

WEST VIRGINIA EDUCATION AND STATE EMPLOYEES

GRIEVANCE BOARD

ANNUAL REPORT

TO THE

GOVERNOR AND THE LEGISLATURE

CALENDAR YEAR 1999

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History, Mission and Operations

In 1985 the Legislature created the West Virginia Education Employees Grievance Board and established a grievance procedure for educational employees. W. Va. Code §§ 18-29-1, et seq. The procedure is intended to provide a simple, expeditious and fair process for resolving grievances at the lowest possible administrative level.

In 1988 the Legislature enlarged the Grievance Board's jurisdiction considerably by enacting a Grievance Procedure for State Employees, which covers most state employees.¹ The purpose of this law is to establish a procedure for the equitable and consistent resolution of employment disputes. This law also changed the agency's name to the West Virginia Education and State Employees Grievance Board (hereinafter Board). W. Va. Code §§ 29-6A-1, et seq.

In 1998, the Legislature made several changes to the law governing state employee grievances.² One of the most significant changes was the inclusion of a default provision by which an employee may prevail in his or her grievance, if the grievance evaluator at Level One, Two or Three fails to respond to the grievance in the time required by law. Another notable change gives the Board jurisdiction over procedural matters at Levels Two and Three of the grievance procedure in both state and education employee grievances. Until this change in the law, the Board's authority was limited to administering Level Four of the procedure. In addition, the Board was also given the authority to require mediation

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

² House Bill 4314, effective July 1, 1998.

at the request of any party in cases involving state agencies. W. Va. Code §29-6A-12 (1998).³ The Board consists of three members appointed by the Governor, with the advice and consent of the Senate, for three year terms. In March 1997, Governor Underwood appointed three new members to the Board. Billy Coffindaffer, from Monongalia County, was appointed for a term ending July 1, 1998, replacing James P. Geary, who had served as Chair of the Board since 1985. Mr. Coffindaffer was subsequently reappointed for a term that expires on July 1, 2001. Roger Smith, II, from Cabell County, was appointed to a term that expired on July 1, 1999, filling a vacancy on the Board. The third new member, Lowell Witters, from Kanawha County, was appointed to a term expiring on July 1, 2000, replacing David L. White, who had served as a member of the Board since 1985.

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 so that good morale may be maintained, effective job performance may be enhanced, and the citizens of this State may be better served.

The Board employs full-time attorneys to preside over grievances that reach Level Four of the grievance procedure. These attorneys are designated as "hearing examiners" in the grievance procedure statutes, but the Board refers to them as administrative law

³ 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).

judges (ALJs) in light of their duties and responsibilities.⁴ The Board requires its ALJs to be licensed to practice law in West Virginia, and they are not permitted to have an outside law practice.

The Board has seventeen (17) budgeted positions in a flat organizational structure and currently employs fifteen (15) employees. See Appendix A. The Director, an Administrative Officer, four ALJs, one Secretary and a part-time Secretary are assigned to the Board's principal office in Charleston.⁵ Two ALJs and a Secretary are based in the Morgantown office that was opened in December 1995. One ALJ and a Secretary are assigned to the Beckley office. The Elkins and Wheeling Offices are staffed presently with only a Secretary. Most of the hearings in the Elkins and Wheeling Office are conducted by the ALJs based in Morgantown.

The Board's primary activities are to: (1) Schedule and conduct Level Four hearings and prehearing conferences in public employee grievances; (2) Issue binding, written decisions with findings of fact and conclusions of law, subject to limited judicial review in the circuit courts; (3) Provide mediation services to actively assist employers and employees in identifying, clarifying and resolving issues anytime before a Level Four hearing; (4) Administer Levels Two, Three and Four of both the education and state employees grievance procedure; and (5) Prepare transcripts and certify records to circuit courts when decisions are appealed.

⁴ The West Virginia Division of Personnel has placed these positions in the class title of ALJ II in its classified-exempt plan.

⁵ The Director has performed the functions of a chief administrative law judge for the past few years.

The Board has identified the following goals and objectives: (1) Issue timely and prompt decisions; (2) Issue decisions within 30 working days after the cases are ready for decision, as required by law; (3) Process grievances in a fair, objective manner, 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) Promptly publish decisions and case summaries on the Internet for all interested persons.

The Board estimates that the grievance procedure covers approximately sixty-nine thousand, one hundred ninety-two (69,192) public employees, consisting of about forty-seven thousand seven hundred eighty-six (47,786) educational employees, twenty thousand six hundred six (20,606) state employees, and eight hundred (800) local health department employees.⁶

Both grievance procedure laws contain a broad definition of what can be grieved. Employees may 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 (1985) & 29-6A-2 (1988).⁷ The Board also

⁶ 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).

⁷ For example, "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 misinterpretation regarding compensation, hours, terms and conditions of employment, employment status or discrimination; any discriminatory or otherwise aggrieved application
(continued...)"

exercises jurisdiction over claims based upon alleged 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 Board has issued more than four thousand one hundred (4,100) decisions since it was created. The most common types of grievances include challenges to promotion and selection decisions, dismissal and other disciplinary actions, and classification and compensation matters.

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

Annual Open Meeting and Third Customer Satisfaction Survey

The Board, after proper notice, conducted its annual open meeting in Charleston on January 11, 2000, as required by W. Va. Code § 18-29-5 (1985), and W. Va. Code § 29-6A-5 (1988). The purpose of the open meeting is to help the Board to evaluate the functioning of the grievance process, the performance of its ALJs, and to prepare an annual report to the Governor and the Legislature.

