



November 2010
PE 10-10-477

SPECIAL REPORT
COURT OF CLAIMS

AUDIT OVERVIEW

The Claims Review Process of the West Virginia Court of Claims for Small Claims Against the State is Unduly Burdensome to Citizens and Costly to the State



JOINT COMMITTEE ON GOVERNMENT OPERATIONS

Senate

Edwin J. Bowman, Chair
Herb Snyder, Vice-Chair
Walt Helmick
Brooks McCabe
Clark S. Barnes

House of Delegates

Jim Morgan, Chair
Dale Stephens, Vice-Chair
Ruth Rowan
Patti Schoen
Craig Blair, Nonvoting
Scott G. Varner, Nonvoting

Agency/ Citizen Members

John A. Canfield
W. Joseph McCoy
Kenneth Queen
James Willison
Vacancy

JOINT COMMITTEE ON GOVERNMENT ORGANIZATION

Senate

Edwin J. Bowman, Chair
Herb Snyder, Vice-Chair
Richard Browning
Dan Foster
Jeffrey V. Kessler
Brooks McCabe
Joseph M. Minard
Corey L. Palumbo
Randy White
Bob Williams
Jack Yost
Donna J. Boley
John Shott
Dave Sypolt

House of Delegates

Jim Morgan, Chair
Dale Stephens, Vice-Chair
Brent Boggs
Greg Butcher
Samuel J. Cann, Sr.
Roy Givens
Daniel J. Hall
William G. Hartman
Barbara Hatfield
Mike Manypenny
Dale Martin
Daniel Poling
Meshea L. Poore
Margaret A. Staggers

Randy Swartzmiller

Joe Talbott
Terry Walker
Tom Azinger
Daryl E. Cowles
Pat McGeehan
Carol Miller
Jonathan Miller
Thomas Porter, Jr
Ruth Rowan



WEST VIRGINIA LEGISLATIVE AUDITOR

PERFORMANCE EVALUATION & RESEARCH DIVISION

Building 1, Room W-314
State Capitol Complex
Charleston, West Virginia 25305
(304) 347-4890

Aaron Allred
Legislative Auditor

John Sylvia
Director

Michael Midkiff
Research Manager

Brandon Burton
Senior Research Analyst

Tina L.C. Baker
Referencer

CONTENTS

Executive Summary 5

Objective, Scope and Methodology 7

Issue 1: The Claims Review Process of the West Virginia Court of Claims for Small Claims
Against the State is Unduly Burdensome to Citizens and Costly to the State 9

List of Tables

Table 1: FY 2005-2009: Total Claims Recommended To Be Paid 10

Table 2: Reduction in Staff Hours For Claims Under \$2,500 with SB 619 18

Table 3: Potential Annual Savings Without Small Claims Hearings Under \$2,500 19

Table 4: Potential Savings Per Claim Under \$2,500 Under SB 619 20

List of Figures

Figure 1: Court of Claims Review Process 12

Figure 2: DOH Preparatory Process 14

List of Appendices

Appendix A: Transmittal Letters to Agencies 23

Appendix B: Court of Claims and DOH Reduction in Work Hours with Proposal Bill 25

Appendix C: Agency Responses 27

EXECUTIVE SUMMARY

Issue 1: The Claims Review Process of the West Virginia Court of Claims for Small Claims Against the State is Unduly Burdensome to Citizens and Costly to the State.

The Performance Evaluation and Research Division (PERD) reviewed the adjudication process of the West Virginia Court of Claims for small claims filed against the State by the general public during the years 2008 and 2009. Over 70 percent of all claims were filed against the Division of Highways (DOH) for mostly road hazard incidents. The review also shows that 84 percent of claims filed are under the value of \$2,500, and the average amount claimed in those cases is \$475. However, the average cost to the State to completely adjudicate one claim is \$1,339. Most of the per-claim cost is associated with staff having to attend hearings.

Despite holding over 30 hearings for small claims annually, with 20 claims per hearing, the Court has 840 cases, \$2,500 or under, that are pending a small claims hearing. The large number of pending files has contributed to claims not being heard for over a year and awards not being distributed to claimants for two and a half years. During 2008 and 2009, claims were filed against a variety of state agencies, but the DOH was the only agency that denied every claim, thus forcing a hearing. Other state agencies often settled with claimants without the need for a hearing, which saved claimants the costs of attending a hearing and shortened the time they would receive an award. It is the Legislative Auditor's opinion that the DOH practice of denying every claim is a way of taking advantage of the fact that generally half of the claimants do not show for a hearing and therefore no award will be recommended by the Court and the DOH will not have to pay the claim. While this practice has saved the DOH money, it has contributed to a large number of pending cases, increased the costs to the State, and placed an undue burden on the public.

In order to reduce costs and decrease the wait-time for awards, the Legislature should consider establishing a claims review procedure for claims against the State under \$2,500 to be determined by the Clerk of the Court without the need for a hearing. Appropriate language should be included that would allow for an appeal by either the claimant or state agency. The Legislative Auditor also recommends allowing currently pending cases be reviewed under the administrative procedure. The

Despite holding over 30 hearings for small claims annually, with 20 claims per hearing, the Court has 840 cases, \$2,500 or under, that are pending a small claims hearing.

It is the Legislative Auditor's opinion that the DOH practice of denying every claim is a way of taking advantage of the fact that generally half of the claimants do not show for a hearing and therefore no award will be recommended by the Court and the DOH will not have to pay the claim.

retroactive administrative procedure would create a significant workload on both the Court of Claims and DOH but once the pending cases are worked through, the process will be more manageable. It is also the Legislative Auditor's opinion that any procedural changes that may be implemented should be reviewed by the Legislative Auditor within one to two years after the start of the process.

Recommendations

1. *The Legislature should consider amending state law to establish a non-hearing administrative review procedure for claims against the State under \$2,500. Such a procedure should require that the recommendation to the Legislature be approved by a Court of Claims judge. In addition, the recommended statutory change should include language that would allow for an appeal by either the claimant or state agency.*
2. *If the Legislature decides to comply with the first recommendation, the Legislature should consider allowing the non-hearing administrative review process to be used retroactively for all currently pending claims under \$2,500.*
3. *Any procedural changes that may be implemented should be reviewed by the Legislative Auditor within one to two years after the start of the process.*

OBJECTIVE, SCOPE & METHODOLOGY

Objective

Pursuant to Chapter 4, Article 2, Section 5 of the *West Virginia Code*, the Legislative Auditor initiated a review of the West Virginia Court of Claims by the Performance Evaluation and Research Division. The objective of this review is to examine the efficiency of the current claims review process of the Court of Claims and evaluate an alternative process proposed in Senate Bill 619 as introduced to the Legislature during the 2010 legislative session.

