

STATE OF WEST VIRGINIA

Update of the FULL PERFORMANCE EVALUATION OF THE OFFICE OF JUDGES

**Office of Judges has Reduced
the Number of Pre-June 1995
Protests in Its Backlog**

**Office of Judges Has Eliminated
Its Backlog of Cases Ready
for Final Decision for
Over 90 Days**

**Backlog of "Old Law" Permanent Total
Disability Cases Created by the
Worker's Compensation Division
Continues to Decline**

**Office of Judges Has Reduced
Its Use of Contract Attorneys**

**Chief Administrative Law Judge Does Not
Comply With Reporting Requirements**

**OFFICE OF LEGISLATIVE AUDITOR
Performance Evaluation and Research Division
Building 1, Room W-314
State Capitol Complex**

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November 2000

PE-00-28-186

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November 2000

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Antonio E. Jones, Ph.D.
Director

November 12, 2000

The Honorable Edwin J. Bowman
State Senate
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Weirton, West Virginia 26062

The Honorable Vicki V. Douglas
House of Delegates
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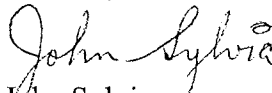
Dear Chairs:

Pursuant to the West Virginia Sunset Law, we are transmitting an Update of the Full Performance Evaluation of the *Office of Judges*, which will be presented to the Joint Committee on Government Operations on Sunday, November 12, 2000. The issues covered herein are "*Office of Judges has Reduced the Number of Pre-June 1995 Protests in Its Backlog; Office of Judges Has Eliminated Its Backlog of Cases Ready for Final Decision for Over 90 Days; Backlog of "Old Law" Permanent Total Disability Cases Created by the Worker's Compensation Division Continues to Decline; Office of Judges Has Reduced Its Use of Contract Attorneys; and, Chief Administrative Law Judge Does Not Comply With Reporting Requirements.*"

We conducted an exit conference with the *Office of Judges* on November 1, 2000. We received the agency response on November 2, 2000.

Let me know if you have any questions.

Sincerely,


John Sylvia
Director

JS/wsc

Joint Committee on Government and Finance

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Executive Summary

This is the third compliance monitoring and further inquiry update of the performance evaluation conducted in 1997 on the Workers' Compensation Office of Judges (OOJ) as required by WVC §4-10-4a.

Issue Area 1: The Office of Judges has Reduced the Number of Pre-June 1995 Protests in Its Backlog.

The Office of Judges reduced the number of pre-June 1995 cases in their backlog from 3,595 in 1998 to 619 cases in the current reporting period. This is a significant improvement on the part of the OOJ.

Issue Area 2: The Office of Judges Has Eliminated Its Backlog of Cases Ready for Final Decision for Over 90 Days.

In the original performance review, seven per cent of OOJ cases awaited a final decision for over 180 days. In the current reporting period, no cases wait over 90 days for a decision. This is a commendable improvement over prior performance.

Issue Area 3: The Backlog of "Old Law" Permanent Total Disability Cases Created by the Worker's Compensation Division Continues to Decline.

The OOJ received 253 protests between October 1999 and September 2000, an average of 21 protests a month. The number is considered normal. The OOJ has successfully dealt with the protest backlog created in 1998 by the Workers' Compensation Division.

Issue Area 4: The Office of Judges Has Reduced Its Use of Contract Attorneys.

The OOJ has reduced its expenditures on contract attorneys since 1997. However, since the January 2000 update, the OOJ has not significantly reduced its reliance on contract attorneys.

Issue Area 5: The Chief Administrative Law Judge Does Not Comply With Reporting Requirements.

The ALJ is required to file a report indicating the degree of compliance with time standards. The report is to be filed with the Joint Committee on Government and Finance. The ALJ has not filed these reports with the Committee and reports that this requirement has not been fulfilled due to problems with the Office of Judges' Information Management System.

Review Objective, Scope and Methodology

This is the third compliance monitoring and further inquiry update of the January 1998 full performance evaluation of the Workers' Compensation Office of Judges (OOJ). This update is required by WVC §4-10-4a. The purpose of this update is to determine whether or not the agency has complied with recommendations made in the original evaluation as well as subsequent compliance monitoring and further inquiry updates.

