

Preliminary Performance Review

Division of Protective Services

**The Lack of an Appointed Director of the
Division of Protective Services Could Cause
Policy or Decisions to be Legally Challenged**



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John Sylvia
Director

December 7, 2003

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

The Honorable J.D. Beane
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 a Preliminary Performance Review of the Division of Protective Services, which will be presented to the Joint Committee on Government Operations on Sunday, December 7, 2003. The issue covered herein is "The Lack of an Appointed Director of the Division of Protective Services Could Cause Policy or Decisions to be Legally Challenged."

We transmitted a draft copy of the report to the Division of Protective Services on November 25, 2003. The Division opted not to have an exit conference. We received the agency response on December 5, 2003.

Let me know if you have any questions.

Sincerely,

Handwritten signature of John Sylvia in cursive script.
John Sylvia

JS/wsc

Joint Committee on Government and Finance

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Executive Summary

Issue 1: The Lack of an Appointed Director of the Division of Protective Services Could Cause Policy of Decisions to be Legally Challenged.

The Division of Protective Services within the West Virginia Department of Military Affairs and Public Safety was created in 1999 to provide for the safety and security of individuals who visit, conduct business or work at the Capitol Complex and other state facilities. Since its inception the Division has worked towards establishing a greater law enforcement presence in Capitol buildings while establishing policies and procedures to increase employee and public safety.

In April of 2002, the Director of the Division resigned. A replacement director has not yet been properly appointed. In the absence of a director, the operation of the Division has been overseen by a deputy director. As much of the growth of the Division has occurred since the events of September 11, 2001, many changes have been orchestrated without the oversight of a properly appointed director.

Although the Deputy Director meets all director qualifications as outlined in Code, the fact that statutory authority is assigned specifically to the Director of the Division causes some concern that any policies or projects initiated by the Division could be compromised or legally challenged.

The Division is presently at a crucial point in its development. As it moves forward with plans to increase Capitol security it is likely that it will have to develop new policies. It is thus important that as the Division evolves, it does so under the supervision and authority of a properly appointed director. Therefore, it is the opinion of the Legislative Auditor that a director should be appointed so that the Division can further its efforts to make the Capitol Complex a safer environment for employees and visitors alike.

Recommendation

The Governor's Office should appoint a director to the Division of Protective Services with the advice and consent of the West Virginia Senate.

Review Objective, Scope and Methodology

This Preliminary Performance Review of the Division of Protective Services of the West Virginia Department of Military Affairs and Public Safety is required and authorized by the West Virginia Sunset Law, Chapter 4 Article 10 of the West Virginia *Code*, as amended. The agency is designed to provide for the safety and security of individuals who visit, conduct business or work at the Capitol Complex and other state facilities. The Division intends to provide that service with a highly-trained and professional work force.

Objective

The objective of this audit is to determine whether the lack of a properly appointed director could hinder policy or the progression of new projects taken on by the Division.

Scope

The scope of this review covers the period from the agency's codification on June 13, 1999 to the present.

Methodology

Information compiled in this report has been acquired through interviews, conversations, and correspondence with the Deputy Director of the Division of Protective Services, and other Division staff. Documents obtained from the agency include: 1) a statement of the agency's "Strategic Plan"; 2) the Division's monthly status reports dating back to December of 2001 and; 3) a Memorandum of Understanding between the West Virginia Department of Administration and the Department of Military Affairs and Public Safety. A legal opinion was also obtained from Legislative Services legal staff.

Every aspect of this evaluation complied with **Generally Accepted Government Auditing Standards (GAGAS)**.

Issue 1

The Lack of an Appointed Director of the Division of Protective Services Could Cause Policy or Decisions to be Legally Challenged.

Issue Summary

The Division of Protective Services has been without a director since April 2002. The Governor has not appointed a new director nor has an acting director been named. In the absence of a director, the operation of the Division has been overseen by the Deputy Director. **Given the nature of the Division's responsibilities as outlined in West Virginia Code, the Legislative Auditor is concerned that the absence of a properly appointed director could cause any actions or decisions of the Division to be legally challenged.**

Statutory Authority is Specifically Assigned to the Director of the Division

On April 1, 2002, the Director of the Division of Protective Services resigned. No one has been appointed to fill that position, nor has an acting director been appointed. Current operations of the Division are being overseen by the Deputy Director of the Division. West Virginia Code §15-2D-2(b) requires that the Governor:

The Division of Protective Services has been without an appointed director since April 1, 2002.