Scope

The scope of this review covers calendar years 2008 and 2009 for all monetary claims filed by the general public against the State. PERD evaluated each claim during 2008 and 2009 in order to document the agency the claim was filed against, when the claim was filed, the agency response, the amount claimed, the date of the hearing, the outcome of the hearing, the recommended award for the claimant, when claimants were informed of their award and the percentage of claims filed under \$2,500. The scope of this review also covers fiscal years 2005-2009 for the number of claims paid under and over \$2,500, the total number of claims filed, the number of claims filed against the Division of Highways (DOH) from calendar years 2000-2010 and the total number of claims dismissed for claimants' failure to appear from calendar year 2000-2009.

Methodology

The Legislative Auditor's staff reviewed all claims filed against the State by the general public during calendar years 2008 and 2009. Claims were reviewed to record the average amount claimed, the average amount awarded, the average time for the claim to go to a hearing, the state agency involved in the claim, and the average time to be awarded damages. The West Virginia Court of Claims and the DOH provided information regarding the amount of time it takes to completely process a typical claim under \$2,500. PERD utilized the time provided by both parties to process a typical small claim with the salaries of each employee to estimate the administrative cost for both the DOH and the Court of Claims. Senate Bill 619 was reviewed to document an alternative procedure for processing small claims. PERD utilized the process outlined within Senate Bill 619 to estimate the reduction in staff hours per small claim, the annual cost savings at 20 to 25 less hearings and the potential cost savings per small claim.

ISSUE 1

The Claims Review Process of the West Virginia Court of Claims for Small Claims Against the State Is Unduly Burdensome to Citizens and Costly to the State.

Issue Summary

The West Virginia Court of Claims, a legislative agency, is responsible for making recommendations to the Legislature with regards to monetary claims filed by the general public against the State. The Legislative Auditor has determined that for most cases (small claims), the review process is an undue burden to citizens because it takes on average more than two years before the Legislature appropriates funds to pay for monetary damages incurred by citizens, and citizens have to travel relatively long distances to attend a hearing. Furthermore, the Legislative Auditor found that the cost to the State to review small claims significantly exceeds the amount claimed. A review of claims filed during 2008 shows that 84 percent of claims filed are under the value of \$2,500. In these cases, the average amount claimed is \$475; however, the total cost to the State (for the Legislature and state agency) to review a typical case is an estimated \$1,339. Moreover, 52 percent of 2008 claims under \$2,500, for which hearings were scheduled, were dismissed due to claimants not appearing at the hearing. **On average, the State spent an estimated \$1,339 for each dismissed case.**

The Legislative Auditor has determined that for most cases (small claims), the review process is an undue burden to citizens because it takes on average more than two years before the Legislature appropriates funds to pay for monetary damages incurred by citizens, and citizens have to travel relatively long distances to attend a hearing.

The Legislative Auditor recommends that the Legislature consider legislation that would allow the Court of Claims to make recommendations to the Legislature for payment of a claim without a hearing if the claim amount is less than \$2,500. Such a modified process could lower the per-case cost from \$1,339 to an estimated \$768. Most of the per-case savings is from the elimination of most (20-25) small-claims hearings. The total annual savings from the reduction of small-claims hearings is between \$76,500 and \$95,625. Also, claimants could receive awards within 8 to 18 months of filing a claim, instead of the current two and a half years, and the need for claimants to attend a hearing would be eliminated.

The Court of Claims Holds Hearings Annually Across the State

The West Virginia Legislature provides individuals the ability to file a claim against the State through the Court of Claims, a legislative agency that cannot be determined in the regular courts of the state. According to *West Virginia Code §14-21-1*, the Court of Claims is to “...provide a simple and expeditious method for consideration of claims against the state....” Claims are filed with the Clerk of the Court of Claims. The case is heard in court if an agreement is not reached between the claimant and the state agency in question. The Court may hold regular sessions in county seats throughout the state as needed. There are 13 districts (Beckley, Bridgeport, Charleston, Chief Logan State Park, Elkins, Flatwoods, Huntington, Lewisburg, Martinsburg, Morgantown, Parkersburg, Princeton, and Wheeling) that are used for hearings throughout the year.

PERD reviewed claims filed during calendar years 2008 and 2009. During both years over 80 percent of claims, for which the claims process was completed, were filed for under \$2,500.

Small claims are defined as any claim under \$20,000. The majority of claims against the State are small claims, and of those, the large majority is under \$2,500. PERD reviewed claims filed during calendar years 2008 and 2009. During both years over 80 percent of claims, for which the claims process was completed, were filed for under \$2,500. Table 1 documents the number of claims recommended to be paid from FY 2005 through FY 2009.

Table 1
FY 2005-2009: Total Claims Recommended To Be Paid

Fiscal Year	Claims Paid Under \$2,500	Claims Paid Over \$2,500	*Over-Expenditure Claims	Total Claims Paid
2005	138	24	123	285
2006	87	11	15	113
2007	106	20	43	169
2008	113	21	8	142
2009	119	17	9	145
Totals	563	93	198	854

Source: *West Virginia Court of Claims*

*Over-expenditure claims are claims against the State by a vendor that was not paid due to the agency not having the financial resources to pay the invoice.

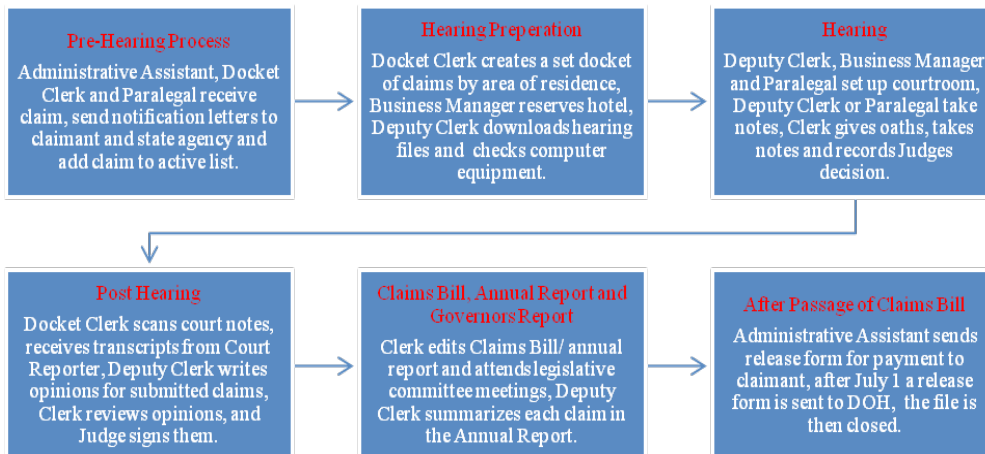
During fiscal year 2009, 82 percent of payments made by the Legislature to claimants were under \$2,500 and since fiscal year 2005, 66 percent of all payments made to claimants were under \$2,500. Small claims court is held nine months out of the year. According to the Court of Claims, there are over 30 small claims hearings held per year. Despite holding over 30 hearings for small claims annually, with around 20 claims per hearing, the Court has 840 cases, \$2,500 or under, that are pending a small claims hearing.

