

STATE OF WEST VIRGINIA

**WORKERS' COMPENSATION APPEAL BOARD
SPECIAL REPORT**

The Appeal Board Awarded a \$95,000
Contract for Legal Services to an Attorney
Unlicensed to Practice Law in West Virginia

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

**CHARLESTON, WEST VIRGINIA 25305
(304) 347-4890**

PE98-08-100

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Performance Evaluation and Research Division

July 1998

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Antonio E. Jones, Ph.D.
Director

July 12, 1998

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

The Honorable Vicki Douglas
House of Delegates
Building 1, Room E-213
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0470

Dear Chairs:

Pursuant to the West Virginia Sunset Law, we are transmitting the Workers' Compensation Appeal Board Special Report, which will be presented to the Joint Committee on Government Operations on Sunday, July 12, 1998. The issue covered herein is "The Appeal Board Awarded a Contract for Legal Services to an Attorney Unlicensed to Practice Law in West Virginia."

Sincerely,

A handwritten signature in black ink, appearing to read "Antonio E. Jones".

Antonio E. Jones

AEJ/wsc

Joint Committee on Government and Finance

Finding: The Workers' Compensation Appeal Board Contracted For Attorney/Law Clerk Services With An Unlicensed Attorney For Almost A Year Before The Attorney Was Admitted To The West Virginia State Bar.

The Workers' Compensation Appeal Board (Code, 23-5-1 et. seq.) employs four contract attorneys who write summaries and opinions of cases on appeal from the Office of Judges. **One of the contract attorneys was a licensed Florida attorney. However, this attorney was unlicensed to practice law in West Virginia from the date of his contract on July 1, 1997 until he was admitted to the West Virginia State Bar by reciprocity on June 9, 1998.** The contract between the unlicensed attorney and the Workers' Compensation Appeal Board provided for the attorney to be paid \$50 per hour with a maximum annual cost of \$75,000. The Workers' Compensation Appeal Board entered into a change order with the unlicensed attorney dated April 4, 1998. This change order increased the maximum annual charge by \$20,000, raising the total to \$95,000 annually.

The attorney was paid by the Workers' Compensation Appeal Board a grand total of \$90,100 for work conducted between July 1, 1997 and June 30, 1998. For the period between July 1, 1997 and June 9, 1998, when the attorney became licensed to practice law in West Virginia, the attorney billed the state for \$90,100 in services.

Definition of Practicing Law in West Virginia

West Virginia Code, 30-2-4 prohibits the practice of law without a license. Specifically, it states in relevant part:

It shall be unlawful ... to practice or appear as an attorney-at-law...render legal services, or to hold himself out to the public as being entitled to practice law, or in any manner to assume, use, or advertise the title of lawyer...without first having been duly and regularly licensed and admitted to practice law... .

Further, the Supreme Court of Appeals defined the practice of law in 1961 as:

One is deemed to be practicing law whenever he or it furnishes to another advice or service under circumstances which imply the possession or use of legal knowledge and skill. One undertakes, with or without compensation and whether or not in connection with another activity, to prepare for another legal instruments of any character... .

Contract Between the Workers' Compensation Appeal Board & Unlicensed Attorney

Before becoming a vendor for the State of West Virginia, a person or company must register with the Division of Purchasing. The **unlicensed contract attorney** registered on June 26, 1997 as an attorney for the purpose of providing "**legal advisory and consulting services.**" The agreement and purchase order were signed by the Commissioner of the Bureau of Employment Programs and his representative, the Division of Purchasing within the Department of Administration, and the

Attorney General. The agreement reads:

This agreement constitutes the acceptance of contract made by and between the State of West Virginia by the Director of the Purchasing Division for and on behalf of Bureau of Employment Programs...for:

legal/law clerk¹ services for the Workers' Compensation Appeal Board beginning July 1, 1997 and extending until June 30, 1998. All in accordance with the agreement attached hereto as a part hereof.

This is the same statement as contained in the purchase order between the Workers' Compensation Appeal Board and two of the other three attorneys who also summarize cases and draft opinions for the Workers' Compensation Appeal Board.

The Agreement Questionnaire submitted by the Workers' Compensation Appeal Board to the Division of Purchasing describes the *scope of work* as follows:

This individual is experienced in administrative appellate law, particularly Workers' Compensation law and will assist the Appeal Board in completing the increased number of appeals.

Further, the questionnaire addresses the *results expected* under the contract.

The appeal board expects this contract to permit the orderly, efficient transaction of Board business and the timely issuance of decisions.

