

Special Report

**Board of Risk and
Insurance Management**

**The Legislative Auditor Finds
BRIM Liability Settlements to
Be Inappropriate Where Signifi-
cant Evidence Exists to Support
Reprimand and Termination**



**October 2006
PE 06-21-394**

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John Sylvia
Director

October 15, 2006

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 Special Report on the Board of Risk and Insurance Management which will be presented to the Joint Committee on Government Operations on Sunday, October 15, 2006. The issue covered herein is "The Legislative Auditor Finds BRIM Liability Settlements to Be Inappropriate Where Significant Evidence Exists to Support Reprimand and Termination."

We transmitted a draft copy of the report to the Department of Administration and the Board of Risk and Insurance Management on October 13, 2006. An exit conference was held with the Department of Administration and the Board of Risk and Insurance Management on October 12, 2006. Due to the limited time to respond, we did not receive a response from the Department of Administration or the Board of Risk and Insurance Management.

Let me know if you have any questions.

Sincerely,

Handwritten signature of John Sylvia in cursive script.
John Sylvia

JS/jda

Joint Committee on Government and Finance

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Executive Summary

Issue 1: The Legislative Auditor Finds BRIM Liability Settlements to Be Inappropriate Where Significant Evidence Exists to Support Reprimand and Termination.

The Secretary of the Department of Administration terminated Mr. Jim Burgess as Acting Director of the General Services Division in January 2006. Consequently, the former acting director filed a grievance against the State of West Virginia.

In December 2005, a former employee of the General Services Division (former trade specialist), informed the Legislative Auditor that during state work hours he had previously performed work on an apartment complex in Danville, West Virginia that was owned by the former acting director.

The Legislative Auditor disagrees with the Board of Risk and Insurance Management's recent liability release settlement with the former acting director of the General Services Division in the amount of \$50,000. BRIM offered the settlement even though it was in possession of information which stated that the former acting director used a state employee and state inventory resources for personal gain. The Secretary of the Department of Administration terminated Mr. Jim Burgess as Acting Director of the General Services Division in January 2006. Consequently, the former acting director filed a grievance against the State of West Virginia. On July 21, 2006, the former acting director agreed to release the State of all liability in consideration of a \$50,000 indemnity payment by the Board of Risk and Insurance Management on behalf of the Department of Administration. In a letter dated July 24, 2006, the former acting director requested to the Grievance Board that his grievance be cancelled. The Secretary of the Department of Administration informed BRIM that he disagrees with BRIM's decision to settle. The Legislative Auditor also disagreed with the decision to settle. The Board of Risk and Insurance Management chose to settle with the former acting director, even though it had been in possession of Legislative Auditor's reports that were critical of the former acting director's management of the General Services Division and cited in his dismissal letter.

In December 2005, a former employee of the General Services Division (former trade specialist), informed the Legislative Auditor that during state work hours he had previously performed work on an apartment complex in Danville, West Virginia that was owned by the former acting director. According to the former trade specialist, this work was conducted during regular state work hours on at least two occasions. The former trade specialist's supervisor (maintenance supervisor), a current employee of the Division, reported to the Legislative Auditor that he had inquired with the former acting director as to how the employee was to record leave for the time worked at the apartment complex. In response, the former acting director told the maintenance supervisor that he was not to be concerned with this detail. The maintenance supervisor further indicated that while it was possible that the former acting director or the former trade specialist would have recorded annual leave for the occasion, it was unlikely. The former trade specialist also reported to the Legislative Auditor that he had used state-owned paint on the former acting director's apartment complex. The Executive Branch was in possession of this information when the decision was made to fire the former acting director of General Services. During 2004 and 2005, the former acting director was involved in a legal matter against members of his family. The former acting director did not record annual leave for the time away from work to attend the legal proceedings.