The Per-Case Cost for Court of Claims to Review a Small Claim Is Over \$931

PERD requested from the Court of Claims a detailed description of the regular procedure for the consideration of small claims. The Court of Claims provided information regarding a typical claim filed against the Division of Highways which is under \$2,500 and involves a defect in the road. The process of adjudicating a claim for the Court of Claims involves the services of six employees (Clerk of the Court, Deputy Clerk, Administrative Assistant, Docket Clerk, Paralegal, and Business Manager) and a Court Reporter. The Pre-Hearing process begins when a claim is received by the Administrative Assistant (see Figure 1). The claim is filed with the Court of Claims and a notification letter regarding the claim is sent to the state agency by the Docket Clerk. A hearing is scheduled by the Docket Clerk once 20 claims have been filed from the same region. If an out-of-town hearing has been scheduled, the Business Manager reserves hotel rooms for employees of the Court of Claims who will be attending. Hearing notification letters are mailed by the Docket Clerk to the claimant and the state agency.

The process of adjudicating a claim for the Court of Claims involves the services of six employees (Clerk of the Court, Deputy Clerk, Administrative Assistant, Docket Clerk, Paralegal, and Business Manager) and a Court Reporter.

Figure 1
Court of Claims Review Process



Hearings are held in 12 to 15 different locations throughout West Virginia in order to accommodate the claimants. The typical small claim hearing takes about 45 minutes and involves the judge eliciting and hearing testimony from the claimant which is recorded by a court reporter with cross examination by counsel for the Division of Highways. Then the Division may or may not produce a witness(es) with testimony from the witness(es) all of which creates a complete record for the Court along with any exhibits proffered by the parties. Although the judge discusses the claims at the conclusion of all of the hearings with the Clerk for decisions to be prepared, the transcripts of the hearings are reviewed at a later date when a draft opinion has been written by staff for editing by the judge and it is also reviewed by the full Court. A notification letter regarding the court’s decision is sent to the claimant and state agency. Prior to receiving an award the claimant must wait until the Claims Bill is drafted by the Clerk and recommended to the Legislature for consideration. The Claims Bill lists every claim which the Court of Claims recommends to be appropriated by the Legislature and from what state agency fund it should be paid. Once drafted, the Claims Bill is presented to the Legislature for review. After passage of the Claims Bill, release forms for payment are sent to the claimant and state agency. Claimants are paid by respondent agencies in August. The file is then closed by the Court of Claims.

The typical small claim hearing takes about 45 minutes and involves the judge eliciting and hearing testimony from the claimant which is recorded by a court reporter with cross examination by counsel for the Division of Highways. Then the Division may or may not produce a witness(es) with testimony from the witness(es) all of which creates a complete record for the Court along with any exhibits proffered by the parties.

The entire process from the point of receiving a claim, adjudicating it, the Legislature appropriating recommended claims, and state agencies making payment requires over 28 hours of staff time by the Court of Claims.

The entire process from the point of receiving a claim, adjudicating it, the Legislature appropriating recommended claims, and state agencies making payment requires over 28 hours of staff time by the Court of Claims. This incurs an estimated per-claim cost of \$764.45 to the Court

of Claims to prepare a case and to attend a hearing. Additional expenses are associated with conducting a Court of Claim hearing. The Court of Claims estimates that there are 33 small claims hearings which involve at least 20 to 25 travel days when traveling to out-of-town hearings. Each out-of-town hearing requires the presence of the Clerk, the Deputy Clerk, the Judge and Court Reporter. It is the responsibility of the State to reimburse the lodging, food and travel costs associated with a hearing. The State is also responsible for payment of the conference center to hold a hearing. According to the Court, a conference room per day is \$150, and each individual is reimbursed on the average \$125 per day for food and lodging. PERD estimates that \$75 per employee would be the average round-trip mileage expense to attend court hearings. The Court Reporter is paid by the State on the average of \$120 per transcript written and there are at least 20 transcripts written per day. These additional expenses associated with a court hearing total \$3,350. The average hearing costs per claim for a hearing of 20 small claims is \$167.50. Therefore, the total cost for the Court of Claims to adjudicate and make payment of a small claim is an estimated \$931.95.

Therefore, the total cost for the Court of Claims to adjudicate and make payment of a small claim is an estimated \$931.95.

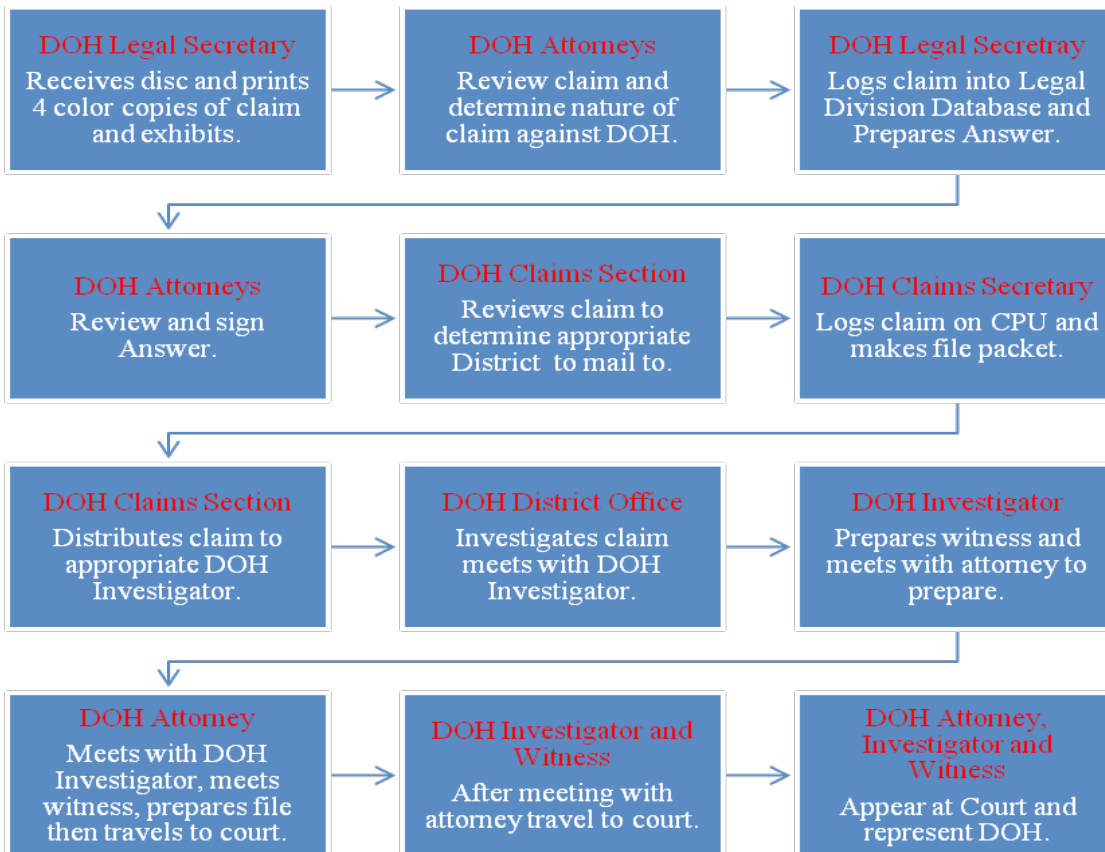
The Per-Case Cost for the DOH to Contest a Small Claim Is Over \$406