The Board mailed more than eight hundred (800) notices of the open meeting. All

⁷(...continued)

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 are, therefore, not grievable.

grievants whose cases were completed in 1999 were mailed a notice. State agencies, educational institutions, county superintendents, employee organizations, and the Director of the West Virginia Division of Personnel (Personnel) were also invited to attend or to submit written comments. A Customer Satisfaction Survey form was mailed with the notice of the open meeting. In addition, the Board made the Customer Satisfaction Survey form available on its Home Page for completion by anyone who participated in the grievance process in 1999.

Ten people attended the public meeting. Five Grievants, an attorney for the School Service Personnel Association, and an employee representative from the West Virginia State Employees Union testified. All Grievants were either current or former state employees. Much of the testimony was about Grievants' experiences with the grievance process, both at Level Four and at the lower levels of the procedure. Grievants were generally dissatisfied with the process or the ALJ who decided their cases, or both.⁸

Many of the comments and suggestions were about matters over which the Board has little or no control, or which would require changes in the law. In that regard the Board must emphasize that it does not generally recommend changes in the law or take positions on public policy questions. The reason for this practice is the Board knows that its role as the neutral third party would be jeopardized if it did so. Nonetheless, the Board and its staff does consider all this information in its ongoing efforts to improve its service.

The Board began using a Customer Satisfaction Survey in 1997 to help in the

⁸ There appears to be a correlation between the negative comments and ratings on the customer survey and whether the grievant lost his or her grievance. Sixteen grievants reported an overall satisfaction rating of zero.

evaluative process, to identify areas in which our customers think we need to improve, and to serve as a benchmark for future evaluations. (Appendix B).⁹ The Board's use of the Customer Survey has always produced more responses than simply notifying grievance participants that they may file written comments and/or appear and testify. One hundred and eleven (111) customer surveys were received by the Board as of January 21, 2000.

Customers were grouped into five categories on the Customer Survey form: Grievant, Employer, Employee Representative, Counsel, and Other. The survey results were tallied and analyzed based on these categories.¹⁰ Ratings for most questions on the Customer Survey were as follows: (5) Excellent; (4) Good; (3) Fair; (2) Poor; (1) Very Poor, or Not Applicable. Two reports about the customer survey results for 1999 and 1998 are in Appendix C. A brief summary of customer survey responses is set forth below.

Customers were asked to give their Overall Satisfaction rating of the agency on a scale from 100% to 0%. In 1999 the average Overall Satisfaction rating was lower than in the past two years. On a separate survey question, the percentage of customers reporting a decreased satisfaction level also was higher than in the two previous years in which the survey was conducted.

As it did last year, the Board plans to review the survey results at its next meeting

⁹ In designing the customer survey questions, the Board reviewed surveys used by agencies in other states that perform similar functions, and survey forms used in the Department of Administration.

¹⁰ Five responses were not included in this database or otherwise considered. One response was submitted twice and four others were so incomplete that inclusion was considered inappropriate. The Board recognizes that administrative agencies performing quasi-judicial functions do not have "customers" in the ordinary meaning of that term.

in April 2000. The Board will meet with all staff to discuss the survey results and to consider setting goals to improve the agency's overall performance.

Grievances Filed at Level Four and Adjudication Activities in 1999

The number of grievances filed at Level Four has not fluctuated greatly in the last several years. While the number of grievances filed in 1999 increased by 5%, this was just about equal to the average number of grievances filed during the last eight years.¹¹ The number of grievances filed in 1999 includes 54 default claims, most of which were filed by state employees. The table below shows the number of grievances filed during the past eight years for each major category of employer.¹²

Grievances filed at Level Four	1999	1998	1997	1996	1995	1994	1993	1992
State	281	301	261	200	265	276	252	217
Higher Education	56	36	56	57	38	57	48	30
County Boards of Education	213	186	269	277	283	277	243	261
Totals	550	523	586	534	586	610	543	508

¹¹ A detailed breakdown of grievance activity for the last eight calendar years is contained in Appendices D and E. Appendix D shows the number of grievances filed at Level Four against higher education institutions and county boards of education. Appendix E is an alphabetical listing by state agency showing the number of grievances filed at Level Four.

¹² The table does not include five hundred forty-six (546) higher education classification grievances filed in 1994 after the Mercer Project was implemented. For information about those cases, please review the 1997 report which is available on-line at the Board's web page. The number of grievances filed includes cases remanded by circuit courts and claims filed by state employees seeking relief by default. The number of grievances filed at Level Four represents less than 1 percent of all public employees who have the right to invoke the grievance procedure.

The Board issued about an average number of Decisions in 1999, as reflected in the table below.¹³ The clearance rate for 1999 was about 94 percent, with 516 cases disposed of and 550 cases filed.

All Decisions and Orders	1999	1998	1997	1996	1995	1994	1993	1992
Decisions Issued	329	366	422	339	349	313	280	274
Dismissal Orders and Default Orders	187	181	240	389	266	201	225	198
Totals	516	547	662	728	615	514	505	472

In 1999, as shown in the table below, ALJs issued their decisions more quickly than ever before. The ALJs reduced the average number of days to issue decisions by 26 percent, continuing the improvement made last year. Substantial improvement was also made on the percentage of decisions issued within thirty working days, the statutory time limit. The table below shows the average number of working days it took to issue decisions after the cases became mature, average total case processing time at Level Four, the percentage of all cases issued within thirty working days, and the percentage of dismissal cases issued within thirty working days.¹⁴

¹³ Dismissal orders are often entered when grievances have been prematurely appealed to Level Four without a required lower level hearing having been held, or when cases are settled and the grievant requests that the grievance be dismissed. Occasionally, however, these rulings involve complicated procedural or substantive issues.