The Legislative Auditor finds that the former acting director's use of his subordinate employee to work on his apartment complex is clearly using his position for private gain, and may have violated the state ethics law. Likewise, the former acting director's use of state supplies for the same purpose is a possible violation of the state ethics law. Therefore, the Legislative Auditor will forward this report to the State Ethics Commission for review. In addition, the United States Department of Health and Human Services Office of Audit Resolution and Cost Policy is examining the possible misuse of federal asbestos abatement money by the General Services Division.

The Legislative Auditor disagrees with BRIM's settlement with employees when evidence exists that shows that employer violated the law or failed to manage their agency.

The settlement with the former acting director of the General Services Division is not the first time that the Board of Risk and Insurance Management has settled with state employees even though employees had been cited for evidence of either illegal activity or mismanagement. In 2005, BRIM settled with the former executive director of the Consolidated Public Retirement Board in the amount of \$100,000. The Legislative Auditor disagrees with BRIM's settlement with employees when evidence exists that shows that employees violated the law or failed to manage their agency. While the Legislative Auditor finds case settlement to be prudent action under certain conditions where defeat of the State is imminent, it should not be considered appropriate when a state agency has appropriately suspended or terminated an employee. Unnecessary and costly settlements fly in the face of the demand for excellence in state government personnel.

Recommendations

1. *The Legislative Auditor recommends that the Legislature consider requiring BRIM to present wrongful termination monetary settlement proposal analysis to the Joint Committee on Government and Finance for review purposes. The committee should be given 30 days to review BRIM's analysis.*
2. *The Legislative Auditor recommends that the Legislature consider requiring BRIM to present wrongful termination monetary settlement proposal analysis to the Attorney General for review and consent purposes. At the end of a 30 day period, the Attorney General shall certify or deny the settlement proposal based on legal reason.*

Review Objective, Scope and Methodology

This Special Report on the Board of Risk and Insurance Management is authorized by §4-2-5, as amended. This review was initiated as a result of the discovery of potential findings realized during the audit process for November 2005, January 2006, and May 2006 Special Reports on the General Services Division. This report also examines action taken by the Board of Risk and Insurance Liability to alleviate uncertain liability to the State.

Objective

The objective of this report is to review the Board of Risk and Insurance Management's decision to settle uncertain state liability with the former acting director of the General Services Division.

Scope

The scope of this report considers activities that occurred between 2004 and 2006.

Methodology

Information used in this report was compiled from the Department of Administration, the Board of Risk and Insurance Management, the Education and State Employees' Grievance Board, interviews with current and former staff of the General Services Division, interviews with siblings of the former acting director of the General Services Division, and observations and conclusions of the Legislative Auditor. Every aspect of this review complied with Generally Accepted Government Auditing Standards (GAGAS), with the exception of providing the report to the agency in a timely manner.

Issue 1

The Legislative Auditor Finds BRIM Liability Settlements to Be Inappropriate Where Significant Evidence Exists to Support Reprimand and Termination.

Issue Summary

The Secretary of the Department of Administration terminated the former acting director of the General Services Division in January 2006.

The Legislative Auditor disagrees with the Board of Risk and Insurance Management's recent liability release settlement with the former acting director of the General Services Division in the amount of \$50,000 given the magnitude of the findings contained in the Legislative Auditor's 2005 and 2006 audit reports on the General Services Division. In addition, BRIM offered the settlement even though it had been privately informed by the Legislative Auditor that the former acting director of General Services had used a state employee and state supplies for personal gain and had failed to properly take annual leave while attending personal legal proceedings.

On July 21, 2006 the former acting director agreed to release the State of all liability in consideration of a \$50,000 indemnity payment by the Board of Risk and Insurance Management on behalf of the Department of Administration.

The Legislative Auditor Disagrees with the Board of Risk and Insurance Management's Decision to Release the Department of Administration from Uncertain Liability with the Former Acting Director of the General Services Division for \$50,000.

