

STATE OF WEST VIRGINIA

**REGULATORY BOARD EVALUATION OF THE
BOARD OF DENTAL EXAMINERS**

Board is Needed for Public Protection
Board is in Partial Compliance with Applicable Laws
Board Exceeded its Authority in Purchase of Retroactive Service Credit

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

CHARLESTON, WEST VIRGINIA 25305
(304) 347-4890

June 2002

PE02-07-239

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June 2002

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John Sylvia
Director

June 9, 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
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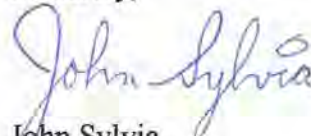
Dear Chairs:

Pursuant to the West Virginia Sunset Law, we are transmitting a *Regulatory Board Evaluation of the Board of Dental Examiners*, which will be reported to the Joint Committee on Government Operations on Sunday, June 9, 2002. The issues covered herein are "The Board is Needed for Public Protection;" "The Board is in Partial Compliance with Applicable Laws;" and "The Board Exceeded its Authority in Purchase of Retroactive Service Credit."

We transmitted a draft copy of the report to the Board of Dental Examiners on May 30, 2002. The Board opted not to have an Exit Conference. We received the agency response on June 5, 2002.

Let me know if you have any questions.

Sincerely,


John Sylvia

JS/wsc

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Executive Summary

Issue 1: The Board of Dental Examiners is Necessary to Protect the Public.

The Legislative Auditor determined that there is a need for the Board of Dental Examiners. Incompetent or unqualified dentists and dental hygienists can jeopardize the public health. All 50 states regulate these profession through licensure. In West Virginia, the Board of Dental Examiners provides assurances to the public about the quality of oral health care and completes the system of checks and balances in dentistry.

Issue 2: The Board is in Partial Compliance with Chapter 30 of the West Virginia Code and is in Non-Compliance with Other Applicable Laws.

The Legislative Auditor finds that the Board of Dental Examiners has complied with the following Chapter 30 General Provisions: meets annually; maintains a record of proceedings; has a sufficient fee structure; submits annual reports; is listed in the state government section of the Charleston area telephone book; attended the State Auditor's training session; adopted a seal; and provides due process when responding to complaints against licensees.

The Board requires continuing education for its licensees and conducts random audits to confirm compliance. The Board does need to conform to its own rules and require licensees to report continuing education hours in the time period set by rule. The Board's register of applicants is not complete and it is not in full compliance with the Open Meetings Law.

Issue 3: The Board of Dental Examiners Exceeded its Authority when it Used Licensure Fees to Pay for Retroactive Service Credit for its Executive Secretary.

The Board of Dental Examiners, despite knowing that it was not responsible for the employer portion of its Executive Secretary's retroactive service credit, transferred \$28,000 to the Consolidated Public Retirement Board in January 2002. It is the opinion of the Legislative Auditor that the Board's purchase is an improper use of public money and a breach of public trust.

Recommendations

1. *The Board should comply with its own continuing education renewal period, as set by rule.*

2. *The Board should develop its register of applicants to comply with state law.*
3. *The Board should consistently comply with the Open Meetings Law.*
4. *The West Virginia Board of Dental Examiners should request a refund from the Consolidated Public Retirement Board for the \$28,120.82 which the Dental Examiners Board unlawfully paid to purchase the Executive Secretary's previous service credit.*
5. *The Legislature should consider amending the Code to allow Chapter 30 Boards and other agencies funded by special revenue the continuous provision to purchase the employer share of retroactive benefits for employees.*

Review Objective, Scope and Methodology

This regulatory board evaluation of the Board of Dental Examiners was conducted in accordance with the West Virginia Sunset Law, Chapter 4, Article 10 of the West Virginia *Code*. As stated in *Code* a regulatory board evaluation is to determine whether a Board is 1) necessary for the protection of public health and safety, and 2) whether the Board is operating in compliance with applicable laws and rules. This evaluation also examined the Board's purchase of retroactive service credit for its Executive Secretary.

This regulatory board evaluation covers the period of 1997 through January 2002.

Information compiled in this evaluation was acquired from the West Virginia *Code*, interviews with the Board's staff, examinations of annual reports, meeting minutes, expenditure schedules and complaint files. Every aspect of this report complied with Generally Accepted Government Auditing Standards (GAGAS).