Given that the large majority of claims filed with the Court of Claims are against the Division of Highways (DOH), PERD analyzed DOH costs per adjudicated case to estimate the cost for state agencies that have cases filed against them. DOH's costs per case would be representative for state agencies because DOH cases are a large percentage of the cases filed. PERD's review found that for calendar years 2008 and 2009, over 70 percent of all claims are filed against the Division of Highways (DOH) and of those over 80 percent are under \$2,500. All DOH claims reviewed by PERD during 2008 and 2009 were denied (contested) by DOH, thus forcing the claim to be scheduled for a hearing. DOH receives small claims regarding a variety of road hazard issues but in most cases the claims involve potholes which have caused damage to a vehicle. During both 2008 and 2009, pothole claims accounted for over 42 percent of all DOH claims.

PERD's review found that for calendar years 2008 and 2009, over 70 percent of all claims are filed against the Division of Highways (DOH) and of those over 80 percent are under \$2,500.

The typical DOH small claim utilizes the services of legal secretaries, attorneys, claim section secretaries, investigators and witnesses who are state employees of DOH (see Figure 2).

Figure 2
DOH Preparatory Process



PERD requested a breakdown of the approximate time it takes each individual to work on one claim for under \$2,500. According to DOH it takes on average 13 hours and 15 minutes to see a typical claim through the adjudication process. Using current salary information for these employees, PERD estimates a per-case staff cost of \$382.87 to DOH to fully investigate a small claim and to have the appropriate personnel present for the hearing. This amount does not include the travel costs associated with attending a hearing. Each out-of-town hearing requires the presence of the DOH attorney, investigator and a witness, who is a DOH employee. PERD estimates the average cost to DOH for round-trip mileage per employee is \$75, and the attorney and investigator are

According to DOH it takes on average 13 hours and 15 minutes to see a typical claim through the adjudication process.

reimbursed \$125 per day for food and lodging. Therefore, the total travel cost to DOH to attend a hearing is an estimated \$475 per day. Assuming 20 cases per hearing, the per-case travel cost to the DOH is \$23.75. Therefore, the total per-case cost to the DOH for cases under \$2,500 is \$406.62.

It is important to keep in mind that 20 to 30 percent of cases under \$2,500 represent claims against other state agencies, such as the Division of Corrections, Regional Jail and Correctional Facility Authority, and the Department of Health and Human Resources, to name a few. PERD did not attempt to estimate the staff time and travel costs for all state agencies to contest a claim against them. The staff costs for the DOH may be above or below the average staff costs for all state agencies. Furthermore, travel costs for other state agencies are likely less than the DOH travel costs because other state agencies on average will have only a few cases on the court docket. Therefore, an overnight stay may not be necessary for other state agencies. Although many court dockets consist of only DOH cases, there are times in which more than one state agency has to attend a hearing. Therefore, travel costs per small claim are higher when more than one state agency travels to a hearing. Given these different cost scenarios it is not clear what the actual average per-case cost is for state agencies to contest a claim. However, since the DOH claims comprise over 70 percent of all small claims, the cost per claim for the DOH is likely close to the actual cost for all state agencies.

Therefore, the total per-case cost to the DOH for cases under \$2,500 is \$406.62.

The Current Adjudication Process Is Burdensome to the Public

According to *West Virginia Code §14-2-16* and *§14-2-17*, the regular procedure for the consideration of claims can be expedited if the state agency and the claimant reach an agreement regarding the facts upon which the claim is based. If an agreement is not reached or the state agency denies the claim, the Court shall place it upon its regular docket for a hearing. Most claims filed against the State are contested by the state agency and require a hearing. The Court is currently behind by over a year in hearing cases. According to the Clerk of the Court, “*The average small claim takes approximately a year, to a year and a half to reach the hearing stage due to the number of claims filed, and the travel*

necessary to be accessible to the claimants.”

After a hearing, the Court considers the claim and according to *West Virginia Code §14-2-16* “...shall conclude its determination, if possible, within thirty days.” According to *West Virginia Code §14-2-23*, after the determination is made by the Court, the Clerk shall do the following:

“...certify to the department of finance and administration, on or before the twentieth day of November of each year, a list of all awards recommended by the court to the Legislature for appropriation. The clerk may certify supplementary lists to the governor to include subsequent awards made by the court. The governor shall include all awards so certified in his proposed budget bill transmitted to the Legislature.”

The Clerk is then required to create a Claims Bill regarding all of the claims against the State that were recommended by the Court to be paid. If the Legislature passes the Claims Bill as recommended, the claimant receives the award. Therefore, after claims are heard, the claimant must wait until the Claims Bill is passed into law by the Legislature. According to the Clerk of the Court “...the entire process can take up to two and a half years, including the time considered by the Legislature and payment made to the claimant.”

It is the Legislative Auditor’s opinion that the current review process does not adjudicate small claims in an expeditious manner as required by Code and is not advantageous to the Legislature which operates the Court of Claims. Furthermore, the significant amount of time it takes for a case to reach a hearing, the travel cost for citizens to appear in court, and the amount of time to receive an award payment is an undue burden to the claimants in the opinion of the Legislative Auditor.