Finally, the agreement says the vendor offers legal skills, particularly writing; and in response to the question, "Describe the methodology and evaluation criteria utilized to select this consultant", the response was:

This attorney was selected to attack the increased caseload in order to avoid a backlog at the Appeal Board level.

These three statements are the same as the statements contained in the Agreement Questionnaire submitted for two of the other three attorneys who also summarize cases and draft opinions for the Workers' Compensation Appeal Board and who are also paid the exact same rate of \$50 an hour. The provisions of the contracts for the unlicensed attorney and the three other licensed attorneys are similar in wording as compared in TABLE 1 below.

1 The term "law clerk" was not found in *Black's Law Dictionary*.

**TABLE 1
COMPARISON OF UNLICENSED ATTORNEY
TO
THE LICENSED ATTORNEYS ALSO HIRED BY
THE WORKERS' COMPENSATION APPEAL BOARD**

	West Virginia Licensed When Hired?	Date Licensed	Date of Service	Rate Per Hour	Annual Maximum Amount of Agreement
Attorney 1	No	6/9/98	7/1/97 to 6/30/98	\$50	\$95,000
Attorney 2	Yes	5/15/84	1/1/98 to 1/1/99	\$50	\$75,000
Attorney 3	Yes	5/17/83	5/1/97 to 4/30/98	\$50	\$80,000
Attorney 4	Yes	5/19/87	10/1/97 to 9/30/98	\$50	\$75,000

Payments made to the unlicensed attorney were made by the Board on the dates and for the amounts reported in TABLE 2. Invoices sent to the Board for the first two payments of the contract were transmitted on letterhead marked with the name and the West Virginia address of the contract attorney followed by "Attorney at Law". After the first two invoice transmittals, "Attorney at Law" was dropped from the letterhead.

On February 18, 1998, a request for expanding the contract was made by the unlicensed attorney, stating that:

Since the advent of the current Workers' Compensation Appeal Board which began its tenure on July 1, 1998, the dockets have been increased by 40% over the previous appeal board. Also, the previous Appeal Board had two legal/law clerks preparing Orders and they were not influenced by the recent Conley decision. That decision requires that all Orders must now contain findings of fact and Conclusions of Law. The combination of the increased docket and the Conley decision have added additional responsibilities and time on my part to prepare the Orders in accordance with the law.

Although the contract attorney most likely was referring to July 1, 1997, he obviously describes his work as preparing orders in accordance with the law, which is practicing law, and that he is doing the work of the two previous attorneys.

The Chairman of the Appeal Board also submitted a letter on February 18, 1998 to the Assistant Director of Administrative Support for the Bureau of Employment Programs requesting the increase of \$20,000 for the contract for the unlicensed attorney's services. That letter stated in relation to the work of the unlicensed attorney:

...his competence and skill in preparing the necessary orders for the board are without equal.

Chairman of the Appeal Board States the Unlicensed Attorney Was a Law Clerk

The Workers' Compensation Appeal Board argues that the unlicensed attorney did not perform the work of a licensed attorney, but instead acted as a "law clerk." The Chairman of the Workers' Compensation Appeal Board informed the Legislative Auditor's Office:

We entered into a contract with [the unlicensed attorney] on July 1, 1997. I was aware that he was not licensed to practice law in West Virginia. [The unlicensed attorney] had practiced law in Florida for several years and was in the process of acquiring his license to practice in West Virginia For the reason that he was not licensed, we designated him as a law clerk and not counsel or attorney to the Board. In that capacity he performed the administrative function of drafting reversal orders and remands consistent with the express rulings and directives of the three-member Board, all of whom are attorneys. He acted under my direct supervision and that of the other two attorney members. He did not perform the function of an attorney in this capacity.

Comparison of Payments to the Unlicensed Attorney with Licensed Attorneys and Law Clerks

Given the Chairman of the Appeal Board's statements, the Legislative Auditor's Office reviewed the Board's payments of \$90,100 to the unlicensed attorney in relationship to other licensed attorneys and other "law clerks."² This analysis shows that if in fact the unlicensed attorney merely acted as a law clerk, the Workers' Compensation Appeal Board significantly overpaid the unlicensed attorney. As shown in Table 2 below, the Workers' Compensation Appeal Board paid the unlicensed attorney more in 11 months than the Justices of the West Virginia Supreme Court earn for 12 months work. In addition, the unlicensed attorney/law clerk earned approximately \$40,000 more in 11 months than what the law clerks for the West Virginia Supreme Court earn for 12 months work, all

2 See Appendix A for a summary of the monthly billings while the individual was not licensed to practice law in West Virginia.

of whom are licensed to practice law in West Virginia. In addition, the unlicensed attorney/law clerk earned approximately \$45,000 more than the law clerks for the United States Supreme Court.