Issue 1: The Board of Dental Examiners is Necessary to Protect the Public.

This report is a *Regulatory Board Evaluation* which requires by law a determination of whether or not the Board is necessary for the protection of public health and safety. In determining if there is a need for the Board of Dental Examiners (Board), a primary consideration is whether the unregulated practice of the profession would clearly endanger the health and safety of the public. **The Legislative Auditor has determined that the Board of Dental Examiners is necessary for the assurance of public protection.**

The Board of Dental Examiners licenses both dentists and dental hygienists. In fiscal year 2002, the Board licensed 1,432 dentists and 1,167 hygienists. West Virginia Code §30-4-4 defines "Dentistry" as:

...evaluation, diagnosis, prevention and treatment of diseases, disorders and conditions of the oral cavity, maxillofacial area and the adjacent and associated structures...

In the state of West Virginia, a license to practice dentistry requires education from an accredited school, passage of national and clinical examinations.

Many functions performed by dentists and dental hygienists require specific knowledge based on a wide range of skills and expertise. Incompetent practitioners can cause:

- Undue pain and suffering;
- A loss of teeth;
- Inability to chew properly;
- Poor esthetics or appearance;
- and in the failure to diagnose oral cancers, serious illness or even death.

Additionally, unlike physicians, who practice in larger settings, such as group practices and hospitals, and receive a much greater degree of peer review, most dentists practice in solo practices and do not have as many opportunities to interact with or have their work reviewed by their peers.

The dental profession is regulated through licensure in all fifty states as well as in the District of Columbia, Puerto Rico and the Virgin Islands. In West Virginia, the Board of Dental Examiners provides assurances to the public about the quality of oral health care and completes the system of checks and balances in dentistry.

Issue 2: The Board is in Partial Compliance with Chapter 30 of the West Virginia Code and is in Non-Compliance with Other Applicable Laws.

The Board of Dental Examiners complies with some applicable state laws and rules. These laws and rules, found within the Board's own article of the Code and in the general provisions of Chapter 30, are important in the effective operation of a licensing board. The Board has complied with the following requirements:

- The president of the Board attended the orientation session provided by the State Auditor (§30-1-2a(b));
- An official seal has been adopted (§30-1-4);
- The Board meets at least once annually (§30-1-5(a));
- The Board maintains a record of its proceedings (§30-1-12(a));
- An annual report has been submitted to the Governor and Legislature describing budget data and transactions for the proceeding two years (§30-1-12(b));
- The Board's address and telephone number are listed in the State Government listing of the Charleston area telephone book (§30-1-12(c)).

The Complaint Process

The Board of Dental Examiners has promulgated rules addressing disciplinary and complaint procedures and contested case hearing procedures as required by §30-1-8(h). Title 5, Series 5 of the Code of State Rules provides for disciplinary action against dentists or dental hygienists upon proof the licensee has committed a felony or has:

...engaged in conduct, practices or acts constituting professional negligence or a willful departure from accepted standards of professional conduct in violation of W. Va. Code...

Any person, firm, corporation or member of the Board may make a complaint against a dentist. The Board may provide a form, but accepts complaints in any written form. Table 1 indicates the number of complaints and actions taken by the Board of Dental Examiners against dentists and dental hygienists since fiscal year 1995.

Table 1 - Complaints				
FY	Total Complaints	Completed Investigations	Disposed Complaints	License Revocations
1995	31	3	16	1
1996	34	1	23	1
1997	35	4	22	0
1998	33	4	33	0
1999	34	1	17	0
2000	28	5	36	1
2001	46	3	48	0

Source: 2002 PERD Analysis of information provided by the Board of Dental Examiners.

Once the Board receives a complaint, it is assigned to a two member complaint committee appointed by and responsible for making recommendations to the Board. The Board then issues one of the following acknowledgments to the complainant:

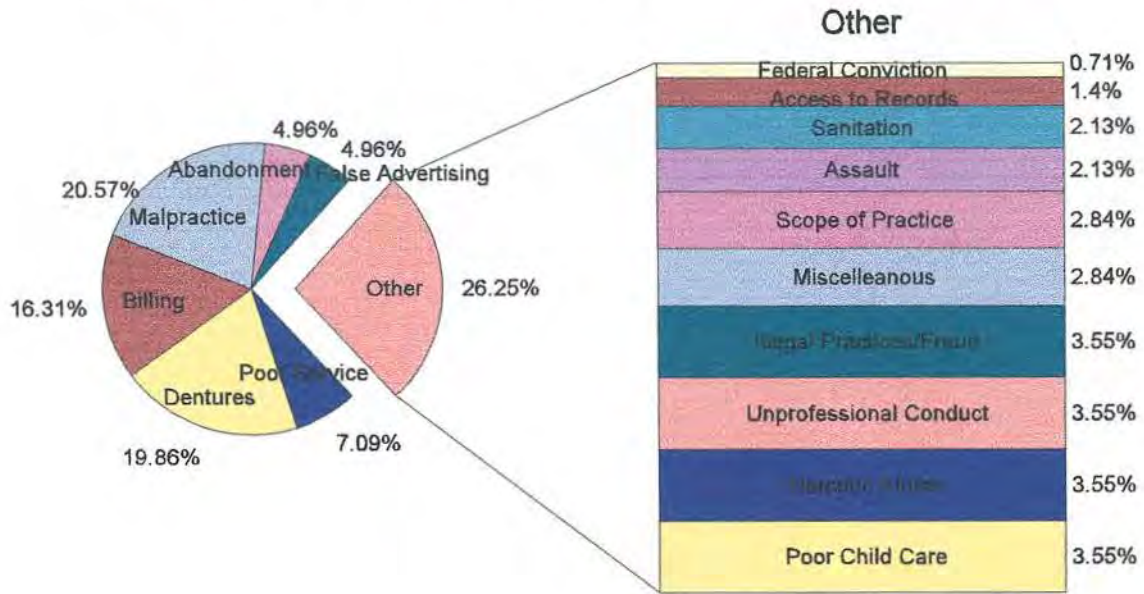
- The matter will be reviewed by the Board;
- The complaint is outside the jurisdiction of the Board;
- More information will be required in order to adequately review the individual complaint.

Once the committee reviews the complaint and determines more information is necessary, a letter is sent to the dentist or hygienist informing them of the complaint and requesting a response within thirty days.

The Legislative Auditor reviewed 139 complaint files, received between fiscal years 1996 and 2001, and found that the **due process rights of the licensees are protected throughout the disciplinary process.** The Board collected costs and fines in the amount of \$9,389 in fiscal year 1999; \$2,991 in fiscal year 2000; and \$7,500 in fiscal year 2001.

The majority of complaints result from individuals who are unhappy with their dentures, allegations of malpractice and billing disputes. Figure 1 shows the nature of complaints received by the Board of Dental Examiners.

Figure 1 - Nature of Complaints



In January 2000, the Board began a complaints log which records the receipt of each complaint, its nature and disposition as required by §5-5-5.4 of the Code of State Rules. There are no requirements in the Board's rules that require complaints to be resolved in a specific length of time, however a **review of 139 complaint files indicate that unless a licensee fails to respond to requests for information, complaints are resolved in a timely manner.** The average resolution for complaints takes approximately 180 days whereas the median resolution is 138 days.

The Board is Financially Self Sufficient

Chapter 30 Boards are required by §30-1-6(c) to set fees which shall be sufficient to enable boards to effectively carry out their responsibilities. **The Board of Dental Examiners has set its fees by rule and is self sufficient.** Table 2 indicates revenue, expenditures and ending balances for past three fiscal years.

Table 2 - Revenue, Expenditures, Ending Balance			
Fiscal Year	Total Revenue	Total Expenditures	Ending Balance
1999	\$197,006	\$176,030	\$76,030
2000	\$189,979	\$176,982	\$89,887
2001	\$191,994	\$199,898	\$100,620
<i>Source: Board of Dental Examiners Annual Reports and FIMS inquiries.</i>			

The Board is also in compliance with §30-1-10 which requires Boards to transfer special revenue funds to the general revenue fund when the amount exceeds twice the annual budget of the board or ten thousand dollars, whichever is greater. The Board of Dental Examiners has not accumulated funds in excess of its annual budget.

Continuing Education Practices Not Consistent With Rules

The Code of State Rules, §5-1-11, provides for continuing education requirements for dentists and dental hygienists. There are two exemptions to the continuing education requirement:

- Licensees who graduated within one year prior to the beginning of the renewal period;
- Retired practitioners who do not pay licensure fees.