The DOH Contributes to the Inefficiencies of the Review Process

The Legislative Auditor finds that the DOH has contributed

The Legislative Auditor finds that the DOH has contributed significantly to the inefficiencies of the review process. The reason for this finding is that in every 2008 and 2009 claim filed against the DOH, it denied the claim, which forced a hearing.

significantly to the inefficiencies of the review process. The reason for this finding is that in every 2008 and 2009 claim filed against the DOH, it denied the claim, which forced a hearing. Conversely, other state agencies have often concurred with claims and reach an agreement with claimants without the need for a hearing. The Clerk of the Court indicated that in many cases, the DOH decides to settle cases prior to the start of the hearing only when or if the claimant appears. The Legislative Auditor concludes that the DOH is taking advantage of the high probability that claimants do not show for hearings, and therefore, no award is recommended. Given the experience of other state agencies, the Legislative Auditor also finds that it is likely that many cases filed against the DOH could be concurred by the agency. While the practice of denying every claim filed against it may save the DOH money, it places a burden on the claims review process, forces claimants to incur travel costs, lengthens the time in which a claimant receives an award, and denies claimants an award who are unable to appear at a hearing.

Proposed 2010 Legislation Would Have Created a More Expeditious and Less Costly Review Process of Claims Under \$2,500 But Was Unconstitutional

In order to reduce costs and decrease the wait-time for awards to claimants, Senate Bill (SB) 619 was introduced to the Senate and referred to the Committee on Judiciary during the 2010 legislative session; however, the bill did not pass out of the Judiciary Committee. The bill would have allowed for the administrative determination of all claims under \$2,500 to be made by the Clerk with approval by the Court. Also, the bill would have granted the Court of Claims authority to order payment by a state agency. According to the Clerk of the Court of Claims, this would have reduced the time to receive an award to five and a half months unless an extension was requested by the respondent. According to the Clerk *“...the time to complete the proposed statute may be within six months or less depending on the issues of the claim. However, that does not take into consideration the payment of the claim which may take the agency more than two or three weeks.”*

However, the proposed bill did not account for prohibitions in the West Virginia State Constitution (Article VI, Section 35) and court rulings that do not allow state entities to make such payments to the public unless the full Legislature approves the payments as moral obligations. Therefore, while the Court of Claims may administratively make decisions in claims

The Legislative Auditor concludes that the DOH is taking advantage of the high probability that claimants do not show for hearings, and therefore, no award is recommended.

In order to reduce costs and decrease the wait-time for awards to claimants, Senate Bill (SB) 619 was introduced to the Senate and referred to the Committee on Judiciary during the 2010 legislative session; however, the bill did not pass out of the Judiciary Committee.

Therefore, while the Court of Claims may administratively make decisions in claims against the State under the Constitution, the Constitution requires the payments must have the approval of the Legislature.

against the State under the Constitution, the Constitution requires the payments must have the approval of the Legislature. This will require the Court of Claims to continue the practice of drafting a Claims Bill for legislative consideration. Although the approval of the Claims Bill adds time to the payment process of awards, an administrative determination of small claims could still reduce the time claimants receive awards from the current 2 and a half years to 8 to 18 months. The proposed bill did indicate that if warranted a hearing could be determined by the Clerk, but it is the Court of Claims and Legislative Auditor’s opinion that language should be added to the bill allowing due process by an appeal with the Court by either the claimant or state agency.

Currently the Court takes approximately 28 hours and 15 minutes to completely process one small claim. According to the Clerk, if a bill similar to SB 619 were enacted, it would reduce the total time to process a small claim by 9 hours 30 minutes.

SB 619 would also reduce the travel days of the Court of Claims by 20 to 25 days and reduce the amount of time spent by the Court of Claims on claims under \$2,500. Currently the Court takes approximately 28 hours and 15 minutes to completely process one small claim. According to the Clerk, if a bill similar to SB 619 were enacted, it would reduce the total time to process a small claim by 9 hours 30 minutes (see Table 2). This would reduce the Court of Claims administrative costs from \$764.45 to \$473.55 to determine one claim under \$2,500.

State Agency	Current Staff Hours Per Claim	Staff Hours Per Claim Under SB 619	Reduction in Staff Hours Per Claim Under SB 619
Court of Claims	28 hours 15 minutes	18 hours 45 minutes	9 hours 30 minutes
Division of Highways	13 hours 15 minutes	10 hours 15 minutes	3 hours
Total	41 hours 30 minutes	29 hours	12 hours 30 minutes

Source: West Virginia Court of Claims and the Division of Highways

Table 3 shows that costs associated with a small claims hearing for both the Court of Claims and the DOH totals \$3,825. These costs include travel, food, and lodging costs for state employees to appear in court, and the Court of Claims’ costs for a court reporter, transcripts and a conference room for the hearing. The procedure within SB 619 would reduce travel days and small claims hearings by 20 to 25 per year. Therefore the total savings from eliminating the need for 20 to 25

The procedure within SB 619 would reduce travel days and small claims hearings by 20 to 25 per year.

hearings would be between \$76,500 and \$95,625 annually. Most of these savings would be for the Court of Claims. It must be noted that these savings are understated because in several hearings a year more than one state agency will have to appear in court. Therefore, the cost savings will be higher depending on how many state agencies are present in a hearing and the number of hearings that have more than one state agency. Most hearings have only the DOH present because of the large volume of DOH claims. However, given the large percentage of claims that are against DOH, these cost savings are close to the total savings to the State.

Table 3
Potential Annual Savings Without Small Claims Hearings Under \$2,500

Agency	Hearing Cost Per Day	Annual Cost Savings at 20 Less Hearings	Annual Cost Savings at 25 Less Hearings
Court of Claims	\$3,350	\$67,000	\$83,750
DOH	\$475	\$9,500	\$11,875
Total	\$3,825	\$76,500	\$95,625

Source: West Virginia Court of Claims and the Division of Highway.

Table 4 shows the total cost savings per claim under \$2,500, including staff time savings and travel and hearing expenses for the Court of Claims and the DOH. SB 619 would have reduced the per-claim cost from \$1,339 to \$768, for a 43 percent cost reduction. Two-thirds of the savings would come from a reduction in staff time, which is mostly from employees spending less time in court. This would have allowed the agencies to spend more time on claims of larger amounts. The remaining one-third cost savings would have been from the elimination of actual travel and hearing expenses.

As stated earlier, the DOH’s staff time to contest a claim may or may not represent the average staff time for all state agencies, but given that the DOH represents most claims, its \$383 staff time cost is likely within a reasonable margin of error. In addition, the travel costs to attend a hearing are clearly understated because of instances in which more than one state agency has to be present in a hearing. It is not clear how much additional cost the State incurs in those cases, but it is certain that the DOH costs are the significant share. Therefore, the cost savings from the reduced number of hearings is likely larger than presented in this report.