¹⁴ A case is considered mature for decision on the date the ALJ has everything he or she needs to render a decision. For example, a case is not considered mature for decision until proposed findings of fact and conclusions of law are filed or the time for filing (continued...)

Average Number of Working Days	1999	1998	1997	1996	1995	1994
Decision-Making Time	29	39	69	44	39	67
Total Processing Time	168	149	181	145	136	154
Percentage of Cases Decided within 30 Working Days	81%	52%	19%	38%	40%	17%
Dismissal Cases Decided within 30 Working Days	89%	71%	37%	41%	60%	12%

Seventy-four (74) decisions issued in 1999 are known to have been appealed to circuit court. The appeal rate has fluctuated only moderately from year to year, as shown in the table below.

1999	1998	1997	1996	1995	1994	1993	1992
23%	23%	17%	22%	17%	20%	26%	23%

The overall percentage of grievances granted has not fluctuated greatly in the past several years, and remained at 29 percent in 1999.¹⁵ The table below tracks this statistic for several years.

¹⁴(...continued)

proposed findings and conclusions has expired. ALJs are required to render decisions within thirty (30) working days after the Level Four hearing.

¹⁵ Cases were counted as granted, if the grievance was granted in any part. Cases were counted as denied, if the grievance was rejected on the basis that it was not timely filed. Two grievances against State Department of Education institutions, both of which were denied, were counted as board of education professional personnel cases in the table of grievances granted in 1998. Higher education cases involving classification matters were not broken out and examined separately as "Mercer" cases.

1999	1998	1997	1996	1995	1994
29%	29%	26%	26%	24%	27%

A breakdown by category for 1999 is set forth in the table below.

1999 DECISIONS	DECISIONS ISSUED	GRIEVANCES GRANTED	PERCENT GRANTED
Higher Education	27	7	26%
State	145	46	32%
Boards of Education - Professional Personnel	75	17	23%
Boards of Education - Service Personnel	75	25	33%
State Department of Education	6	0	0%
Regional Education Service Agencies	1	0	0%
TOTALS	326	95	29%

The Board gives high priority to cases in which employees were dismissed from employment to expedite the disposition of those cases. The Board received more dismissal grievances in 1999, and issued more decisions in these cases, than in the previous three years, as shown in the table below.

Dismissal Cases	Cases Filed	Decisions Issued	Grievances Granted
1999	72	45	15
1998	65	41	12
1997	69	34	9
1996	61	21	6

The Board disposed of an additional thirty (30) dismissal and suspension cases by Dismissal Order due to such factors as settlements and withdrawals.

The percentage of cases decided based upon the record made at lower levels of the grievance procedure, without a Level Four hearing, has not fluctuated greatly during the past five years. ALJs issued decisions in these cases much more quickly, however, than last year, as reflected in the table below.

Submitted on Record (SOR) Cases	1999	1998	1997	1996	1995
Number of Decisions Issued in SOR Cases	60	63	82	53	73
Working Days To Issue Decisions	11	33	63	31	27
Percentage of All Cases Decided	18%	17%	23%	18%	21%

The number of hearings scheduled and the number of hearings held decreased in 1999. The Board has tried a number of approaches for setting Level Four hearings. Experience has shown that scheduling the Level Four hearing within fifteen days of the request for a hearing, as required by law, works very poorly. The parties will almost always request a continuance for one or more good reasons, such as they cannot get prepared that quickly or key witnesses cannot be available on the date the hearing is set. The Board has found that the most effective and efficient approach is to require the parties to confer with each other, and agree on three or four hearing dates. The hearing is then scheduled on the first date when the ALJ and a hearing room are available. Even though the hearing date is ordinarily one the parties have agreed upon, the Board receives at least one request for a continuance in a large percentage of the cases. These

continuance requests are generally not objected to by the other parties. This is why the number of hearings held, as shown in the table below, has always been so much lower than the number of hearings scheduled.

Hearing Activity	1999	1998	1997	1996	1995	1994
Hearings Scheduled	713	758	688	789	988	725
Hearings Held	329	337	313	303	386	268

Administrative Support Activities and Increasing Use of the Internet

In 1999 the Board's secretarial staff assembled and transmitted more certified records to circuit clerk's offices than ever before.

Records Certified to Circuit Court	1999	1998	1997	1996	1995	1994
	93	86	90	82	66	60

The Board's secretarial staff typed the transcripts in nine-eight (98) percent of these cases, and did not use a transcription service as frequently as last year. Producing transcripts continues to be a substantial task for the Board's limited secretarial staff. Nonetheless, the certified record is generally transmitted to the circuit clerk within thirty (30) days of receipt of the circuit court order requiring submission of the record.¹⁶

The Board must acknowledge that it does not comply with its statutory duty under

¹⁶ The Administrative Procedures Act, specifically W. Va. Code § 29A-5-4(d), provides that an agency shall transmit, within fifteen days of receipt of the petition for appeal or within such further time as the court may allow, a certified copy of the record to the circuit court. Circuit courts must decide cases on appeal based only upon the evidentiary record developed in the grievance procedure. See W. Va. Code §§ 18-29-7 & 26-6A-7.