The rule specifies a list of 17 approved providers for continuing education and allows for Board approval of other providers not specified in the rule. The Board's continuing education renewal

period begins on February 1st and extends until January 31st each year. Dentists must obtain 20 hours including 3 hours of infection control and dental hygienists must obtain 12 hours including 3 hours of infection control biennially. The Code of State Rules, §5-1-11.3(e), requires that:

Each dentist and dental hygienist must submit to the Board by February 1, 1996, and every two years thereafter documentation of satisfactory completion of the required hours of continuing education during the previous two years.

The Legislative Auditor found that the Board's practice is not consistent with its rules. In 1999 and 2001 (but not 2000) the Board's newsletters gave licensees until March 15th to report continuing education hours to the Board.

In addition, rules also require the Board to randomly audit continuing education hours. The Board's 2000 newsletter indicates an audit of 50 dentists' and 50 dental hygienists' continuing education credits was conducted. Only one licensee (1% of the sample tested) had not yet complied with continuing education requirements.

Register of Applicants Not Complete

The general requirements of Chapter 30 specifically instructs boards to maintain a register of all applicants. The Board provided the Legislative Auditor with a register containing 5 applicants. The Board's Assistant Executive Secretary stated to the Legislative Auditor that:

Please be advised concerning our database of current applicants would only contain those applicants currently on file that have not yet obtained a license. When an individual is licensed they are then placed on the current roster with more extensive information...

The register only contained: first, last and middle names; address; age; degree; date received and application type. The register did not contain other information specified in the code. West Virginia Code §30-1-12(a) states:

The secretary of every board shall keep a record of its proceedings and a register of all applicants for license or registration, showing for each the date of his or her application, his or her name, age, educational and other qualifications, place of residence, whether an examination was required, whether the applicant was rejected or a certificate of license or registration granted, the date of this action, the license or registration number, all renewals of the license or registration, if required, and any suspension or revocation thereof. [Emphasis added.]

Although the Board licenses over 2500 individuals, it provides a register of only 5 names. Additionally, not all of the information specified in §30-1-12(a) was available in the register. **The Board's policy is in violation of this general provision of Chapter 30.**

Roster of Licensees Corrected

The Legislative Auditor also reviewed a roster of licensees which includes name and office address but did not include social security numbers, as required by §30-1-13. The Board was therefore in violation of this general provision of Chapter 30 until May 2, 2002 when it provided the Legislative Auditor with “corrected current rosters of dentists and dental hygienists.” However, House Bill 4124, passed during the 2002 Regular Session, removed this general provision. Social security numbers are not required in the roster, effective May 15, 2002.

Other Applicable Laws

The Board is not in compliance with the Open Governmental Proceedings Act (§6-9A). Documentation provided by the Secretary of State’s Administrative Law Division shows three out of 21 meeting notices were not filed in time to be included in the state register. Analysis of meeting minutes indicates no meeting notices were filed for March 1999 or December 2000 meetings, despite the fact both meeting minutes began with the statement:

The West Virginia Board of Dental Examiners met ... for an open meeting.

The Board needs to direct its staff to file notice of all meetings with the Secretary of State’s Office in a timely manner.

Conclusion

The Board of Dental Examiners complies with many of the general provisions of Chapter 30 of the West Virginia Code. The Board is accessible to the public through its telephone listing and its website. The Board meets regularly and maintains adequate records of its meetings. The Board also requires and verifies continuing education of its licensees, responds to complaints, provides due process to licensees against whom a complaint has been filed and maintains financial independence. The Board should follow its rule requiring timely notification of continuing education hours, maintain a register as required by §30-1-12 and should fully comply with the Open Meetings Law.

Recommendations

1. *The Board should comply with its own continuing education renewal period, as set by rule.*
2. *The Board should develop its register of applicants to comply with state law.*
3. *The Board should consistently comply with the Open Meetings Law.*

Issue 3: The Board of Dental Examiners Exceeded its Authority when it Used Licensure Fees to Pay for Retroactive Service Credit for its Executive Secretary.

In January 2002, the West Virginia Board of Dental Examiners transferred \$28,120 (employer portion) to the Consolidated Public Retirement Board (CPRB) even though the Board was informed that the Executive Secretary was responsible for purchasing both the employer and the employee portion of the retroactive service credit. The Board purchased the employer portion of the retirement benefits for its Executive Secretary because the Board failed to carry out its duty to provide for participation of the employee in the retirement system prior to 1983.