Objective

The objective of this update is to examine the status of the OOJ's efforts in 1) reducing the number of pre-June 1995 protests from its backlog; 2) reducing the amount of time a protest must wait for a final decision after its final hearing; 3) eliminating the backlog of "old law" permanent total disability cases created by the Workers Compensation Division; 4) reducing and eliminating the use of contract attorneys; and 5) complying with reporting requirements.

Scope

The scope of this update focused the recommendations made in the January 1999 update as well as the new issue area of complying with reporting requirements. The time period covered by this update is from October 1999 to September 2000.

Methodology

The methodology included a review of documentation from the end of the time period covered in the last update to the present, October 1999 to September 2000, to determine the status of Issue Areas 1 through 4 (issue area numbers coincide with those listed in the Objective section above). For Issue Area 5, the Senate and House Clerks' Offices and the Joint Committee on Government and Finance were contacted to determine if the OOJ were complying reporting requirements. Every aspect of this review is in compliance with **Generally Accepted Government Auditing Standards** as set forth by the Comptroller general of the United States.

Background

The West Virginia Legislature created the Office of Judges (OOJ) as an independent organization headed by a Chief Administrative Law Judge. The Governor, with the advice and consent of the Senate, appoints the Chief Administrative Law Judge (ALJ). The ALJ serves at the will and pleasure of the Governor. According to provisions in §23-5-9, as amended, the OOJ has the statutory power to hear and determine disputed claims in accordance with the provisions of this article, establish a procedure for hearing disputed claims, take oaths, examine witnesses, issue subpoenas, establish the amount of witness fees, keep such records and make such reports as are necessary for disputed claims, and exercise such additional powers, including the delegation of such powers to administrative law judges or hearing examiners as may be necessary for the proper conduct of an organization for administrative review of disputed claims, as stated in §23-5-8 of the *West Virginia Code*, as amended.

Prior to the creation of the OOJ, the Commissioner of Worker's Compensation and their Legal Division were responsible for the dispute resolution process within the agency. However, the Worker's Compensation appeals process was criticized for three obvious reasons: a lack of due process, a lack of substance within legal decisions, and a lack of expediency. To remedy this blatant deficiency of the Worker's Compensation Division, the OOJ was created by a special session of the Legislature in June 1990. Under *West Virginia Code* §25-5-1, the OOJ was granted jurisdiction over all new protest requests. The OOJ's administrative appellate power commenced on July 1, 1991. All cases, which were in the litigation process were transferred to the jurisdiction of the OOJ on January 1, 1991.

By creating the OOJ, the Legislature addressed the structural weaknesses within the Worker's Compensation dispute resolution process. First, the lack of due process was remedied by establishing the OOJ as an independent organization, which is headed by the Chief Administrative Law Judge (ALJ) who is appointed by the Governor and confirmed by the Senate. The Chief ALJ can only be removed by a vote of two thirds of the members of the Compensation Programs Performance Council and shall not be removed except for official misconduct, incompetence, neglect of duty, gross immorality or malfeasance and then only after he or she has been presented in writing with the reasons for their removal and is given an opportunity to respond and to present evidence (WVC §25-5-8.) Second, the lack of substance with prior Worker's Compensation administrative law decisions was remedied by requiring that all OOJ decisions contain findings of fact and conclusions of law. Lastly, the West Virginia Legislature attempted to remedy the lack of expediency in processing cases by requiring that the OOJ manage and control the litigation process.

On March 16, 1993, the West Virginia Supreme Court of Appeals, citing section 2.5 of the American Bar Association's Standards Relating to Court Delay Reduction stated "*under the current procedure, the time frame order is entered automatically, and, unless there is an objection, nothing more is done with the claim until the time frame expires* (Lyons v. Richardson, 189 W. Va. 157,54.) As a result of the West Virginia Supreme Court of Appeals' ruling, the OOJ instituted Time Standards to comply with the Court's holding and expedite the dispute resolution process. Time Standards are shown in Table 1.