W. Va. Code § 29-6A-6(d), to provide promptly a certified copy of the Level Four hearing transcript to any party upon request. With its limited resources and small secretarial staff, the Board simply cannot comply with this obligation. Hearings held at the Board's offices are mechanically recorded but a transcript is not ordinarily prepared, unless the case is appealed to circuit court. The Board, however, has equipped each office with a high-speed tape reformat and, upon request, will promptly provide the parties with audio tapes of the hearing, instead of a transcript. In addition, when a case is appealed, the Board began providing the parties with a copy of the transcript in electronic form in 1999.

Since 1997 the Board has been using the Internet to provide access to its decisions and to improve its services. The Board's staff created a Home Page, located on the State of West Virginia's Home Page, with the assistance of the Information Services and Communications Division of the Department of Administration (IS&C). The address is www.state.wv.us/admin/grievanc/grievanc.htm.

The web site has become the Board's primary method of distributing information. The full text of all decisions issued since January 1994 are on-line and can be searched. New decisions are published twice a month. All of these decisions can be searched on-line and the decisions can be downloaded by year in WordPerfect or Rich Text Format. The Board started a project recently to publish selected older decisions on the web.

The Board's staff created and maintains an electronic database, called Boardlaw, containing case summaries and pertinent information on more than four thousand one hundred (4,100) decisions issued since 1985. The database is updated monthly with summaries of the new decisions rendered and with any information received about cases

on appeal to the courts. All the information in the database is published on the web page and can be searched in a variety of ways. In addition, the database can be downloaded in two database applications in a compressed form. In response to customer requests, the Board now makes the database available in Microsoft Access 97.¹⁷

In response to last year's customer survey, the Board's staff created a brochure primarily to help employees in handling a grievance. It contains frequently asked questions and other helpful information. This brochure is available on the web site. The Board's staff has also designed new grievance forms for both education and state employees. The new forms, containing instructions about each step in the process, is available on the web site in WordPerfect and Adobe Acrobat (PDF) format. The Board's Procedural Rules are also available on the web site.

Customers have responded very positively to the web site, and they are certainly using it. According to monthly reports from IS&C, the number of user sessions per day increased sharply during 1999, rising to an average of two hundred eight (208) sessions per day during the second half of the year, up from one hundred five (105) sessions during the same period last year. In December 1999, the number of user sessions per day had climbed to two hundred fifty (250), lasting an average of twenty-eight (28) minutes.

The Board is required by W. Va. Code § 18-29-11 (1992) to provide a statewide quarterly report to inform the members of both higher education governing boards and all county boards of education and employee organizations of current personnel-related

¹⁷ This database is a valuable research tool for the ALJs and all interested persons who need to be aware of new precedent interpreting and applying personnel laws and regulations applicable to public employees.

issues. The Board distributes the report on a monthly basis rather than quarterly to distribute the information more quickly. The report contains summaries of all cases decided each month. These reports have been redesigned and are now distributed primarily via the web page.¹⁸

In 1999, the Board continued to replace and upgrade its equipment and software to provide all employees better tools to perform their duties effectively and efficiently and to solve any Y2K problems. The Board is also working to improve the hearing offices it maintains.

This summary of administrative support activities is by no means comprehensive. It does not include any data on several functions and activities performed by the agency's administrative staff to keep the agency operating effectively and efficiently. For example, the Board's staff answers procedural questions on a daily basis about the grievance process.

Mediation

Mediation involves a trained, neutral third party who helps the parties negotiate a mutually acceptable agreement to resolve their dispute. Mediation emphasizes solutions that satisfy the interests of the parties, rather than litigation to determine which party has the "correct" legal position.

W. Va. Code § 18-29-10 (1992), requires the Board to engage in mediation and other dispute resolution techniques to actively help the parties in identifying, clarifying and

¹⁸ The Secretary of State's office is provided copies of all decisions in electronic form twice a month.

resolving issues prior to the Level Four hearing, to the extent feasible with existing personnel and resources. After the enactment of this provision in 1992, the Board expanded a limited, experimental mediation program it had previously initiated. The ALJs serve as mediators and are generally able to schedule mediation sessions so as not to delay the processing of the case.¹⁹ A report on the progress of the mediation project was filed with the Legislature on December 23, 1992. The Board recommended the grievance procedure laws be revised to give ALJs the authority to compel the parties to participate in settlement conferences. Under the law at that time, ALJs could conduct settlement conferences only with the consent of the parties. W. Va. Code §§ 18-29-6 & 29-6A-6. In 1998, the Legislature adopted this recommendation for state employee cases by amending W. Va. Code § 29-6A-6.

Based in part on comments and suggestions from participants in the grievance process, the Board increased its efforts to encourage the use of mediation, emphasizing that a mediator would be provided before an evidentiary hearing had been held. The Board publicized this service and distributed publications about mediation.²⁰ The Board sponsored an in-house seminar focused on mediation of workplace disputes.

¹⁹ 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 and/or the West Virginia State Bar. The Board also held an in-house mediation training session this year, focusing on recent trends in workplace mediation.

²⁰ The Board continued sending a Notice of The Availability of Mediation Services to all parties explaining what mediation is, and when the Board will provide a mediator, in cases in which a hearing is requested. The ALJs also hold prehearing conferences more frequently, typically by a recorded conference call, in an effort to identify and clarify issues and to encourage settlement discussions.

Due to these on-going efforts promoting grievance mediation, particularly at an early stage in the grievance process, the number of mediation sessions conducted in 1999 more than doubled, as reflected in the table below.