In November 2001, the CPRB informed the Executive Secretary, in writing, that the employee was responsible for paying both the employee and employer portions of the retroactive service credit. The letter specifically stated:

Please note that the employee is responsible to pay both the 4.5% employee contribution and the 9.5% employer contribution along with interest for service before 01-01-89 as stated in West Virginia Code §5-10-14(e).

The CPRB's letter to the Executive Secretary is consistent with West Virginia Code §5-10-14(e), which states:

*...that for the purchase of service credit for employment prior to [1989], in any department...which operated from the general revenue fund and which was not expressly excluded from budget appropriations in which the blanket appropriations were made for the state's share of public employee's retirement coverage in years prior to [1989], the employee shall pay the employee's share. **Other employees shall pay the state's share and the employees share to purchase retroactive service credit.** [Emphasis added.]*

Despite receiving this very clear instruction, on January 10, 2002 the Board voted to purchase 11 years and 7 months of retroactive service credit for the Executive Secretary. On January 17, 2002 the Board's Assistant Executive Secretary contacted the Department of Administration's Budget Office, requesting approval of an amended fiscal year 2002 budget. The Board's amended budget indicated it would pay the employer share of the Executive Secretary's retroactive service credits for the period beginning December 1, 1971 through June 30, 1983. On January 23, 2002 the Board transferred \$28,120 to the CPRB for the retroactive service credit. As the Board consistently operated during the period of the retroactive purchase, with revenues generated from fees and not from the general revenue fund, §5-10-14(e) applies and **the Board's purchase is an improper use of public money and a breach of public trust.**

Although the Board is granted the power in §30-4-5(2) and (10) to hire and fix the compensation of and discharge employees necessary to enforce the provisions of the statute, and to take all other actions necessary and proper to effectuate the purpose of the statute, **it cannot be reasonably argued that the Board's gratuitous payment of the employer's share of the**

retroactive purchase of service credit is an action required for administration and enforcement of the Board's duties. The Board and the employee should be advised that the payment of the employer's share to the retirement board should be reported by the Board, for tax purposes, as income to the employee since the Board was not required to make this payment and it clearly is a benefit to the employee. Furthermore, Article VI, Section 38 of the State Constitution provides that no extra compensation shall be granted or allowed to any public officer, agent, servant or contractor. It cannot be argued that the Board's payment of the employer's share was compensation for current service. The Executive Secretary clearly accepted the terms of employment with the Board and was agreeable to continue employment under current salary arrangements without the payment to the Retirement Board. **The Legislative Auditor finds no valid argument justifying the Board's action.**

The Legislative Auditor asked the Assistant Executive Secretary how the Board justified the purchase of retroactive service credit and received the following response:

They were aware they did not have to pay this for him (the Executive Secretary), but voted unanimously to do so....The discussion and vote for this payment took place without employee presence and the Board informed of the results after the vote. The Board is of the opinion that since the West Virginia Board of Dental Examiners could not afford to pay retirement for Mr. Anderson for the first almost twelve years that he worked for them that they would like to pay it now while they had the money to do so.

Before the Budget was amended and these monies were transferred, [the Executive Secretary] and [the Office Manager], spoke to [a Contribution Specialist at the West Virginia Consolidated Public Retirement Board] by telephone conference. They asked [the Contribution Specialist] if there was any law to keep the Board from paying it and she said "No" and that, "it was nice that the Board would do this for him."

The Board asserts that the action was justified because the Board could not afford to purchase the benefits earlier than 2002. **It is the opinion of the Legislature Auditor that despite the fact the Board's licensure fees could not cover retirement benefits prior to 1983, the Board's expenditure is an improper use of licensure fees and a breach of public trust.**

The Board Fails to Carry Out Its Duty Prior to 1983

The Board of Dental Examiners failed to carry out its duty to provide for participation of its employee in the retirement system prior to 1983. In wording unchanged since 1971, West Virginia Code §5-10-2(5), makes clear that political subdivisions may elect whether to become participating public employers for the purposes of the Public Employees Retirement System. Entities, including "any board" considered to be departments of state government are not provided a choice. It should be noted that the Legislature, in 1973 and in 1988, permitted employers to retroactively purchase service credit for employees, but the purchase was limited to one year periods following the enactment of the provision. **The Board did not take advantage of these opportunities presented by the Legislature to buy retroactive service credit for its Executive Secretary.**