Table 1
Office of Judges Time Standards

Protest Type	Time Standards
1) Compensability - Protests concerning whether an injury or disease occurred in the course of and as the result of employment.	6 Months (180 Days)
2) Rehabilitation - Protests concerning whether an individual is entitled to receive physical or vocational rehabilitation benefits as a result of a compensable injury.	10 Months (300 Days)
3) Medical Treatment - Protest concerning whether an individual should receive a particular kind of medical treatment or medical equipment aid regard to a compensable injury.	4 Months for claimants (120 Days) 6 Months for employers (180 Days)
4) Temporary Total Disability Benefits - Protest concerning whether an individual, as a result of a compensable injury, is temporarily unable to perform the job that he or she had at the time the injury occurs or at a later time if necessary.	6 Months (180 Days)
5) Dependent Benefits (104 Weeks) - Protest concerning whether as individual is a dependent of a person receiving permanent total disability and whether that person is entitled to receive the 104 weeks of benefits provided by law.	4 Months (120 Days)
6) Dependent Benefits (Fatal) - Protest concerning whether a compensable injury or disease was a material contributing factor to the death of a deceased claimant.	12 Months (360 Days)
7) Permanent Partial Disability - Protest concerning whether claimants have any permanent partial (not total) disability as a result of a compensable injury.	15 Months (450 Days)
8) Occupational Pneumoconiosis Non-Medical - Protest concerning whether an individual has been exposed to the hazards of occupational pneumoconiosis for the requisite time period provided by law whether any impairment is presumed to have been caused by such exposure, and whether any award should be allocated among different employers.	9 Months (270 Days)
9) Permanent Total Disability Threshold- Protest concerning whether an individual has 50% whole body medical impairment resulting from compensable injuries so as to qualify that claimant for consideration for permanent total disability.	8 Months (240 Days)
10) Permanent total Disability Entitlement - Protest concerning whether a claimant is permanently and totally disabled in accordance with law.	15 Months (450 Days)
11) Permanent Total Disability Onset/Changeability - Protest concerning the date permanent total disability commenced once it has been determined that an individual is permanently and totally disabled.	4 Months (120 Days)
12) Permanent Total Disability Second Injury - Protest concerning whether a permanent disability award should be paid from the second injury fund.	4 Months (120 Days)
13) TTD Reopening - Protest concerning whether the claim of an individual who has suffered a compensable injury should be reopened.	5 Months (150 Days)

Issue Area 1: The Office of Judges has Reduced the Number of Pre-June 1995 Protests in Its Backlog.

The original performance evaluation conducted by the Legislative Auditor on the Office of Judges uncovered an estimated 6,000 to 8,000 protests that were in its backlog prior to June 1, 1995. The significance of the June 1, 1995 date is that it is the date that the OOJ's new computer system went online. At that time the computer system did not have a programmed report that identified active cases filed prior to June 1, 1995. Since then, the OOJ completed a project that accurately identified the number of pre-June 1, 1995 protests backlogged in its inventory. Since 1998, the number of pre-June 1995 protests has dropped significantly, from 3,595 to 619 (See Table 2 for a full breakdown of the type and number of protests). The OOJ needs continue to reduce the number of pre-June 1995 protests to zero since all of these protests have surpassed their respective time standards.

**Table 2
Pre-June 1, 1995 Protests**

PROTEST TYPE	NUMBER OF PROTESTS (1998)	NUMBER OF PROTESTS (1999)	NUMBER OF PROTESTS (2000)
Compensability	53	5	2
Rehabilitation	1	1	0
Medical Treatment/Equipment	75	20	3
Temporary Total Disability	23	5	1
Dependent Benefits 104	161	21	21
Dependent Benefits Fatal	60	121	38
Permanent Partial Disability	2,852	56	15
Occupational Pneumoconiosis (non-Medical)	123	349	50
Occupational Pneumoconiosis (PPD)	NA	977	448
Permanent Total Disability Threshold	2	0	0
Permanent Total Disability Entitlement	127	55	32
Permanent Total Disability Onset Date	5	3	3
Permanent Total Disability 2 nd Injury	20	3	2
Reopening	55	18	4
System Resolution Only	NA	117	0

Miscellaneous	38	0	0
TOTAL	3,595	1,751	619

Recommendation 1:

The Office of Judges should complete all pre-June 1, 1995, protests through its appeals process in accordance with time standards as established in its regulations.