Mediation Sessions Conducted	1999	1998	1997	1996
After Cases Reached Level Four	20	13	11	4
Before Cases Reached Level Four	7	0	0	0

About fifty-two (52) percent of the cases mediated after reaching Level Four were resolved to the satisfaction of the parties, while about seventy-one (71) percent of the cases mediated before reaching Level Four resulted in settlement. Disciplinary cases were the most frequently mediated type of case by far. Since 1991 the Board has mediated one hundred one (101) cases, and the parties were able to amicably resolve about fifty-eight (58) percent of these cases.

The Board continues to believe mediation is the single, most cost-effective means of resolving grievances. The proper use of mediation promotes equitable settlements to the benefit of all parties. Delay and costly litigation are eliminated. It is clear that public employers can use mediation to save money, make more efficient use of their resources, retain some control over the outcome of grievances, and, perhaps what is most important, preserve the integrity of ongoing working relationships. No negative consequences have been experienced by the Board's use of mediation.

The Board's mediation efforts have fostered a climate in which the parties discuss problems, consider possible solutions to problems and engage in settlement activity more

frequently. The Board's experience with mediation teaches, however, that only a small percentage of its cases will be resolved through mediation. This is partly because the grievance procedure is itself a form of alternative dispute resolution, and therefore the incentives for settlement are not as great as in civil litigation. Moreover, settling workplace grievances in the public sector is more difficult and time consuming than in the private sector for a number of reasons.²¹

Evaluation of Level Four Grievance Process and ALJ Performance

Based upon its observations and all available information, including the responses to the Customer Survey, the Board believes the grievance procedure at Level Four is functioning well. By any objective measure, the Board's overall performance continued to improve in 1999. The Board's primary goal in 1999 was to issue decisions more quickly, without sacrificing the quality of decisions. The Board was successful in reducing decision-making time as discussed earlier in this Report. The quality of decisions has remained high, and may even have improved. The efforts of the agency to encourage the use of mediation produced positive results. Many more cases were mediated in 1999 than ever before. For the first time several cases were mediated early in the grievance process, prior to an evidentiary hearing being held. This initiative proved beneficial to all the parties involved and the general public.

The Board believes its ALJs performed well as a whole in 1999. The Board continues to believe its ALJs have adhered to the neutral and impartial role envisioned by

²¹ One reason is that public employers have fewer settlement options in certain types of cases due to statutory and personnel policy requirements.

the Legislature. They are providing fair hearings and promptly issuing high quality decisions.

Grievances are being decided based upon the law and the evidence, not based on politics or any other impermissible factor. The percentage of grievances granted or denied simply reflects the merits of the individual cases. Grievances are denied frequently because employees must meet a high legal standard to prevail. For example, in a case in which the grievant contends he should have been selected for a position rather than the successful applicant, the grievant cannot prevail, unless he can prove the employer's decision was in violation of a statute, was arbitrary and capricious or the selection process was significantly flawed. Proving an employer abused its discretion is no easy task and is not frequently done. Furthermore, certain types of employees, such as at-will or probationary employees, have only limited rights to continued employment and, therefore, grievances by these employees concerning the termination of their employment must frequently be denied.

Furthermore, it must be remembered that ALJs have a limited role under the law. It is not the job of an ALJ to manage the agency or to substitute their judgment or management philosophy for agency personnel who have the responsibility to make personnel decisions. See Skaff v. Pridemore, 200 W. Va. 700, 709, 490 S.E.2d 787,796 (1997)(ALJ exceeded his authority in ordering employer to adopt a specific personnel policy).

It is also critical to understand that this State has an unusual, if not unique, system for resolving public employee grievances. In West Virginia, an individual public employee

has the right to file a grievance and pursue it through Level Four of the grievance procedure, with little or no cost. In sharp contrast, in collective bargaining situations the grievance generally belongs to the union, and it alone decides which cases are sufficiently meritorious to pursue to arbitration. As a result, legally marginal grievances that may be difficult or impossible to prove are screened out by the union and not pursued to arbitration. Although public employee unions and associations undoubtedly screen out some grievances here too, they do not control the grievance process. In short, major differences exist between the grievance procedure in West Virginia and arbitration in a collective bargaining situation.

The low percentage of decisions reversed by the Courts is a good indicator that the ALJs are properly applying the law to diverse factual situations and are rendering legally sound and fair decisions. By December 31, 1999, the Board had issued final decisions in four thousand one hundred and ninety-one (4,191) grievances. One thousand fifty-one (1,051), or 25 percent, of those decisions were appealed to circuit court. The Board's records contain the following known results of judicial review: the courts have reversed only one hundred thirty-six (136), or 13 percent, of the cases appealed. Accordingly, approximately 97 percent of the Board's decisions were either not appealed or not reversed on appeal.

The Board continues to be concerned about unnecessary delay in the processing of grievances at the lower levels. The Board has limited information available to it about that issue, and only limited options to address delay problems at the lower levels. However, the Board does allow grievants to bypass the lower levels of the grievance

procedure where they elect to skip those levels because the employer has not complied with the time limits for holding hearings. See W. Va. Code § 29-6A-3(a).

Fiscal Summary

The Board was appropriated \$1,050,347 for FY 2000. The Board's actual expenditures for FY 1999 were \$938,611. The Board does not charge for any of its services and generates no revenue.

