

Preliminary Performance Review

**Driver's Licensing
Advisory Board**

**The Driver's Licensing Advisory Board Provides
a Necessary Service to the Commissioner
of Motor Vehicles**

**There Is No Language in the West Virginia Code
to Protect Board Members From
Professional Liability**



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John Sylvia
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September 15, 2002

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

The Honorable Vicki V. 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 a Preliminary Performance Review of the Driver's Licensing Advisory Board, which will be presented to the Joint Committee on Government Operations on Sunday, September 15, 2002. The issues covered herein are "The Driver's Licensing Advisory Board Provides a Necessary Service to the Commissioner of Motor Vehicles;" and "There is no Language in the West Virginia Code to Protect Board Members from Professional Liability."

We transmitted a draft copy of the report to the Driver's Licensing Advisory Board on August 27, 2002. The Advisory Board opted not to have an Exit Conference. We received the agency response on September 4, 2002.

Let me know if you have any questions.

Sincerely,

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

John Sylvia

JS/wsc

Joint Committee on Government and Finance

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Executive Summary

The Driver's Licensing Advisory Board was created to advise the Commissioner of Motor Vehicles as to vision standards and all other medical criteria relevant to the licensing of persons to operate motor vehicles. In addition, upon request of the Commissioner, the Board offers advice as to the mental or physical fitness on an applicant for, or the holder of a license. The Board also furnishes the Commissioner with medical standards, statistics, data, and professional information and advice. Since July of 1996, the Board has reviewed 79 cases. The review of these cases required seven meetings and five mail-in meetings. Of the cases reviewed 25 were recommended for approval of licensure and 54 were recommended for denial. The cost of operation for the Board during this time was \$2,700.

Issue 1: The Driver's Licensing Advisory Board Provides a Necessary Service to the Commissioner of Motor Vehicles

The benefits of the functions performed by this Board are twofold. First, the Board protects the citizens of West Virginia by recommending to the Commissioner of the DMV that persons who are physically or mentally unable to safely operate a motor vehicle on the highways of this state be denied licensure. Secondly, the Board provides due process wherein medical information is used to protect arbitrary revocation of licenses, thus providing a sense of fairness to the general public concerning the decisions of the DMV. For this service, the costs of the Board are minimal; the DMV has spent only \$2,700 since 1996 to pay and reimburse members for related expenses.

Issue 2: There Is No Language in West Virginia Code to Protect Board Members From Professional Liability

Though members of the Board offer a service and act solely in an advisory capacity, there is nothing to guarantee that they are protected from being held professionally liable for their recommendations. Members have expressed concern regarding this matter and have been reassured that it should not be a matter for concern. Nonetheless, there is no concrete evidence that this is the case. The Legislative Auditor found that a similar board in Missouri has language in its code to clarify such a matter.

Recommendations:

1. The Legislative Auditor recommends that the Driver's Licensing Advisory Board be continued.

2. The Legislative Auditor recommends that the Legislature consider amending §17B-2-7a of the West Virginia Code by adding language to clarify that members of the Board acting within their advisory capacity can not be held professionally liable for their recommendations.

Review Objective, Scope and Methodology

This Preliminary Performance Review of the West Virginia Division of Motor Vehicles' Driver's Licensing Advisory Board is required and authorized by the West Virginia Sunset Law, Chapter 4, Article 10 of the West Virginia Code, as amended. The Board is intended to advise and make recommendations to the Commissioner of Motor Vehicles regarding the licensure of individuals with physical or mental disabilities. The Board is designed to protect the citizens of West Virginia by keeping unfit motorists off West Virginia's highways, and to offer due process wherein medical information is used to protect arbitrary revocation of licenses.

Objective

The objective of this audit is to determine whether there is a need for such a board to aid the Commissioner in his decision making process. It is also the intent of the Legislative Auditor to evaluate the design of the board and its effectiveness in fairly evaluating unique and individual cases.