Issue Area 2: The Office of Judges Has Eliminated Its Backlog of Cases Ready for Final Decision for Over 90 Days.

In the original performance review, the OOJ had 3,254 protests which had a final hearing but were not yet decided. As of October 6, 2000, the OOJ had 2,802 protests awaiting a final decision. Of these decisions, 61% occur within thirty days. All decisions were completed within ninety days. This is a significant improvement over previous years (See Table 3 for a complete description of the type of protest and the number of days since the final hearing).

**Table 3
Cases In The OOJ's System (10/06/00)**

PROTEST TYPE	NUMBER OF DAYS SINCE FINAL HEARING						TOTALS
	0-30	31-60	61-90	91-180	181-360	361+	
Compensability	180	61	11	0	0	0	252
Rehabilitation Services	38	8	6	0	0	0	52
Medical Treatment/Equipment	170	22	10	0	0	0	202
Temporary Total Disability	165	35	44	0	0	0	244
Dependent Benefits	1	3	0	0	0	0	4
Dependent Benefits Fatal	24	28	8	0	0	0	60
OP Non-Med	152	63	26	0	0	0	241
PTD Threshold	0	3	1	0	0	0	4
PTD	55	24	88	0	0	0	167
PTD Onset	9	2	3	0	0	0	14
PTD Second Injury	0	0	1	0	0	0	1
Reopening	148	44	32	0	0	0	224
OP Board PPD	241	84	33	0	0	0	358
PPD Injury	290	329	43	0	0	0	662
Employer Treatment	245	62	10	0	0	0	317
2000 TOTAL	1718	768	316	0	0	0	2802
1999 TOTAL	1248	1311	740	122	0	0	3424
1998 TOTAL	1116	345	370	209	28	4	2072
1997 TOTAL	1336	791	492	384	147	104	3254

Issue Area 3: The Backlog of Permanent Total Disability Cases Decided by the Worker’s Compensation Division Continues to Decline.

The 1997 performance review identified a potential crisis looming on the horizon for the OOJ. A backlog of approximately 4,000 Permanent Total Disability (PTD) cases had accumulated in the Workers Compensation Division. The West Virginia Supreme Court of Appeals recalled Judge James Holiday to conduct all proceedings pertaining to Worker’s Compensation on behalf of the Court. On October 9, 1997, Judge Holiday signed an order requiring the Worker’s Compensation Division to render decisions on approximately 1,500 backlogged “*Old Law*” PTD cases by February 15, 1998 and approximately 2,500 Ferral “*Old Law*” cases by June 15, 1998. The OOJ estimated that two thirds of the cases would be appealed to them.

PTD protests are the most complex received by the OOJ. They are only assigned to its staff of administrative law judges. Neither paralegal writing teams, nor contract attorneys are permitted to handle these types of protests because of their complexity. The OOJ received 253 PTD protests between October 1999 and September 2000, an average of 21 protests a month. This amount of protests is considered normal. Thus, *the OOJ has successfully dealt with the PTD backlog created in 1998*. Table 4 shows the total and average monthly number of protests from January 1996 to September 2000.

**Table 4
Number of PTD Protests Received by the OOJ,
January 1996 to September 2000**

TIME PERIOD	TOTAL NUMBER OF PTD PROTESTS	AVERAGE NUMBER OF PTD’S RECEIVED PER MONTH
1/96 - 12/96	112	9
1/97 - 10/97	310	31
11/97 - 10/98	1393	116
11/98 - 9/99	684	68
10/99 - 9/00	253	21

According to the OOJ, actual completion dates for these cases may vary substantially from the projections based on extensions requested by the parties involved.

Issue Area 4: The Office of Judges Has Reduced Its Use of Contract Attorneys.

The OOJ has had to use contract attorneys to write decisions for some of its protests. The goal of the OOJ has been to reduce and eliminate the need for contract attorneys and complete all decision writing in house. The OOJ has reduced its expenditures on contract attorneys since 1997. However, since the January 2000 Update, the OOJ has not significantly reduced its expenditures or reliance on contract attorneys. In 1997, the monthly average paid for contract attorneys was \$135,633. In 1999 the monthly average was reduced by 75%. However, the OOJ expenditures for contract attorneys in 2000 decreased slightly.