**TABLE 2
SALARY COMPARISON**

	Salary	Difference
Unlicensed Attorney/Law Clerk Workers' Compensation Appeal Board ³	\$90,100	
W.V. Supreme Court Justices	\$85,000	\$5,000
W.V. Circuit Court Judges	\$80,000	\$10,000
W.V. Supreme Court Law Clerks (Average)	\$51,278	\$38,822
U.S. Supreme Court Law Clerks	\$45,823	\$44,277

Attorney Licensed to Practice in West Virginia in June 1998

In the last month of the contract, the attorney was admitted to practice in West Virginia, as stated in the following excerpt from a letter to the Legislative Auditor from The West Virginia State Bar dated June 18, 1998. In relevant part, it reads:

According to the records of our mandatory organization,...[contract lawyer] was admitted to practice law in our state on June 9, 1998. He was admitted through the reciprocity procedure.

Further, a letter from the Board of Law Examiners dated July 7, 1998, stated that the basis for the law license was reciprocity with the District of Columbia. The attorney was able to become a licensed attorney in the District of Columbia on January 5, 1998 through a reciprocity agreement between the State of Florida and the District of Columbia.⁴ The attorney was then able on June 18, 1998 to become a licensed attorney in West Virginia through the reciprocity agreement between the District of Columbia and the State of West Virginia.

3 It should be noted that since the unlicensed attorney was not considered a permanent employee, he would have to pay his own Social Security, health insurance, retirement, office space, and would not receive vacation or sick leave.

4 Upon further inquiry, the reciprocity was granted from the District of Columbia on January 5, 1998; the D.C. Bar told the Legislative Auditor that the attorney was “waived in”, referring to using another state to become licensed.

Conclusion

The Workers' Compensation Appeal Board entered into an agreement with an individual who: 1) Was not licensed to practice law in West Virginia for 11 months of the agreement; 2) was hired to replace two licensed attorneys who had previously written the Board's decisions; 3) was paid the same rate of \$50 per hour that the Workers' Compensation Appeal Board pays its other licensed contract attorneys; 4) was hired through a contract that spelled out the unlicensed attorney's work in the same language as the contracts between the Appeal Board and two licensed attorneys; and, 5) was paid more for 11 months work than the annual salary of West Virginia Supreme Court Justices. Therefore, it would appear that the individual hired by the Workers' Compensation Appeal Board may have practiced law illegally. However, the Chairman of the Workers' Compensation Appeal Board states that the unlicensed attorney acted only in the capacity of a law clerk. *Thus, either the contract attorney was engaged in the unlicensed practice of law, writing decisions affecting Workers' Compensation claimants and employers for over 11 months of his contract, or the Workers' Compensation Appeal Board was inappropriately paying fees in excess of the salary of West Virginia Supreme Court Justices to an unlicensed law clerk.*

Recommendations

- 1) If it is found that the previously unlicensed attorney practiced law illegally in West Virginia, the Workers' Compensation Appeal Board should request the individual to repay the \$90,100 he received from the Appeal Board.***
- 2) If the unlicensed attorney was merely a law clerk, the Workers' Compensation Appeal Board should consider requesting the attorney to repay a portion of the \$90,100 so that his total compensation was equivalent to that of other law clerks.***

APPENDIX A

**Summary of Invoices for Legal Services Paid to
Unlicensed Appeal Board Attorney**

Date	Hours @ \$50	Amount Paid
July 1 - 15, 1997	100.00	\$5,000.00
July 16 - 31, 1997	63.00	3,150.00
August 1 - 31, 1997	174.25	8,712.50
September 1 - 30, 1997	210.00	10,500.00
October 1 - 31, 1997	193.75	9,687.50
November 1 - 30, 1997	204.00	10,200.00
December 1 - 31, 1997	143.00	7,150.00
January 1 - 31, 1998	236.50	11,825.00
February 1 - 28, 1998	177.50	8,875.00
March 1 - 31, 1998	100.00	5,000.00
April 1 - 30, 1998	100.00	5,000.00
May 1 - 31, 1998	100.00	5,000.00
TOTAL	1,802.00	\$90,099.50