Recommendations

Because of its role as the neutral third party and its limited statutory duties and responsibilities, the Board, as noted earlier, generally does not take positions on public policy questions. The Board, however, has two recommendations to make to the Governor and the Legislature. First, the Board recommends that the Legislature revise the grievance procedure laws to help insure its complete neutrality. The Board's role is that of an impartial third party to resolve employment disputes. When the Executive Branch of State government was reorganized in 1989, the Board was placed within the Department of Administration, along with the West Virginia Division of Personnel. The Board objected to this then and continues to believe this organizational structure creates a conflict of interest, and at least an appearance of impropriety. For example, the Board must hear and decide grievances filed by employees who work for agencies that are within the Department of Administration. Some of these cases involve personnel decisions made by the Secretary of this Department, who has substantial control over the Board budget. Public employees have expressed, and continue to express, a distrust of this agency partly because of this structural arrangement. It should be made clear, however, that no attempt

has been made by anyone in authority to exert any influence or to exact any retribution from the Board or its ALJs.

From a structural or organizational standpoint, the Board should be in a more autonomous position. Consequently, 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.

Second, the Board also recommends that the grievance procedure for education employees be amended to give its ALJs the authority to require the parties to participate in mediation where one of the parties requests it. The law was changed for state employee cases in 1998, and this change should now be extended to grievances by educational employees. This would improve communications and perhaps resolve difficult and/or complex disputes without litigation. It is not likely that this authority would be exercised frequently, but the selective use of this power in a thoughtful could achieve significant benefits in selected cases.

Conclusions

The Board continues to believe its accomplishments show the wisdom of the legislation establishing a grievance procedure for public employees and creating an independent forum to resolve disputes. Many disputes have been resolved fairly and quickly, without resort to the courts, to the benefit of public employers, public employees and the citizens of this State. The Board believes the benefits of the grievance procedure far outweigh its cost. The existence of the procedure helps to resolve disputes quickly by

offering a channel for communications. The procedure helps to prevent improper actions against public employees involving a broad range of personnel matters, including questions of discipline, reductions in force, promotion, transfer, compensation, discrimination and favoritism. The procedure helps prevent costly litigation in the courts involving current and former employees.

The Board decisions have established a body of employment law to guide agencies and employees. This should help improve public personnel management in West Virginia. Public employers frequently look to Board decisions for guidance in making personnel decisions, and employee organizations likewise consult the decisions in advising employees about whether to file and/or to pursue grievances to higher levels in the process.

The Board will continue to focus its efforts on prompt decision making and the avoidance of unreasonable delay at Level Four, particularly unreasonable delay by ALJs in issuing decisions after the cases are ready to be decided.²² The Board will continue to track the processing of grievances, keep detailed information about decisional delay, and consider such information to be a critical factor in evaluating the performance of its ALJs. It will continue to promote the use of mediation and to provide mediators before an evidentiary hearing has been held.

This Board is committed to continuing to improve Level Four of the grievance

²² Parties frequently delay cases for legitimate reasons. Delay caused by the parties' desire to submit findings of fact and conclusions of law is not considered to be unnecessary delay. Numerous circumstances can contribute to delay, including the complexity of the legal and factual issues presented, fluctuating caseloads, turnover in ALJ positions, performance problems, and other human factors present in any agency.

process. It will continue to strive to meet its statutory duties and responsibilities, and to improve the quality of the adjudication services and the other services it provides. The Board will also exercise its new jurisdiction over procedural matter at Levels Two and Three in a deliberate and judicious manner to improve the overall functioning of the grievance process.

With pride in its achievements, the West Virginia Education and State Employees Grievance Board, respectfully submits its Annual Report to Governor Cecil H. Underwood and the Legislature.

APPENDIX A

ORGANIZATIONAL CHART

WEST VIRGINIA EDUCATION AND STATE EMPLOYEES GRIEVANCE BOARD

JOSEPH F. MARKUS
Secretary

BOARD MEMBERS*

CHAIRMAN

LOWELL WITTERS

MEMBERS

BILLY COFFINDAFFER

ROGER SMITH, II

DIRECTOR**

C. RONALD WRIGHT

ADMN OFFICER

VALERIE RIST

ADMN LAW JUDGES

IONA KELLER

JANIS REYNOLDS

LEWIS BREWER

MARY JO SWARTZ

BRENDA GOULD

DENISE M. SPATAFORE

ANDREW MAIER

VACANT (3)

SECRETARIES

CRICKET POWELL

LEE ANN CARNAHAN

DONNA MADDEN

KRISTY GLADIS***

LISA SUMMERS

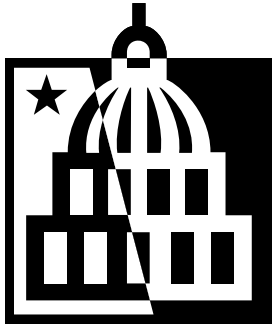
JULIE BLOSSER

* Board appointed by Governor 18-29-5,
part of Department of Administration
5F-2-1 (a) (7)

** No statutory provision for a Director

*** Part-time

Prepared: February 8, 2000



State of West Virginia

Education and State Employees Grievance Board

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 January 7, 2000.** 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.