Scope

The performance evaluation covers the period from the last PERD performance review in April of 1996 to the present. **It is not within the scope of this audit to determine the degree of improved safety on West Virginia's roads and highways.**

Methodology

Information compiled in this report has been acquired through interviews, conversations and correspondence with the Supervisor of the Citations Unit of the Division of Motor Vehicles who serves as the Commissioner's liaison concerning matters dealing with the Driver's Licensing Advisory Board. Documents obtained from the Division's staff include: 1) Board meeting minutes from 1996 through 2002; 2) A list of Board Members and their term expiration dates; 3) Letters from the Division to Board members regarding issues of liability; 4) A written description of the process by which cases are referred to the Board; and 5) A letter from the Commissioner expressing a need for the Board. Information acquired from other states included: 1) Missouri's Impaired Driver Law; 2) Missouri's Medical/Vision Advisory Board statute; 3) Missouri's Medical/Vision Advisory Board fact sheet; and 4) Virginia Code §46.2-204. Medical Advisory Board. The review further included examination of state and federal regulations as well as statistics

on impaired drivers. Every aspect of this review complied with Generally Accepted Auditing Standards (GAGAS).

The Driverís Licensing Advisory Board Provides a Necessary Service to the Commissioner of Motor Vehicles.

The Driverís Licensing Advisory Board advises the Commissioner of the Division of Motor Vehicles as to the vision standards and all other medical criteria relevant to the licensing of persons to operate motor vehicles. In addition, upon request of the Commissioner, the Board offers advice as to the mental or physical fitness of an applicant for, or the holder of a license. The Board also furnishes any and all medical standards, statistics, data, professional information and advice as the Commissioner may reasonably request. **The Board has cost the Division only \$2,700 since 1996, and the Legislative Auditor finds that the minimal cost is worth the benefit provided to the Commissioner and to the citizens of the state.**

The Division Is Responsible for Promoting Motor Vehicle Safety

The DMV Commissioner sees the Driverís Licensing Advisory Board as an invaluable asset...

The Division of Motor Vehicles (DMV) is responsible for the licensing of individuals to operate motor vehicles. It is thus the responsibility of the DMV to determine whether an individual is mentally and physically fit for licensure. West Virginia Code β 17B-2-3 provides that the Division of Motor Vehicles shall not issue a driverís license:

To any person when the Commissioner of Motor Vehicles has good cause to believe that the operation of a motor vehicle on the highways of this State by the person would be inimical to public safety or welfare.

WVC β 17B-3-6 further authorizes the Division to suspend without a preliminary hearing the driverís license of any person upon a showing by the Divisionís records or other sufficient evidence that the person is incompetent to drive a motor vehicle. Since the Division does not have in-house medical staff, staff may have difficulty evaluating cases involving an individual with an unusual or complex medical disability. The Driverís Licensing Advisory Board, composed of four physicians and one optometrist, aids the Commissioner in rendering decisions when such difficult cases arise. In a letter from the Commissioner to the Legislative Auditor, the Commissioner stated:

The Division feels that the need for the continuation of the Driverís Licensing Advisory Board is an invaluable asset, one in which the legitimacy of our mission to ensure the safety of the motoring public is vital.

A Medical Advisory Board Is Beneficial to the Division and to West Virginians

The benefits of such a board are twofold. First, the Board works to protect the citizens of West Virginia by keeping unfit motorists off West Virginia's highways. Secondly, it offers due process wherein medical information is used to protect arbitrary revocation of licenses, thus providing a sense of fairness to the general public concerning the decisions of the DMV. The Division only refers individuals to the Board who have complex medical conditions, such as narcolepsy, bi-polar disorder, or blackout spells unrelated to epilepsy, upon which the Division is unable to make a decision.

When the DMV accumulates six to ten cases that need reviewing, a meeting date is scheduled and all members are notified. If within a two-month period the DMV does not accumulate enough cases to justify a formal meeting, cases are mailed to the members who will issue a written response. The Division then reviews the physicians recommendations to determine how to proceed with each case.

The Cost of the Board Is Minimal

Since 1996...the Board has cost the state only \$2,700.