**Table 5
Expenditures For Contract Attorneys (1995-2000*)**

CALENDAR YEAR	TOTAL EXPENDITURE	MONTHLY AVERAGE
1995	\$1,862,807	\$155,234
1996	\$1,453,800	\$121,150
1997	\$1,627,600	\$135,633
1998	\$1,058,924	\$88,244
1999	\$470,262	\$39,189
2000*	\$344,200	\$38,244
TOTAL	\$6,817,593	\$98,806

*Includes 1/00 through 9/00.

The OOJ claimed that the large number of PTD cases caused by the mandamus actions in regards to the Workers' Compensation Division was responsible for the continued use of contract attorneys. The January 2000 Update reported that the OOJ estimated that it would take six to ten months to complete these cases. The number of PTD cases received by the office of Judges has dropped significantly since the January 2000 update.

Recommendation 2:

The Legislative Auditor recommends that the Office of Judges should continue in its efforts to eliminate the use of contract attorneys and appear before the Joint Committee on Government Operations during the 2001 Interim Session to give an oral presentation and provide a written status report on this issue.

Issue Area 5: The Administrative Law Judge Does Not Comply With Reporting Requirements.

The Chief Administrative Law Judge is required by §93-2-3 of the Code of State Rules to file a report indicating the degree of compliance with time standards. The section states:

On December 31, 1995 and on September 1, of each year thereafter, the Chief Administrative Law Judge shall file a report with the Governor, the Joint Legislative Committee on Government and Finance or such other committee as shall be designated by the President of the Senate and the Speaker of the House, and with the Compensation Programs Performance Council indicating the degree of compliance with these rules. Such report shall include, with respect to any area of non-compliance with these rules, the reason for non-compliance together with a plan to secure compliance with these rules.

The Joint Committee on Government and Finance does not receive this report. Nor does the Clerk of the House of Delegates. The Assistant Clerk of the State Senate informed the Legislative Auditor that:

The West Virginia Senate received an annual report from the Worker's Compensation Office of Judges in 1996. This has been the only year in which we received such report.

The chief ALJ informed the Legislative Auditor that the report had not been filed for either 1999 or 2000. According to the ALJ:

On June 30, 1999, an amended time standard rule was filed to reflect changes made to applicable Workers Compensation statutes. The effective date of the amended rule was August 1, 1999. The amended rule altered the reporting requirements in several substantial ways and the case management system in place at the time did not collect the data needed to report on the amended requirements. The Office of Judges was, therefore, unable to comply at that time with the reporting requirement of the rule.

The Office of Judges reports that they have been working on developing and implementing a new case management system. The new system was operational on April 27, 2000, however, there were substantial problems with it. There are several modules not functioning within the OOJ's information management system. One of the non-functioning modules is the reporting capability. The OOJ states that it will file a report with the Governor and the Legislature stating that a report will not be filed due to system problems it is experiencing. The OOJ's complete explanation of its failure to file these reports is available in Appendix A.

Recommendation 3:

The Workers' Compensation Office of Judges should make every attempt to compile the information and submit a report to the Joint Committee on Government and Finance, as required, before the 2001 Regular Legislative Session.

APPENDIX A

Transmittal Letter to Agency

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
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Antonio E. Jones, Ph.D.
Director

October 26, 2000

Robert Smith
Chief Administrative Law Judge
Workers' Compensation Office of Judges
1 Players Club Drive
Charleston, WV 25311-1638

Dear Judge Smith:

Enclosed is a draft of the compliance monitoring and further inquiry update of the Workers' Compensation Office of Judges. We would appreciate your written response by Thursday, November 2, 2000 so that it can be included in the final report which is scheduled to be presented at the Sunday, November 12, 2000 interim meeting of the Joint Committee on Government Operations. Also, per our telephone conversation of October 26, 2000, the exit conference has been scheduled for Wednesday, November 1, 2000 at 1:30 PM in room W-314 of the Capitol Building.

If you have any questions please contact me.