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

15. During 1999, has your overall satisfaction with the Grievance Board:

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

☐ Grievant
 ☐ Employer
☐ Employee Representative
 ☐ Counsel
☐ Other

Name: _____

Agency: _____

Address: _____

Thank You for Your Response

Average Rating by Customer of Adjudication Services for 1999

Customer Type	Responses	Overall Satisfaction	Prompt Decision	Quality Decision	Orderly Hearing	Know Law re Hearing	Public Criticism	Courtesy
COUNSEL	11	81.82	3.82	4.18	4.64	4.36	4.27	4.73
EMPLOYEE REP	11	58.50	3.00	3.30	3.20	3.33	2.60	3.90
EMPLOYER	23	74.35	3.43	3.91	3.91	4.17	3.83	4.26
GRIEVANT	56	41.00	2.75	2.87	3.13	3.15	2.60	3.71
OTHER	5	67.50	3.25	3.75	3.25	4.25	4.00	3.75

Average Rating by Customer of Adjudication Services for 1998

Customer Type	# of Responses	Overall	Prompt Decision	Quality Decision	Orderly Hearing	Know Law re Hearing	Public Criticism	Courtesy
COUNSEL	16	75.94	3.38	3.69	3.81	3.73	3.67	4.25
EMPLOYEE REP	11	62.73	2.55	3.27	4.18	3.50	3.10	4.36
EMPLOYER	30	79.33	3.55	4.17	4.52	4.34	4.24	4.67
GRIEVANT	40	55.77	3.18	3.67	3.75	4.00	3.47	4.16
OTHER	4	92.50	4.00	5.00	5.00	4.50	4.50	5.00

Average Rating by Customer of Administrative Procedures and Staff for 1999

Customer Type	Responses	Overall Satsfaction	Forms Simple	Procedure	Prompt Hearing Date	Prompt Info Response	Info Accuracy	Staff Courtesy
COUNSEL	11	81.82	4.10	4.30	4.45	4.27	4.45	4.27
EMPLOYEE REP	11	58.50	4.10	3.40	3.90	4.11	4.44	4.40
EMPLOYER	23	74.35	3.78	3.52	3.43	3.86	3.86	4.26
GRIEVANT	56	41.00	3.53	3.20	3.04	3.36	3.13	3.76
OTHER	5	67.50	3.75	3.50	3.67	4.00	3.67	4.00

Average Rating by Customer of Administrative Procedures and Staff For 1998

Customer Type	# of Responses	Overall Satsfaction	Forms Simple	Procedure Simple	Prompt Hearing Date	Prompt Info Response	Info Accuracy	Staff Courtesy
COUNSEL	16	75.94	4.21	4.07	3.88	4.25	4.27	4.40
EMPLOYEE REP	11	62.73	3.91	3.55	3.55	3.80	3.82	4.27
EMPLOYER	30	79.33	4.04	3.82	3.96	4.32	4.36	4.41
GRIEVANT	40	55.77	4.00	3.84	3.43	3.72	3.56	4.24
OTHER	4	92.50	4.25	4.00	4.00	4.25	4.50	4.75

APPENDIX D

GRIEVANCES FILED AT LEVEL FOUR AGAINST GOVERNING BOARDS OF
HIGHER EDUCATION AND COUNTY BOARDS OF EDUCATION
CALENDAR YEAR 1999 THROUGH 1992

<u>Board of Directors:</u>	1999	1998	1997	1996	1995	1994	1993	1992
Bluefield State College	0	1	2	1	0	1	6	2
College of Graduate Studies	0	0	0	1	0	0	3	0
Concord State College	0	2	1	2	2	4	0	2
Fairmont State College	1	0	2	2	1	0	3	3
Glenville State College	0	0	0	0	1	2	0	0
Potomac State College	0	0	1	1	0	1	0	1
Shepherd College	4	1	7	4	3	6	7	2
West Liberty State College	3	4	4	3	5	0	5	1
W. Va. Univ. Institute of Technology	0	0	0	0	0	4	1	2
W. Va. Northern Community College	0	2	2	3	2	4	1	2
W. Va. Southern Community & Technical College	1	1	6	2	2	1	2	1
W. Va. State College	8	2	3	2	4	3	2	1
<u>Board of Trustees:</u>								
Marshall University	11	10	8	6	5	11	10	4
W. Va. Graduate College	0	0	0	1	0	0	0	0
W. Va. University	28	13	18	27	13	19	8	8
W. Va. University Hospitals	0	0	0	0	0	0	0	1
W. Va. University/Charleston	0	0	0	0	0	0	0	0
W. Va. School of Osteopathic Med.	0	0	2	1	0	1	0	0
Totals	56	36	56	56	38	57	48	30

<u>County Boards of Education:</u>								
Barbour County Board	2	0	0	2	3	12	5	3
Berkeley County Board	2	1	7	5	1	3	2	2
Boone County Board	6	6	1	5	10	4	7	1
Braxton County Board	0	2	1	1	1	0	1	2
Brooke County Board	2	1	0	3	4	2	7	7
Cabell County Board	7	0	11	9	9	4	7	11
Calhoun County Board	1	3	0	0	0	0	0	1
Clay County Board	2	0	1	1	0	0	0	1
Doddridge County Board	2	0	0	0	0	0	0	0
Fayette County Board	1	3	7	8	5	4	9	4
Gilmer County Board	0	1	0	0	4	0	1	2
Grant County Board	2	1	3	2	2	1	0	1
Greenbrier County Board	2	1	5	7	5	3	0	1
Hampshire County Board	1	0	3	1	1	0	2	2
Hancock County Board	7	9	12	11	10	15	16	6
Hardy County Board	1	0	0	1	1	0	0	2
Harrison County Board	8	4	4	5	4	1	1	1
Jackson County Board	4	1	3	2	3	1	1	1
Jefferson County Board	1	4	2	2	3	1	2	2
Kanawha County Board	25	13	17	19	17	33	25	28
Lewis County Board	4	2	4	3	0	0	4	6
Lincoln County Board	20	30	33	7	9	9	15	10
Logan County Board	7	7	18	15	21	12	13	12
Marion County Board	1	3	2	5	5	7	22	10
Marshall County Board	2	1	3	0	0	0	5	2
Mason County Board	5	4	5	9	7	19	8	4
McDowell County Board	5	0	2	5	7	4	6	10