Since its last PERD performance review in June of 1996, the Board has cost the state only \$2,700. During this time, 79 cases have been reviewed. Of these 79 cases, the Board recommended 25 for approval of licensure and 54 for denial. Review of these cases required 7 formal meetings and 5 mail - in meetings. Members of the Board receive compensation and expenses for each meeting equal to those paid to members of the Legislature. The average cost per meeting over the last six years has been \$386. Members do not receive compensation when cases are mailed and no formal meeting is called. If a formal meeting is called and a member is not physically present but issues a written response by fax or mail, that member still receives compensation. Table 1 quantifies this information.

| Table 1 Driver's Licensing Advisory Board Meetings and Costs | | | | | | |
|---|-----------------|--------------------|------------------|----------------|-----------------|-----------------|
| Year | Number of Cases | Recommend Approval | Recommend Denial | Costs | Number Meetings | Number Mailings |
| 1996 (July-Dec) | 3 | 0 | 3 | \$0 | 0 | 2 |
| 1997 | 8 | 2 | 6 | \$166 | 1 | 1 |
| 1998 | 39 | 10 | 29 | \$1,415 | 3 | 2 |
| 1999 | 23 | 9 | 14 | \$802 | 2 | 0 |
| 2000 | 0 | 0 | 0 | \$0 | 0 | 0 |
| 2001 | 0 | 0 | 0 | \$0 | 0 | 0 |
| 2002 (Jan-July) | 6 | 4 | 2 | \$315 | 1 | 0 |
| TOTALS | 79 | 25 | 54 | \$2,700 | 7 | 5 |
| <i>Source: Dept of Motor Vehicles</i> | | | | | | |

Recent Changes in Legislation Have Reduced the Need for the Board

The Code of State Rules was revised in 2001 to help alleviate the number of cases referred to the Board regarding visual acuity. New vision standards outlined in β 91-5-3.4.b prohibit the use of special lense arrangements such as bioptic or telescopic lenses. Prior to the enactment of this rule, the Board reviewed all cases where an individual attempting to obtain a learner's permit was legally blind, but trained in the use of such special lenses. Such legislation has significantly reduced the number of cases the Division needs to refer to the Board. Similarly, adoption of federal standards for CDL holders, as outlined in β 91-4-9.6, has eliminated reviews of cases requesting medical waivers thereby reducing the number of cases brought before the Board. In a letter to the Legislative Auditor the Commissioner stated that:

While these revisions have reduced the frequency of need for the Driver's License Advisory Board, it does not eliminate the necessity of this Board to review medical issues.

The Driver's Licensing Advisory Board did not meet or review any cases between June 24, 1999 and June 26, 2002. The Division maintains that it was able to make all decisions in-house during this time. **There is no evidence of any neglected cases during the three years of inactivity.**

Conclusion

...the minimal cost of having the expertise of physicians advising the Commissioner far outweigh the costs.

Though the need for the Board has been reduced, the Legislative Auditor finds that the minimal cost of having the expertise of physicians advising the Commissioner on the medical conditions of licensees, far outweigh the costs. **If the Board were terminated, the Commissioner would be forced to make difficult decisions possibly without having enough adequate information.** The existence of the Board costs the State nothing if there are no meetings held, and the \$2,700 cost for the past six years is minimal, at best, for the advice and assistance of medical professionals. Therefore, the Legislative Auditor recommends that the Driver's Licensing Advisory Board should be continued to allow for the proper consideration of medically disabled driver licensure.

Recommendation 1:

The Legislative Auditor recommends that the Driver's Licensing Advisory Board be continued.

There Is No Language in West Virginia Code to Protect Board Members From Professional Liability.

The Legislature should consider amending the Code to insert language (to protect the members from any liability).

Members of the Driver's Licensing Advisory Board provide an invaluable service to the Commissioner of the Division of Motor Vehicles and to the citizens of West Virginia. Given the present state of medical insurance in West Virginia, physicians are forced to consider their liability with regards to any service they provide. Though members offer a service and act solely in an advisory capacity, there is nothing to guarantee that they are protected from being held professionally liable for their recommendations. Members have expressed concern regarding this issue and have been reassured that they are protected. However, there is nothing more than a legal opinion to guarantee that this is the case. Other states have language in their code to clarify similar issues. The Legislature should consider amending the Code to insert such language and clarify this matter.

Members Have Expressed Concern Regarding Liability

Members of the Driver's Licensing Advisory Board have expressed concern regarding their being held professionally liable for recommendations they make to the Commissioner of Motor Vehicles. The issue was raised at a board meeting on February 26, 1998. The Commissioner told the Board he would refer the issue to the agency's legal counsel for an opinion to be issued at the following meeting.