...shall appoint, with the advice and consent of the Senate, the director of the division whose qualifications shall include at least ten years of service as a law-enforcement officer with at least three years in a supervisory law-enforcement position, the successful completion of supervisory and management training, and the professional training required for police officers at the West Virginia state police academy or an equivalent professional law-enforcement training at another state, federal or United States military institution.

As stated in West Virginia Code §15-2D-3, the director is responsible for the control and supervision of the Division of Protective Services. In addition, the Code outlines specific duties and powers of the director which are as follows:

- Employ necessary personnel, all of whom shall be classified exempt, assign them the duties necessary for the efficient

management and operation of the Division, and specify members who may carry weapons;

- Contract for security and other services;
- Purchase equipment as necessary to maintain security at the Capitol Complex and other state facilities as may be determined by the secretary of the Department of Military Affairs and Public Safety;
- Establish and provide standard uniforms, arms, weapons and other enforcement equipment authorized for use by members of the Division and shall provide for the periodic inspection of the uniforms and equipment;
- Appoint security officers to provide security on premises owned or leased by the state of West Virginia;
- Provide security for the Speaker of the West Virginia House of Delegates, the President of the West Virginia Senate, the Governor, or a Justice of the West Virginia Supreme Court of Appeals, upon request of the West Virginia State Police Superintendent;
- Gather information from a broad base of employees and visitors to the Capitol Complex to determine their security needs;
- Develop a comprehensive plan to maintain and improve security at the Capitol Complex based upon needs;
- Assess safety and security needs and make recommendations for safety and security at any proposed or existing state facility as determined by the secretary of the Department of Military Affairs and Public Safety;
- Deliver a monthly status report to the speaker of the West Virginia House of Delegates and the president of the West Virginia Senate.

The Deputy Director has carried the duties of director in the absence of an appointed director.

Specific duties for the position of deputy director were not outlined in the Code. The Legislative Auditor must also note that the current Deputy Director has carried out the statutorily mandated duties of director in the absence of a properly appointed position.

The Authority of the Division Could be Compromised or Challenged

The Legislative Auditor is concerned with possible legal challenges of policy or projects.

As stated previously, the operation of the Division has been overseen by the Deputy Director since April 2002. The Deputy Director must not only carry out the duties of that position, but also carry out the duties of the position of director. In addition to the inefficiency of one individual carrying out the duties for two positions, **the Legislative Auditor has some concern that any policy or projects carried out by the Division could be compromised or legally challenged.** Specifically, the project of limiting public access to the main Capitol building could be legally challenged. The lack of a properly appointed director could provide a legal loophole.

Based on the Legislative Auditor's concern, a legal opinion was obtained from Legislative Services. The opinion verified the Legislative Auditor's concern by stating:

I have found no statutory provision authorizing anyone but the Director to exercise the specific statutory duties and authority imposed on the Director in W.Va. Code §15-2D-3.

Council went on to state that:

*Although the Division of Personnel's Class Specification 8951 identifies one example of work of the Deputy Director as: "Manages day-to-day operations of the agency in the Director's absence," the specification does not, nor could it, authorize the deputy director to exercise specific authority granted only to the director by the Legislature. **Consequently, any action taken by the deputy director based on authority specifically granted to the director could conceivably be challenged as an ultra vires act.** (Emphasis added)*

The Supreme Court has stated interest in the project of directing public access.

This legal opinion justifies the Legislative Auditor's concern. In addition, the Supreme Court has stated specific interest in the project of directing public access to the Capitol building. The Court has expressed concern with the lack of a planned access point convenient to visitors of the Supreme Court. The Court has informed the Division that it wishes to have at a minimum, one access Wing. The Justice states:

Assuring the respective freedom and liberty of all people

point in the East Wing. Current plans do not include an access point in the East
*to access an open court system is not only a high priority,
it is a constitutional priority.*

*Policy decisions could
provide an opening to legal
challenges.*

In addition to the Supreme Court's concern, the Legislative Auditor questions whether other individuals or special interest groups would challenge the limiting of public access points. Thus, any policy decision made by the Division without a properly appointed director could provide an opening to legal challenges.