The Secretary of the Department of Administration terminated the former acting director of the General Services Division in January 2006. Consequently, the former acting director filed a grievance against the state of West Virginia. On July 21, 2006 the former acting director agreed to release the State of all liability in consideration of a \$50,000 indemnity payment by the Board of Risk and Insurance Management on behalf of the Department of Administration. In a letter dated July 24, 2006, the former acting director requested to the Grievance Board that his grievance be withdrawn. The Secretary of the Department of Administration informed BRIM that he disagrees with BRIM's decision to settle. The Legislative Auditor also disagrees with the decision to settle. It should be noted that the Board of Risk and Insurance Management, as the Department of Administration's insurance provider, acted on its behalf to resolve possible employment practices wrongful termination liability.

The Board of Risk and Insurance Management chose to settle with the former acting director, even though it had been in possession of Legislative Auditor's reports that were critical of the former acting director's management of the General Services Division.

The Board of Risk and Insurance Management chose to settle with the former acting director, even though it had been in possession of Legislative Auditor's reports that were critical of the former acting director's management of the General Services Division. **BRIM also had been informed of details that the Legislative Auditor had not released to the public until this report.**

It is the opinion of the Legislative Auditor, that the Board of Risk and Insurance Management's settlement of this wrongful termination

claim sets a bad precedent. Previous reports issued by the Legislative Auditor have clearly identified negligent management on the part of the former acting director. Further, previously unreported information being reported now, outlines additional misdoing by the former acting director. Therefore, the Legislative Auditor supported the termination of the former acting director from his position in the General Services Division by the Secretary of the Department of Administration based on evidence present at the time of the termination. The evidence presented in the previous reports and the additional information presented in this report shows that the former acting director's awarded settlement was inappropriate.

The Legislative Auditor supported the termination of the former acting director from his position in the General Services Division by the Secretary of the Department of Administration based on evidence present at the time of the termination.

The Former Acting Director of the General Services Division Used One of His General Services Division Employees for Personal Work During State Work Hours and Used State Supply Inventory for the Work.

In December 2005, a former employee of the General Services Division (former trade specialist), informed the Legislative Auditor that during state work hours he had previously performed work on an apartment complex in Danville, West Virginia that was owned by the former acting director. According to the former trade specialist, this work was conducted during regular state work hours on at least two occasions. Additional work also occurred during non-state work hours. **The former trade specialist reported that he did not take annual leave during the time that the work was conducted.** According to the former trade specialist:

[I was] [t]old to go to [a]partment after arriving to work by [the former acting director] him self[sic].

In December 2005, a former employee of the General Services Division (former trade specialist), informed the Legislative Auditor that during state work hours he had previously performed work on an apartment complex in Danville, West Virginia that was owned by the former acting director.

The former trade specialist's supervisor (maintenance supervisor), a current employee of the Division, reported to the Legislative Auditor that he had inquired with the former acting director as to how the employee was to record leave for the time worked at the apartment complex. In response, the former acting director told the maintenance supervisor that he was not to be concerned with this detail. The maintenance supervisor further indicated that while it was possible that the former acting director or the former trade specialist would have recorded annual leave for the occasion, it was unlikely. This assumption is solidified given the fact that the former trade specialist stated himself that he had not taken annual leave for this time. However, it should be noted that the Legislative Auditor was unable to identify the exact dates that this work was performed. The Legislative Auditor was able to verify from the former acting director's siblings that work was conducted at these apartments during work days by the General Services Division employee. The siblings were tenants of the apartment complex during the time of the former trade specialist's work at the building.

The former trade specialist also reported to the Legislative Auditor that he had used state-owned paint on the former acting director's apartment

complex. The maintenance supervisor reported to the Legislative Auditor that on one occasion he had seen the former trade specialist loading state purchased sheet rock, sheet rock mud, and sheet rock joint tape into his pickup truck. As the former trade specialist's supervisor, he knew that the former trade specialist was scheduled to work on the former acting director's apartment complex that day. Therefore, it was logical for the maintenance supervisor to assume that the state-owned sheet rock materials were being transported to the former acting director's apartment complex in Danville.