At a Board meeting on June 25, 1998, no formal opinion was issued regarding the member's liability. However, the Board was advised that because they serve only in an advisory capacity, and because the final decision goes out under the Commissioner's name, members would not be subject to monetary penalties. A letter dated July 17, 1998, was sent to members of the Board from the Division's manager of Driver Services informing them that liability for their recommendations should not be a matter for concern. In the letter, the Driver Services Manager said he had discussed the liability issue with the State Board of Risk and Insurance Management who informed him that the Certificate of Insurance carried by the Division of Motor Vehicles would provide the necessary insurance coverage for members of the Board acting within their capacity as set forth in the law. Members of the Board have received nothing more to assure them that they can not be held professionally liable when acting within their advisory capacity.

Missouri Code Contains Language Protecting Members of a Similar Board

The Legislative Auditor found that Missouri has a similar advisory board whose statutory provisions include language that protects members from professional liability when acting in their advisory capacity. Missouri Statute §302.292.2., pertaining to their Medical/Vision Advisory Board of the Department of Revenue has a provision which states:

No civil or criminal action shall lie against any member of the Medical/Vision Advisory Board of the Department of Revenue who acts in good faith in advising the department under the provisions of this chapter. Good faith shall be presumed on the part of members of the Medical/Vision Advisory Board in the absence of fraud or malice.

Similar language inserted into West Virginia Code §17B-2-7a would clarify the matter of liability.

Conclusion

If members can not be assured that they are protected from liability while serving in an advisory capacity, it may become increasingly difficult to fill vacancies on the Board. Inserting language into the West Virginia Code would protect the members from any liability.

Recommendation 2:

The Legislative Auditor recommends that the Legislature consider amending §17B-2-7a of the West Virginia Code by adding language to clarify that members of the Board acting within their advisory capacity can not be held professionally liable for their recommendations.

Appendix A: Transmittal Letter to Agency

WEST VIRGINIA LEGISLATURE *Performance Evaluation and Research Division*

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1900 Kanawha Boulevard, East
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John Sylvia
Director

August 27, 2002

Roger Pritt, Commissioner
Division of Motor Vehicles
Building 3, Room 113
1900 Kanawha Boulevard, East
Charleston, WV 25305

Dear Mr. Pritt:

This is to transmit a draft copy of the *Preliminary Performance Review of the Driver's Licensing Advisory Board*. This report is scheduled to be presented at the Sunday, September 15, 2002 interim meeting of the Joint Committee on Government Operations. 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 between August 29 and September 3, 2002, please notify us. We need your written response by noon on September 4, 2002 in order for it to be included in the final report.

We request that your personnel treat the draft report as confidential and request that it not be disclosed to anyone except those agency employees who will prepare the response to the report or who will participate in the exit conference. Thank you for your cooperation.

Sincerely,

Handwritten signature of John Sylvia in cursive script.
John Sylvia

Enclosure

_____ *Joint Committee on Government and Finance* _____

Appendix B: Agency Response



WEST VIRGINIA DEPARTMENT OF TRANSPORTATION
Division of Motor Vehicles
1800 Kanawha Boulevard East • Building Three
Charleston, West Virginia 25317

Bob Wise
Governor

Fred VanKirk, P. E.
Secretary

Roger Pritt
Commissioner

September 4, 2002

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

RECEIVED
SEP 04 2002

PERFORMANCE EVALUATION AND
RESEARCH DIVISION

Dear Mr. Sylvia:

Thank you for the opportunity to comment on the contents of the draft copy of the Preliminary Performance Review of the Driver's Licensing Advisory Board. I agree with the contents of the report and with the recommendations contained therein. I would in particular support legislation to protect board members from professional liability for the decisions rendered. I agree that the lack of such statutory protections may make it difficult to fill vacancies on the Board.

Please do not hesitate to contact me or Mr. David Bolyard, Director of Driver Services, if any additional information is needed.

Sincerely yours,

A handwritten signature in black ink that reads "Roger Pritt".

Roger Pritt
Commissioner

Cc: David Bolyard, Driver Services

EEO/AFFIRMATIVE ACTION EMPLOYER