The Division's Authority to Initiate Policy is Hindered by the Lack of a Director

*The size and duties of the
Division have increased
since September 11, 2001.*

Given the recent and rapid growth of the Division and its duties associated with the plan to make the Capitol campus more safe and secure, the need to refine the Division's existing policy has become an important issue. In the wake of the events of September 11, 2001, the Division has experienced rapid growth in the size of the agency as well as the duties with which it is charged. Prior to the events of September 11, 2001, the Division was operating with only six allocated positions. The size of the Division has since grown to 27 positions. Similarly, in its five years of existence, the duties of the Division have also increased as it moves forward with plans to make the Capitol buildings more secure. Since the director position was vacated within months after the September 11 tragedy, **most of this growth of the Division of Protective Services has occurred without the direction of a properly appointed director.**

The Deputy Director of the Division has indicated to the Legislative Auditor that he is:

*...hesitant to develop and implement policy that would
possibly be of a different philosophical nature of a newly
appointed Director.*

*Expended or future
appropriations could be
wasted if efforts would
have to be put on hold or
forgone if legal challenges
were to arise.*

Given that the responsibilities of the Division have increased since the agency's inception, the development of new policy is often necessary. As the Division continues to work towards its goal of increasing Capitol security, it will become increasingly important that it develop new and revise existing policies so that it might enforce security measures in a manner consistent with the intent of the Legislature. **Not having a director who is authorized to create and institute such policy could hinder the progress of the efforts to escalate security at the state's capitol.** Thus, already expended or future appropriations could

be wasted if efforts would have to be put on hold or forgone if legal challenges were to arise.

While the Legislative Auditor does not have an opinion on an individual who should be appointed to the director's position, it must be noted that the current Deputy Director does have the qualifications as required by West Virginia Code.

While the Legislative Auditor does not have an opinion on an individual who should be appointed to the director's position, it must be noted that the current Deputy Director does have the qualifications as required by West Virginia Code. In addition, the Legislative Auditor has been informed by Legislative leadership that the current Deputy Director was recommended to the Governor to be promoted to the position. Therefore, the Legislative Auditor recommends that the Governor properly appoint with the advise and consent of the West Virginia Senate an individual to the position of director within the Division of Protective Services.

Conclusion

The Division of Protective Services is presently at a crucial point in its development. As it moves forward with plans to secure public access to the Capitol Complex, the Division will be faced with many new policy and procedural issues and will likely further increase in size. It is thus important that as the Division evolves, it does so under the supervision and authority of a properly appointed director. Therefore, it is the opinion of the Legislative Auditor that a director be appointed so that the Division can further its efforts to make the Capitol Complex a safer environment for employees and visitors alike without the impending issue of the authority in question or the potential waste of resources if the Division's actions are reversed.

Recommendation

1. *The Governor's Office should appoint a director to the Division of Protective Services with the advice and consent of the West Virginia Senate.*

Appendix A: Transmittal Letter

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John Sylvia
Director

November 25, 2003

Christy Morris, Acting Cabinet Secretary
Department of Military Affairs and Public Safety
Building 6, Room B122
1900 Kanawha Blvd., East
Charleston, WV 25305-0120

Dear: Secretary Morris

This is to transmit a draft copy of the Preliminary Performance Review of the Division of Protective Services. This report is scheduled to be presented during the December 7-9, 2003 interim meeting of the Joint Committee on Government Operations. 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 committee may have.

If you would like to schedule an exit conference to discuss any concerns you may have with the report on December 1st or 2nd please notify us. However, we will need your written response by noon on December 5, 2003 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 Thursday, December 4th to make arrangements.

We request that your personnel treat the draft report as confidential and that it not be disclosed to anyone not affiliated with your agency. Thank you for your cooperation.

Sincerely,

John Sylvia
John Sylvia

c. C.R. "Jay" Smithers, Deputy Director
Division of Protective Services

Joint Committee on Government and Finance

Appendix B: Agency Response



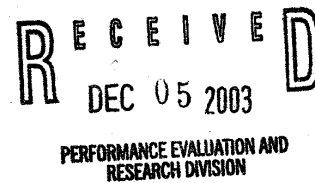
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05 December 03

John Sylvia, Director
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Via Facsimile and Hand-Delivery



Re: Preliminary Performance Review of the Division of Protective Services

Dear Director Sylvia,

Thank you for the opportunity to review the draft copy of the Preliminary Performance Review of the Division of Protective Services. This is to advise you that we do not disagree with the findings of the Review.

Again, we appreciate the chance to provide input and if you have any questions or comments, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script that reads "Christy Morris".

M. Christine F. Morris
Acting Secretary