The former trade specialist and the maintenance supervisor also reported to the Legislative Auditor that the former trade specialist was asked by the former acting director to perform additional work on other General Services Division and Department of Administration employees' houses. However, on all occasions except one, those opportunities were turned down by the former trade specialist. According to the maintenance supervisor, the former trade specialist also repaired the former acting director's home roof during state work hours.

The maintenance supervisor reported to the Legislative Auditor that on one occasion he had seen the former trade specialist loading state purchased sheet rock, sheet rock mud, and sheet rock joint tape into his pickup truck. As the former trade specialist's supervisor, he knew that the former trade specialist was scheduled to work on the former acting director's apartment complex that day.

The maintenance supervisor reportedly had no supervisory control over his subordinate, due to the close relationship between his subordinate and the former acting director. This relationship prohibited the maintenance supervisor from disciplining the subordinate and preventing him from questioning any personal work performed for the former acting director. The same inability would also exist for the former trade specialist insofar that a refusal to perform the work at the former acting director's apartment complex or home could result in job loss or disciplinary action. In fact, the former trade specialist reported to the Legislative Auditor that the former acting director told him that if he would agree to do work for other General Services Division and Department of Administration employees that it would "help us all to do the work." However, the former trade specialist could not speculate as to what that statement meant. This fact is illustrative of the condition of favoritism that existed. It must be noted that unlike the former acting director, the former trade specialist left state employment on his own accord.

The information provided by the General Services Division employees concerning work on the former acting director's personal property was shared by the Legislative Auditor's Office with the Secretary of Administration on December 15, 2005. The former acting director was fired by the Secretary of Administration on January 18, 2006. Thus, the Executive Branch was in possession of this information when the decision was made to fire the former acting director of General Services.

The Former Acting Director of the General Services Division Did Not Take Annual Leave While Attending Personal Legal Proceedings During State Work Hours.

During 2004 and 2005, the former acting director was involved in a personal legal matter. In conjunction with the legal process, the former acting director attended court hearings at the Lincoln County Courthouse. During this time, the former acting director was also deposed by legal counsel, and attended a mediation in Charleston. All instances were during regular state work hours.

The former acting director did not record annual leave for the time away from work to attend the multiple legal proceedings.

According to individual attendance reports of the General Services Division, the former acting director's normal work hours were either 7:00 a.m. to 3:00 p.m. or 8:00 a.m. to 4:00 p.m. Monday through Friday. **The former acting director did not record annual leave for the time away from work to attend the multiple legal proceedings.** The individual attendance reports, which are all signed by the former acting director, indicate that he worked his normal work hours on the legal proceeding dates. The time sheets do not indicate that the former acting director made up any time in lieu of taking annual leave. **The former acting director signed his own individual attendance reports for the questioned period.**

It is important to note that this information was not known when the Secretary of Administration fired the former acting director of General Services on January 18, 2006. However, the Legislative Auditor's Office offered to provide this information to the Board of Risk and Insurance Management prior to BRIM's July 21, 2006 settlement with the former acting director of General Services.

The time sheets do not indicate that the former acting director made up any time in lieu of taking annual leave.

The Former Acting Director of the General Services Division May Have Violated the State Ethics Law.

By using the employees he supervised for personal gain, the former acting director may have violated state ethics laws. West Virginia Code §6B-2-5(b) prohibits **use of public office** by a public employee for **private gain of the employee or of another**. The Code states:

A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person.

State Ethics Commission Legislative Rules further delineates in §158-6-4 public employees use of "subordinates" for personal gain. Rules state in §158-6-4.2:

4.2. During work hours - Public officials and public employees shall not use subordinate employees during work hours to perform private work or provide personal services

for their benefit... This subsection does not apply to de minimis work or services.