SB 619 would have reduced the per-claim cost from \$1,339 to \$768, for a 43 percent cost reduction. Two-thirds of the savings would come from a reduction in staff time, which is mostly from employees spending less time in court.

Table 4
Potential Savings Per Claim Under \$2,500 Under SB 619

Agency	Current Cost Per Claim Under \$2,500	Cost Per Claim Under SB 619
Court of Claims Staff Time Costs	\$764	\$474
Court of Claims Hearing/Travel Costs	\$168	\$0
State Agency Staff Time Costs	\$383	\$294
State Agency Travel Costs	\$24	\$0
Total	\$1,339	\$768

Source: West Virginia Court of Claims and the Division of Highway.

It must also be noted that the proposed changes to the review process would increase the award amounts recommended to the Legislature. The reason for this is that under the current system many claimants do not appear at a hearing. Consequently, such claims are dismissed and no awards are recommended. However, under the proposed legislation, recommended awards will be made without a hearing. Therefore, awards will be recommended in cases that under the current system would not be made because claimants do not appear. The Legislative Auditor estimates that for 2008 cases, the amount of the claims that were dismissed totaled over \$74,000.

Conclusion

The Legislative Auditor recommends that the Legislature consider an administrative procedure for reviewing claims against the State that are under \$2,500. This would reduce total costs on a per-claim basis by nearly 43 percent. Such a process is contained within Senate Bill 619 that was introduced during the 2010 legislative session. The Legislative Auditor also recommends that an appeals process be included in the administrative procedure allowing claimants or a state agency to appeal the decision of the Clerk of the Court of Claims. Furthermore, an administrative determination process would have to continue the practice of having all awards recommended by the Court go before the Legislature for its approval as moral obligations. The analysis of this report is based on the assumption that no more than five percent of the

court's decisions will be appealed and require a hearing. PERD estimates that the number of cases requiring a hearing from a five percent appeals rate could be absorbed in the scheduled hearings of claims above \$2,500. However, the higher the appeals rate, the lower the cost savings from the administrative process. In the extreme case, a 100 percent appeals rate would erode virtually all of the savings from an administrative procedure. Although recommended awards will increase under the proposed process, the savings of staff time, reduced hearing costs and the benefits to the public outweigh the higher recommended awards.

The Legislative Auditor also recommends allowing currently pending cases be determined under the administrative procedure. This would reduce small claims hearings and allow the Court of Claims more time to process pending and new cases. A retroactive administrative procedure would create a significant workload on the Court of Claims and the DOH. However, the alternative of using the new procedure only on new claims would require both agencies to continue to attend 20 to 25 hearings for pending cases while reviewing new cases under an administrative procedure. Once pending cases are worked through the administrative system, the process will be more manageable. It is the Legislative Auditor's opinion that any procedural changes that may be implemented should be reviewed by the Legislative Auditor within one to two years after the start of the process.

Although recommended awards will increase under the proposed process, the savings of staff time, reduced hearing costs and the benefits to the public outweigh the higher recommended awards.

Recommendations

- 1. The Legislature should consider amending State law to establish a non-hearing administrative review procedure for claims against the State under \$2,500. Such a procedure should require that the recommendation to the Legislature be approved by a Court of Claims judge. In addition, the recommended statutory change should include language that would allow for an appeal by either the claimant or state agency.*
- 2. If the Legislature decides to comply with the first recommendation, the Legislature should consider amending state law to require the non-hearing administrative review process to be used retroactively for all currently pending claims under \$2,500.*
- 3. Any procedural changes that may be implemented should be reviewed by the Legislative Auditor within one to two years after the start of the process.*

Appendix A: Transmittal Letters

WEST VIRGINIA LEGISLATURE *Performance Evaluation and Research Division*

Building 1, Room W-314
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0610
(304) 347-4890
(304) 347-4939 FAX



John Sylvia
Director

October 8, 2010

Cheryl Hall, Clerk of the Court
West Virginia Court of Claims
1900 Kanawha Blvd., West Wing, Room W-334
Charleston, WV 25305

Dear Ms. Hall:

This is to transmit a draft copy of the performance review of the West Virginia Court of Claims process for determining monetary awards for claims filed against the State. This report is scheduled to be presented during the November 15-17, 2010 interim meetings to the Joint Committee on Government Operations, and Joint Committee on Government Organizations. We will inform you of the exact time and location once the information becomes available. It is expected that a representative from your agency be present at the meeting to orally respond to the report and answer any questions the committees may have. If you would like to discuss with us any concerns with the draft, please contact us to schedule a meeting. In addition, we need your written response by noon on November 3, 2010 in order for it to be included in the final report.

If your agency intends to distribute additional material to committee members at the meeting, please contact the House Government Organization staff at 340-3192 by Wednesday, November, 10, 2010 to make arrangements. We request that your personnel not disclose the report to anyone not affiliated with your agency. Thank you for your cooperation.

Sincerely,

A handwritten signature in cursive script that reads "John Sylvia".

John Sylvia

Enclosure
JS/bb

Joint Committee on Government and Finance

WEST VIRGINIA LEGISLATURE
Performance Evaluation and Research Division

Building 1, Room W-314
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0610
(304) 347-4890
(304) 347-4939 FAX



John Sylvia
Director

October 8, 2010

Anthony G. Halkias, Director of Legal Division
West Virginia Division of Highways
1900 Kanawha Blvd. East
Building 5, Room 517
Charleston, WV25305

Mr. Halkias:

This is to transmit a draft copy of the performance review of the West Virginia Court of Claims process for determining monetary awards for claims filed against the State. This report is scheduled to be presented during the November 15-17, 2010 interim meetings to the Joint Committee on Government Operations, and Joint Committee on Government Organizations. We will inform you of the exact time and location once the information becomes available. It is expected that a representative from your agency be present at the meeting to orally respond to the report and answer any questions the committees may have.

We need to schedule an exit conference to discuss any concerns you may have with the report. Please notify us at 347-4890 to schedule a time. In addition, we need your written response by noon on November 3, 2010 in order for it to be included in the final report.

If your agency intends to distribute additional material to committee members at the meeting, please contact the House Government Organization staff at 340-3192 by Wednesday, November, 10, 2010 to make arrangements. We request that your personnel not disclose the report to anyone not affiliated with your agency. Thank you for your cooperation.

Sincerely,

A handwritten signature in cursive script that reads "John Sylvia".

