76-LIVESTOCK, FARM, & CONSTRUCTION												
77-BOOKS			5,698			5,698	15,000			15,000		
78-OTHER EQUIPMENT												
TOTAL EQUIPMENT	13,982.40		32,698			32,698	76,542			76,542		
UNCLASSIFIED		152,918										
GROSS TOTAL	XXXXXXXXXXXX	XXXXXXXXXXXX	509,894			509,894	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX
LESS REAPPROPRIATIONS	XXXXXXXXXXXX	XXXXXXXXXXXX					XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX	XXXXXXXXXXXX
NET TOTAL	266,758.18	509,894	509,894			509,894	645,616			645,616		