Sincerely,

A handwritten signature in cursive script that reads "Brian Armentrout".

Brian Armentrout
Research Manager

Joint Committee on Government and Finance

APPENDIX B

Explanation of Inability to File Report

Cecil H. Underwood
Governor

Robert J. Smith
Chief Administrative
Law Judge



West Virginia
Workers Compensation Office of Judges
an equal opportunity/affirmative action employer

October 13, 2000

Mr. Brian Armentrout
Research Manager
West Virginia Legislature
Performance Evaluation and Research Division
Building 1, Room W-314
State Capitol Complex
Charleston, WV 25305

Re: Explanation of Inability to File Report

Dear Mr. Armentrout:

The Office of Judges Time Standard Rule CSR §93-2-3.2 requires the Chief Administrative Law Judge to file a report September 1 of each year indicating the degree of compliance the Office of Judges had for the previous year with the rule. That report has not been filed for either 1999 or 2000.

On June 30, 1999, an amended time standard rule was filed to reflect changes made to applicable Workers Compensation statutes. The effective date of the amended rule was August 1, 1999. The amended rule altered the reporting requirements in several substantial ways and the case management system in place at the time did not collect the data needed to report on the amended requirements. The Office of Judges was, therefore, unable to comply at that time with the reporting requirement of the rule.

Together with the Bureau of Employment Programs MIS staff, the Office of Judges had been working for many months on developing and implementing a new case management system. In September of 1999 it was projected by MIS technical advisors that the new system would be operational by November, 1999. It was our intent to file a report at that time.

However, the new system was not operational until April 27, 2000. Even then there were substantial functionality problems. Several different components simply did not work and many others did not function appropriately. One of the non-functioning modules was the reporting capability. The system is designed to enable us to generate both management reports and reports which measure our overall performance. In order

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to continue to perform our core functions, we focused our initial efforts concerning reporting ability on day-to-day management reports.

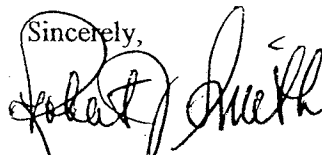
There are still several modules not functioning properly which we have had to develop manual "work arounds." These include the tracking of proposed settlement agreements and scheduling of hearings concerning these settlements.

As a consequence, we are still not able to generate information on performance that meet the reporting requirements of the time standard rule. Indeed, we have not been able this entire year to furnish the Compensation Programs Performance Council with the monthly reports we have routinely provided them since June, 1995.

In retrospect, the Office of Judges should have filed a letter with the Governor and the Legislature in September of 1999 indicating our inability to file a proper report. We intend to file such a letter in the near future.

I trust this is responsive to your inquiry. Should you need additional information, please contact me at your convenience.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert J. Smith". The signature is written in a cursive style with a large initial "R".

Robert J. Smith, Chief
Administrative Law Judge

RJS:kfi

APPENDIX C
Agency Response

Cecil H. Underwood
Governor

Robert J. Smith
Chief Administrative
Law Judge



West Virginia
Workers Compensation Office of Judges
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November 1, 2000

Antonio E. Jones, Ph.D., Director
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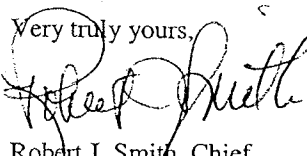
RE: Update of the Full Performance Evaluation Of the Office of Judges

Dear Dr. Jones:

Thank you for the opportunity to review a draft of the report entitled "Update of the Full Performance Evaluation of the Office of Judges" which will be presented to the Joint Committee on Government Operations this month at the Interim Committee Meetings. After review of this report, I have no additional information to provide to the committee. However, I ask the committee to consider the following comment and request.

The performance of the Office of Judges has been evaluated for four consecutive years. Each year the performance has improved. In addition through the oversight provided by the Compensation Programs Performance Council and through internal Office of Judges' procedures, checks and balances are provided for which will assure that the office continues to perform in accordance with the statutory objectives. For these reasons, I request that consideration be given to a multi-year extension for the Office of Judges.

Thank you for the opportunity to respond to this report.

Very truly yours,

Robert J. Smith, Chief
Administrative Law Judge

RJS:ddm

Jonesltr.11100

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