Mercer County Board	1	2	10	3	8	25	8	16
Mineral County Board	3	5	3	2	3	2	6	5
Mingo County Board	6	15	40	49	67	20	16	12
Monongalia County Bd.	14	11	0	8	4	10	5	10
Monroe County Board	5	3	2	6	5	4	1	9
Morgan County Board	1	3	3	4	1	1	2	2
Nicholas County Board	5	4	3	3	2	0	4	2
Ohio County Board	2	1	2	3	3	1	4	5
Pendleton County Board	0	2	1	0	4	1	2	1
Pleasants County Board	0	1	0	0	0	0	0	0
Pocahontas County Board	0	0	2	0	0	0	1	1
Preston County Board	4	1	0	0	4	3	2	4
Putnam County Board	13	6	12	3	4	4	4	4
Raleigh County Board	3	2	10	12	9	29	4	9
Randolph County Board	3	5	3	7	4	6	2	2
Ritchie County Board	0	2	1	1	0	0	1	0
Roane County Board	0	0	0	0	0	0	2	0
Summers County Board	1	3	2	6	5	8	3	9
Taylor County Board	0	0	0	1	2	0	0	0
Tucker County Board	1	1	1	3	0	2	0	4
Tyler County Board	0	0	0	3	0	2	3	1
Upshur County Board	1	2	1	2	1	2	0	0
Wayne County Board	11	6	6	5	4	3	2	4
Webster County Board	1	0	3	4	2	3	3	11
Wetzel County Board	1	2	3	6	2	5	1	2
Wirt County Board	0	1	1	0	0	0	0	0
Wood County Board	5	3	5	6	4	1	1	6
Wyoming County	4	1	4	2	5	4	5	10

Board								
Multi-County Vocational Centers	1	0	0	2	3	1	2	0
Regional Educ. Serv. Agencies	0	1	2	1	0	1	0	1
W. Va. Board of Education (previously reported as a state agency)	7	6	5	6	4	4	3	1
	213	186	268	276	283	277	246	262

APPENDIX E

GRIEVANCES FILED AT LEVEL FOUR AGAINST STATE AGENCIES

CALENDAR YEARS 1999 THROUGH 1992

	1999	1998	1997	1996	1995	1994	1993	1992
Adjutant General	1	0	4	0	2	0	0	0
Administration, Dept.	3	5	5	2	5	1	5	4
Agriculture	0	0	0	2	0	0	0	0
Alcohol Beverage Control Admin.	0	2	5	0	0	1	1	1
Auditor's Office	1	0	0	0	0	0	0	0
Bd. of Examiners for Reg. Nurses	0	0	0	0	1	0	1	0
Clarksburg Public Library	0	0	0	0	1	0	0	0
Commerce, Labor, Econ. Resources	0	0	0	0	1	0	3	4
Consol. Public Retirement Bd.	0	0	0	4	0	1	0	0
Corrections	94	64	48	46	34	29	13	18
Culloden Public Serv. Dt.	0	0	0	0	1	0	0	0
Culture and History	0	2	2	0	1	0	3	1
Development Office	0	0	0	0	0	1	0	0
Economic Development Authority	0	0	0	0	0	0	1	0
Educational Broadcasting Authority	1	1	0	3	0	1	2	0
Bureau of Employment Programs	6	14	13	8	6	10	20	20
Bureau of Senior Services	0	2	NA	NA	NA	NA	NA	NA
Energy	0	0	0	0	0	0	0	1
Environmental Protection	2	3	6	7	12	3	3	0

Farm Management Comm'n	0	0	0	0	0	0	1	0
Fire Commission	0	0	0	0	1	0	1	0
Forestry	0	0	1	0	3	0	0	0
Health and Human Resources	77	70	67	42	85	100	130	83
Highways	32	40	62	41	52	44	24	35
Housing Development Fund	1	2	2	0	0	0	0	0
Human Rights Commission	0	1	0	0	0	0	0	1
Juvenile Services	8	15	NA	NA	NA	NA	NA	NA
Labor	3	1	4	0	0	0	2	1
Library Commission	0	0	0	0	0	1	0	0
Lottery Commission	0	0	0	0	0	1	0	0
Military Affairs (MAPS)	0	1	0	0	0	0	0	0
Miners' Health, Safety & Training	0	0	2	0	0	1	2	0
Motor Vehicles	5	4	4	1	1	19	7	1
Natural Resources	2	6	2	2	6	5	0	6
Parkways, Economic Dev. & Tourism	14	19	14	9	3	5	1	4
Personnel	0	0	0	1	3	4	1	1
Public Safety	2	12	1	4	6	2	1	1
Public Service Commission	1	3	1	5	4	6	2	5
Racing Commission	0	0	0	0	1	0	0	0
Railroad Maintenance Authority	0	0	0	0	1	0	0	0
Real Estate Commission	0	0	0	0	0	1	0	0
Regional Jail Authority	4	11	7	6	14	13	3	8
Rehabilitation Services	5	13	3	6	6	10	11	7

Solid Waste Management Bd.	0	0	0	1	0	0	0	1
Tax & Revenue	7	5	0	3	8	10	3	5
Tourism & Parks	0	0	0	0	1	5	4	2
Veterans' Affairs	3	1	2	0	0	2	0	0
County Health Departments	9	4	6	9	6	0	2	5
Totals	281	301	262	202	265	276	247	215