John Sylvia

Enclosure

JS/bb

Joint Committee on Government and Finance

Appendix B: Court of Claims and DOH Reduction in Work Hours with Proposal Bill

Court of Claims Reduction in Work Hours With Proposed Bill			
Employee	Current Hours Worked	Hours Worked with Proposed Bill	Reduction in Hours Worked with Proposed Bill
Clerk of the Court	10.75	5.75	5
Deputy Clerk	5	4	1
Administrative Assistant	2.75	2.75	0
Docket Clerk	4	2	2
Paralegal	3.25	3.25	0
Business Manager	2.5	1	1.5
Total	28 hours 15 minutes	18 hours 45 minutes	9 hours 30 minutes

Source: West Virginia Court of Claims

Division of Highways Reduction in Work Hours With Proposed Bill			
Employee	Current Work Hours	Hours Worked with Proposed Bill	Reduction in Hours Worked with Proposed Bill
Legal Secretary	45 minutes	45 minutes	0
DOH Attorney	2 hours 45 minutes	1 hour 45 minutes	1 hour
DOH Claims Section Secretary	25 minutes	25 minutes	0
DOH Claims Section Employee	20 minutes	20 minutes	0
DOH Investigator	4 hours	3 hours	1 hour
DOH District and/or County Office	5 hours	4 hours	1 hour
Total	13 hours 15 minutes	10 hours 15 minutes	3 hours

Source: West Virginia Division of Highways

Appendix C: Agency Responses



West Virginia Court of Claims

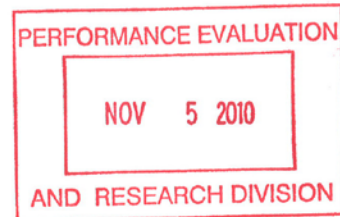
Presiding Judge
John G. Hackney Jr.
Judges
Robert B. Sayre
J. David Cecil

1900 Kanawha Blvd., E., Rm. W-334
Charleston, WV 25305-0610
Telephone (304) 347-4851
Facsimile (304) 347-4915

Cheryle M. Hall
Clerk
Becky A. Ofiesh
Chief Deputy Clerk

November 5, 2010

Mr. John Sylvia
Director
Performance Evaluation and Research Division
Building 1, Room W-314
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305



Dear Mr. Sylvia:

The Court has received correspondence from you regarding the final report prepared by your staff based upon research performed by Brandon Burton and Michael Midkiff. A copy of their findings was a part of the correspondence. The Court has reviewed the findings as requested and comments as follows:

The Court suggests a change in the first full paragraph on page three to read as follows: The typical small claim hearing takes about 45 minutes and involves the judge eliciting and hearing testimony from the claimant which is recorded by a court reporter with cross examination by counsel for the Division of Highways. Then the Division may or may not produce a witness(es) with testimony from the witness(es) all of which creates a complete record for the Court along with any exhibits proffered by the parties. Although the judge discusses the claims at the conclusion of all of the hearings with the Clerk for decisions to be prepared, the transcripts of the hearings are reviewed at a later date when a draft opinion has been written by staff for editing by the judge and it is also reviewed by the full

Page 2

Court.

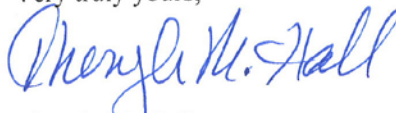
The claims are more correctly referred to as “road hazard” claims rather than “pothole claims” which is used alternately throughout the report. Many of the small claims referred to in the report may involve various scenarios on roads other than just holes in the pavement.

The Court questions the conclusions reached as to the cost savings to the State by the change to an administrative process as well as considering the fairness to claimants, the availability of the Court to the claimants if the Court is not accessible to claimants at various locations around the State, and whether this is a workable solution.

The suggestion of an administrative procedure for treating claims filed with the Court may be contrary to the reasons for the creation of the Court of Claims in 1967. Although the Court would like claims to be processed more expeditiously and awards paid sooner to the claimants, the Court believes that a change to an administrative procedure will not necessarily result in awards being paid sooner or at a greater cost efficiency. The Court also believes that the current procedure is preferable to a conversion to an untested administrative procedure to which the Court can envision the risk of unforeseen pitfalls not considered in this report.

Thank you for the research performed by your Division. It has provided the Court with valuable information.

Very truly yours,



Cheryle M. Hall,
Clerk



WEST VIRGINIA DEPARTMENT OF TRANSPORTATION

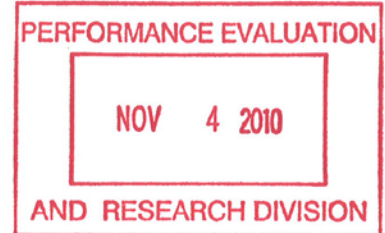
Division of Highways

Legal Division

1900 Kanawha Boulevard East • Building Five • Room 517
Charleston, West Virginia 25305-0430 • (304) 558-2823

Joe Manchin III
Governor

November 4, 2010



VIA FACSIMILE (304) 347-4939

Mr. John Sylvia
West Virginia Legislature
Performance Evaluation and Research Division
Building 1, Room W-314
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0616

RE: Draft Copy of the Performance Review of
The West Virginia Court of Claims

Dear Mr. Sylvia:

Thank you for your October 8, 2010, letter and the opportunity for the Division of Highways (DOH) to respond to your draft performance review of the West Virginia Court of Claims. While DOH shares your interest in streamlining the claims process, we believe some of your report's conclusions warrant reconsideration.

First, any discussion about the claims process must be considered in the context of the State's historic immunity. See Article VI, Section 35 of the West Virginia Constitution. As you know, the State of West Virginia is immune from actions for injuries caused by the State or its instrumentalities. *Id.* The enabling statute that created the Court of Claims is an exception to the State's immunity. The State may pay claims asserted against it for which the State has a "moral obligation." See *State ex rel. Adkins v. Sims*, 46 S.E.2d 81 (W.Va. 1947). While a streamlined claims process is important, the process must be consistent with the West Virginia Constitution, existing law, and only permit the payment of claims for which the State has a "moral obligation." It is our opinion that S.B. 619 is not supported by our Constitution and existing law.

Second, our internal review of historic small claims (less than \$2,500.00) as defined in your letter that have been filed against DOH reflects that at least 53 percent of such claims are not meritorious or require review under the Court's existing process to determine their merit. In our opinion, an award in such cases or an expeditious review of these claims would violate Article VI, Section 35 of the West Virginia Constitution and W.Va. Code § 14-2-1 *et seq.*, and potentially promote the payment of claims for which the State has no "moral obligation."