§158-6-5 discusses the use or removal of government “property” and states the following in 5.2:

5.2 Improper Use - Public officials and public employees shall not use government property for personal projects or activities that result in private gain. This subsection does not apply to the de minimis use of government property.

The Legislative Auditor finds that the former acting director’s use of his subordinate employee to work on his apartment complex is clearly using his position for private gain, and may have violated the state ethics law. Likewise, the former acting director’s use of state supplies for the same purpose is a possible violation of the state ethics law. Therefore, the Legislative Auditor will forward this report to the State Ethics Commission for review.

The Legislative Auditor finds that the former acting director’s use of his subordinate employee to work on his apartment complex is clearly using his position for private gain, and may have violated the state ethics law.

The Board of Risk and Insurance Management Settled With the Former Acting Director of General Services Even Though No Lawsuit Had Been Filed Against the State.

In this matter a grievance under the state employees grievance procedure had been filed. Claims under the grievance procedure are not covered under BRIM’s policy. The Legislative Auditor was unable to find evidence that the former acting director of General Services had initiated any other legal action concerning his termination that would have been covered under BRIM’s policy. The settlement, by the insurance carrier, of a “claim” under these circumstances seems questionable, at best. Had the former acting director of General Services initiated a civil action challenging his termination there would have at least been a complaint filed that should have met the requirements of Rule 11 of the Rules of Civil Procedure. Subsection (b) of this rules provides:

Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person’s knowledge, information, and belief formed after an inquiry reasonable under the circumstances,

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

The rule also allows for the imposition of sanctions if its provision are violated.

In this matter the State did not have the benefit of the former acting director of General Services or his attorney making the representations described in the rule. Settlement of a claim prior to such representation being made may not be in the best interests of the State and may allow for questionable settlements to be made.

The official informed the Legislative Auditor that the federal government is examining the possible misuse of federal asbestos abatement money by the General Services Division.

Auditors From The Federal Department of Health and Human Services Are Reviewing the Possible Misuse of Federal Asbestos Abatement Money

On October 13, 2006, an official from the United States Department of Health and Human Services Office of Audit Resolution and Cost Policy contacted the Legislative Auditor. The official informed the Legislative Auditor that the federal government is examining the possible misuse of federal asbestos abatement money by the General Services Division. The federal official stated that the U.S. Department of Health and Human Resources is determining whether the State of West Virginia should be required to reimburse the federal government for the misuse of these moneys detailed in the Legislative Auditor's 2005 and 2006 audit reports on General Services.

In 2005, BRIM settled with the former executive director of the Consolidated Public Retirement Board in the amount of \$100,000.

The Legislative Auditor Disagrees With the Board of Risk and Insurance Management's Decision to Offer Settlements to Employees Following Disciplinary Actions for Illegal Activity or Mismanagement

The settlement with the former acting director of the General Services Division is not the first time that the Board of Risk and Insurance Management has settled with state employees even though the employee had been cited for evidence of either illegal activity or mismanagement. In 2005, BRIM settled with the former executive director of the Consolidated Public Retirement Board in the amount of \$100,000. The former executive director was originally suspended by the CPRB during an investigation in his role in giving a Colorado firm a no-bid contract to oversee investments for the state teachers pension fund. The former executive director was investigated for possibly breaking state purchasing rules after he cancelled contracts with local investment brokers and gave the business to the Colo-

rado firm. On November 11, 2005, the former executive director of CPRB resigned as part of a \$100,000 settlement agreement with BRIM. On top of the \$100,000 settlement agreement, the Legislative Auditor's Office reported that the former executive director had received over \$78,000 in salary from CPRB during his 8 ½ month suspension. BRIM did not take into account the continued payment of the former executive director's salary in its settlement. Therefore, the former executive director received over \$178,000, although he had not worked for the state for 8½ months and was investigated for possibly violating purchasing regulations.

When former employees, receive exorbitant settlements it serves as a reward for substandard government service and a disincentive for excellence.