Conclusion

In November 2001, the Board's Executive Secretary was informed in writing that he was responsible for the full amount of the retroactive service credit purchase. The Legislative Auditor's Office found no evidence that the Board acted in compliance with state law when purchasing the retroactive benefit for its Executive Secretary. However, the Legislative Auditor recognizes that the Board, with this payment, attempted to correct its past inability to pay its share of the Executive Director's retirement contribution. West Virginia state law allows employers funded by general revenue to purchase the employer share of retroactive benefits for its employees. However, Chapter 30 boards and other entities funded by special revenue are prohibited by law from taking the same action, except in the two one-time opportunities provided by the Legislature in 1973 and 1988. Given that licensure boards provide a service to the state and may be financially unable in their initial years to contribute to their employee's retirement, the Legislature may want to consider providing the same continuous provision to special revenue fund agencies as it does for general fund revenue agencies to purchase retroactively the employer's share of the retirement contribution.

Recommendations

4. *The West Virginia Board of Dental Examiners should request a refund from the Consolidated Public Retirement Board for the \$28,120.82 which the Dental Examiners Board unlawfully paid to purchase the Executive Secretary's previous service credit.*
5. *The Legislature should consider amending the Code to allow Chapter 30 Boards and other agencies funded by special revenue the continuous provision to purchase the employer share of retroactive benefits for employees.*

APPENDIX A

Transmittal Letter to Agency

WEST VIRGINIA LEGISLATURE
Performance Evaluation and Research Division

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John Sylvia
Director

May 30, 2002

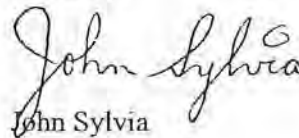
James G. Anderson III, Executive Secretary
West Virginia Board of Dental Examiners
P.O. Drawer 1459
Beckley, West Virginia 25802-1459

Dear Mr. Anderson:

This is to transmit a draft copy of the Regulatory Board Evaluation of the *Board of Dental Examiners*. This report is scheduled to be presented at the Sunday, June 9, 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 June 3 and June 7, please notify us. We need your written response by noon on June 5, 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,


John Sylvia

Joint Committee on Government and Finance

APPENDIX B
Agency Response

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June 3, 2002

Mr. David Mullins
Research Manager
West Virginia Legislature
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Charleston, WV 25305-0610

RECEIVED
JUN 05 2002
PERFORMANCE EVALUATION AND
RESEARCH DIVISION

RE: Response to draft copy of Regulatory Board Evaluation of the Board of Dental Examiners as received by the Board of Dental Examiners on May 30, 2002.

Via facsimile (304)347-4939 & US Mail

Dear Mr. Mullins:

Pursuant to the draft copy of the Regulatory Board Evaluation of the Board of Dental Examiners, this office and its staff would like to thank you for the courtesies extended by your staff for their work concerning the evaluation.

We would like to comment on three of the issues raised in your draft copy as follows:

1. "The Board should comply with its own continuing education renewal period, as set by rule."

Please be advised that the Board on its form for continuing education has changed the date from March 15th to February 1st, and that date will be used for future purposes unless changed by rule.

2. "The Board should develop its register of applicants to comply with state law."

The Board has reviewed its policies to reflect all information concerning the register of applicants as required by West Virginia Code Chapter 30, Article 1, Section 12a, and shall maintain such information for future purposes.

It should be noted that in the past the Board had only placed in their database all applications which were complete. The applications that were not placed in the database were those applicants who did not complete the application process. However, the Board will keep the register of all applicants for future purposes.

3. "The Board should consistently comply with the Open Meetings Law."

Please be advised the Board was not aware that it had not complied with the Open Meetings Law, but has implemented policies to ensure that it does in the future. It should be noted that out of twenty one meetings, two meetings were not noticed in the State Register and three meeting notices were not filed timely with the State Register.

For future purposes the Board of Dental Examiners shall consistently comply with the Open Meetings Law.

Please make this response part of your final report. Once again I would like to thank the Performance Evaluation and Research Division of the West Virginia Legislature for their thorough and complete work and the courtesies extended to this Board during the process.

Very truly yours,



JAMES G. ANDERSON, III
Executive Secretary

JGA/smc