E.E.O./AFFIRMATIVE ACTION EMPLOYER

Mr. John Sylvia
November 4, 2010
Page 2

Third, DOH disagrees with your conclusion about the average cost for a small claims review and hearing. DOH's costs for Court of Claims matters are relatively fixed. For example, DOH requires two attorneys to handle its Court of Claims cases. Aside from small claims, there are at least 100 pending claims between \$2,500 and \$20,000 (medium claims) and an additional 50 claims in which claimants are seeking in excess of \$20,000 (large claims). While most cases are in the discovery stage, DOH's internal review reflects that claimants are currently seeking in excess of Fifteen Million Dollars (\$15,000,000.00) for combined claims of at least \$2,500.00 each. As discovery progresses, it is likely that the value of the claims assigned by the Court will be significantly higher than the current projected \$15,000,000.00. Further, DOH's secretary that supports DOH's attorneys is assigned to five attorneys within the Division and thus her work on Court of Claims matters does not increase DOH's costs but merely reflects DOH's conservative budgeting and wise personnel assignments. Finally, DOH's investigators routinely handle hundreds of claims and matters outside the Court of Claims and thus their work on small claims before the Court of Claims does not enhance DOH's costs but again reflects prudent use of available personnel.

By comparison, the adoption of S.B. 619 or a comparable bill will merely promote inefficiencies in the claims review process and saddle the Court of Claims with greater administrative burdens. Indeed, if at least 53 percent of the small claims filed with the Court of Claims lack merit or require an adversarial process to determine their merit and if S.B. 619 requires a mandatory appeal process as your letter acknowledges, it is safe to assume that DOH or a claimant will request a hearing in each of those cases. If the Court decides to travel for these hearings, the Court will incur the same costs projected in your report and DOH will merely duplicate its efforts and costs to defend these claims. In short, the proposed streamlined claims review process will likely enhance the burdens and costs for all parties.

Fourth, the suggestion that DOH contributes to inefficiencies in the review process is unfounded. DOH recently filled the open position for a Court of Claims attorney. This hiring has already started to promote an efficient review of small claims that will help to diminish the backlog of pending small claims. Further, the Court generally provides the docket for small claims to DOH anywhere from three weeks to 10 days before scheduled hearings. Once the dockets are reviewed DOH's investigators analyze each claim and confer with DOH's counsel. A determination about whether to stipulate or try small claims is not made until a day or two before the scheduled hearing. If claims were docketed with more advanced notice it is likely that DOH's claims review would be more efficient and promote an earlier resolution of potential claims. Likewise, in the past, when DOH agreed to pay small claims, the Court used DOH's prior payment to establish future liability in a case arising out of a different factual scenario, inevitably prompting DOH to reconsider the merit of an early resolution of future small claims.

Mr. John Sylvia
November 4, 2010
Page 3

Fifth, an objective review of the Court's case volume reflects a significant increase in the number of small claims the past few years. Many small claims involve pothole damages that arise between the end of the paving season and before asphalt plants open in the spring when repairs can be made or resurfacing performed. Based on existing science, it is impossible for DOH to make a permanent repair to these potholes during those times of the year. Temporary repairs may be made using cold mix but it is an established fact that cold mix erodes quickly, especially on high volume roads. Further, during this period of the year, potholes inevitably occur during states of emergency or during snow and ice removal conditions when DOH personnel are focused on keeping roads free of hazardous weather conditions. Despite the inability of DOH to repair potholes under such conditions, the Court has generally made awards for such claims.

Finally, support for S.B. 619 fails to consider West Virginia's unique roadway system. West Virginia is one of only four states that has jurisdiction over both state and county roads. West Virginia leads the United States in the percentage of highway miles that are state-maintained. Likewise, West Virginia's roadways constitute the sixth largest state-maintained highway network in the country. Approximately 26,000 miles are ineligible for federal funding. About 35,000 miles of West Virginia's roads are classified as rural. Any process that streamlines the claims process and has the potential to promote the payment of claims that lack merit will unduly constrain DOH and place increased budgetary burdens on the Legislature to allocate appropriate resources to DOH for the maintenance of the State's vast road network.

Despite our concerns, DOH believes that streamlining the process in a balanced and fair fashion will promote efficiency, expedite payments to claimants with meritorious claims, and reduce the State's costs. However, DOH believes S.B. 619 or an amended version of S.B. 619 will not accomplish the mutual goals of the Legislative Auditor, the Court of Claims, and DOH.

Now that it is staffed with two fulltime attorneys dedicated to handle Court of Claims matters, DOH recently adopted an internal initiative to enhance its claims review process that should redress the concerns of the Legislative Auditor and the Court of Claims. DOH recommends the following:

1. DOH will continue its internal review of pending small claims before the Court of Claims. By December 15, 2010, DOH will identify appropriate small claims for potential resolution consistent with W.Va. Code § 14-2-16(3) and advise the Clerk of the Court of Claims accordingly;
2. For small claims filed with the Court of Claims after January 1, 2011, DOH will identify appropriate small claims for resolution and report such claims to the Clerk of the Court of Claims within 90 days after receipt of such claims. As part of this process, DOH will have a status conference with the Clerk of the Court every 45 days to discuss the

**Mr. John Sylvia
November 4, 2010
Page 4**

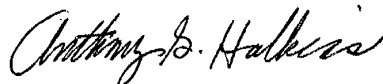
process and potential means to enhance the claims review process. Claims appropriate for resolution will be identified and hearings for such claims will be unnecessary. Claims appropriate for hearing will be docketed consistent with existing West Virginia law; and

3. By September 1, 2011, DOH will meet with the Clerk of the Court of Claims to assess the success of these recommendations. If DOH and the Court are dissatisfied with the process, the parties will confer in good faith to develop an alternative process, including any appropriate legislative initiatives, to accomplish the mutual objectives of all parties.

DOH is optimistic that its internal initiative and recommendations will substantially reduce the Court's current backlog, expedite payments for meritorious small claims, and minimize the administrative burdens of the Court and DOH.

We appreciate the opportunity to respond to your draft performance review. Please contact me if you have any questions or need additional information.

Very truly yours,



**Anthony G. Halkias
Director of Legal Division**

AGH:Fm

**cc: Mike Vasarhelyi
Andrew Tarr
Michael J. Folio**



WEST VIRGINIA LEGISLATIVE AUDITOR

PERFORMANCE EVALUATION & RESEARCH DIVISION

Building 1, Room W-314, State Capitol Complex, Charleston, West Virginia 25305

telephone: 1-304-347-4890 | www.legis.state.wv.us/Joint/PERD/perd.cfm | fax: 1-304-347-4939