The Legislative Auditor disagrees with BRIM's settlement with employees when evidence exists that shows that the employee violated the law or failed to manage their agency. While the Legislative Auditor finds case settlement to be prudent action under certain conditions where defeat of the state is imminent, it should not be considered appropriate when a state agency has appropriately suspended or terminated an employee. Unnecessary and costly settlements fly in the face of the demand for excellence in state government personnel. When former employees, such as those described above, receive exorbitant settlements it serves as a reward for substandard government service and a disincentive for excellence.

Conclusion

In personnel matters affecting the State, proper public policy and principle may be more important factors in decision-making than monetary considerations.

It is the Legislative Auditor's understanding that BRIM settled the former acting director of General Services grievance after considering the cost of defending potential litigation relating to the former acting director's termination. In the private sector, monetary considerations are often the major factor in decision-making. In personnel matters affecting the State, proper public policy and principle may be more important factors in decision-making than monetary considerations. This matter may illustrate the problems of applying a business model in making state personnel decisions. It demonstrates the need for a different approach, and at a minimum, better documentation and oversight on how such matters are considered and determined suitable for settlement. Before entering into a settlement involving state personnel matters an independent review of the justification for approving the settlement should be conducted to ensure that appropriate consideration is given to non-monetary considerations in arriving at settlement terms. **It should be made clear to state personnel that wrongdoing will have serious consequences and that they will not benefit financially as a result of their wrongdoing while acting in their capacities as state employees.**

The Legislative Auditor has found that the former acting director of the General Services Division has improperly used stated owned resources as well as state human resources for personal gain and possibly for the gain of others. It is also apparent that the former acting director should have recorded annual leave at times which he did not. This report, as well as previous reports on the General Services Division, indicates the

Therefore, the Legislative Auditor disagrees with the Board of Risk and Insurance Management's decision to monetarily settle with the former acting director and agrees with the Department of Administration's decision to terminate his employment.

former acting director's lack of responsible management and contribution to organizational failure. In addition, the seriousness of this matter is further highlighted by the fact the federal government is presently reviewing the possible misuse of federal money used by General Services for asbestos abatement. Federal officials informed the Legislative Auditor that this review could lead to the federal government requesting reimbursement for these funds by the State of West Virginia. Therefore, the Legislative Auditor disagrees with the Board of Risk and Insurance Management's decision to monetarily settle with the former acting director and agrees with the Department of Administration's decision to terminate his employment. The Legislative Auditor has also made a recommendation to prevent settlements of unclear purpose with former state employees, such as the former acting director of the General Services Division, without at least notice and review by the Joint Committee on Government and Finance and the consent of the Attorney General. **Also, the Legislative Auditor will forward this report to the Ethics Commission for its consideration of the personal use of state resources and failure to accurately record annual leave.**

Recommendations

1. *The Legislative Auditor recommends that the Legislature consider requiring BRIM to present wrongful termination monetary settlement proposal analysis to the Joint Committee on Government and Finance for review purposes. The committee should be given 30 days to review BRIM's analysis.*
2. *The Legislative Auditor recommends that the Legislature consider requiring BRIM to present wrongful termination monetary settlement proposal analysis to the Attorney General for review and consent purposes. At the end of a 30 day period, the Attorney General shall certify or deny the settlement proposal based on legal reason.*

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 13, 2006

Mr. Robert W. Ferguson Jr., Cabinet Secretary
Department of Administration
1900 Kanawha Blvd., East
Building 1, Room E-119
Charleston, WV 25305-0120

Dear Secretary Ferguson:

This is to transmit a draft copy of the Special Report on the Board of Risk and Insurance Management. This report is scheduled to be presented during the October 15, 2006 interim meeting of the Joint Committee on Government Operations at 1:00 p.m. in the House Government Organization Committee Room (E-215).

We need your written response by 3:00 p.m. on October 13, 2006, 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 make arrangements with the House Government Organization staff at 340-3192.

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

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
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John Sylvia
Director

October 13, 2006

Mr. Charles E. Jones, Jr., Director
Board of Risk and Insurance Management
90 MacCorkle Avenue, Suite 203
South Charleston, WV 25303

Dear Director Jones:

This is to transmit a draft copy of the Special Report on the Board of Risk and Insurance Management. This report is scheduled to be presented during the October 15, 2006 interim meeting of the Joint Committee on Government Operations at 1:00 p.m. in the House Government Organization Committee Room (E-215).

We need your written response by 3:00 p.m. on October 13, 2006, 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 make arrangements with the House Government Organization staff at 340-3192.

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

Joint Committee on Government and Finance

Appendix B: Agency Response

STATE OF WEST VIRGINIA
DEPARTMENT OF ADMINISTRATION
BOARD OF RISK AND INSURANCE MANAGEMENT



90 MACCORKLE AVENUE SW, SUITE 203
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GOVERNOR

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October 16, 2006

Mr. John Sylvia
West Virginia Legislature
Performance Evaluation and Research
Division
Building 1, Room W-314
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0610

RE: Performance Evaluation and Research Division (PERD)
Report on the Burgess Settlement

Dear Mr. Sylvia:

In response to your draft Special Report on the Board of Risk and Insurance Management (BRIM), listed below are our initial comments in response to the PERD report. Inasmuch as these initial comments do not address all the issues and recommendations raised in the PERD report, we reserve the right to respond more completely at a later date.

1. It was known that Mr. Burgess had filed a grievance. It was alleged that the grievant was not allowed due process, having only been the interim director for a short time. He also retained his Deputy Director "classified" status. Personnel practices suggest classified employees should be allowed an opportunity to remedy unacceptable management behavior.
2. The settlement eliminated the grievance, thus avoiding the possible reinstatement of the employee with back pay.

3. Settlement of the claim was a rational business decision rendered in an attempt to save the taxpayers dollars that would have been spent on a protracted defense of a suit that is difficult to predict the outcome, and is expensive even when victorious.
4. Two members of the BRIM Board are attorneys and supported the decision to settle the claim.
5. Defense counsel Vic Flanagan supported settlement of the claim.
6. DOA General Counsel Jim Kirby supported settlement of the claim.
7. Three senior claim personnel at AIG supported settlement of the claim.
8. Four BRIM claim personnel and the Executive Director supported settlement of the claim.
9. The procedural criteria by which the decision to settle the claim was consistent with industry practices.
10. The Legislative Auditor states that settlement was concluded, even though no lawsuit had been brought against the State.
11. This statement suggests that it would have been better had BRIM waited until a lawsuit had been brought.
12. Had BRIM waited on the inevitable lawsuit, it would have taken 2-3 years to conclude and would have cost taxpayers more than \$50,000 in attorney fees, **even if we had won**.
13. However, had we lost the lawsuit, BRIM would have been faced with the following:
 - a. Our attorney fees: at least \$50,000.
 - b. Damages awarded to Burgess: determined by the jury

Mr. John Sylvia
PERD

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- c. Burgess' attorney fees: determined by the judge (fee shifting)
 - d. Possible reinstatement of Mr. Burgess to his job.
14. I still conclude that settlement of the Burgess claim for \$50,000 was in the best interest of the State taxpayers. The Legislative Auditor very capably investigates and reveals instances where agencies abuse their power and deviates from standard procedures. However, the BRIM settlement was a reasoned judgment decision rendered from experience--not an abuse of power, nor a deviation from established procedures.
15. The Legislative Auditor has neither the experience nor the expertise to evaluate and adjudicate employment practices liability claims.

Respectfully submitted,



Charles E. Jones, Jr.
Executive Director

CEJ:lld

- c: Cabinet Secretary Robert W. Ferguson, Jr., DOA
BRIM Board Members
Diane Holley, Communications & Technical Services
Purchasing Division, DOA

