

# WEST VIRGINIA LEGISLATURE

*Joint Committee on Government and Finance*

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## Memo

**To:** Thedford L. Shanklin, CPA, Director

**From:** Michael A. House, CPA, Assistant Director  
Neil McEachron, Jr., CPA, Legislative Auditor III

**Date:** September 15, 2004

**Subject:** FOLLOW-UP REVIEW OF THE AUDIT REPORT OF THE ALCOHOL  
BEVERAGE CONTROL ADMINISTRATION (ABCA) FOR THE PERIOD  
JULY 1, 2000 - JUNE 30, 2002

In accordance with your instructions, we conducted a second follow-up review of the audit report of the ABCA for the period July 1, 2000 through June 30, 2002. This follow-up review focused on the assessment of fines and penalties assessed by the ABCA for violations adjudicated from January 2000 through the present. In conducting this follow-up, we reviewed 32 violations judgmatically selected from a listing of violations provided by the ABCA. We separated the sample into two groups, those processed before July 1, 2003 and those processed after July 1, 2003. The latter group represents those fines and penalties which were assessed during the current commissioner's administration and was reviewed to determine whether fines and penalties assessed were consistent and were in compliance with the unofficial schedule of fines (Exhibit A attached) provided by the ABCA commissioner.

Generally, our review indicated there was no consistency, during either time period, in the amount of the fines and/or penalties assessed licensees with similar violations. Additionally, the fines and penalties were not always in compliance with the unofficial fine schedule. Upon reviewing the documentation supporting each violation, we noted no justification for variances in the fines and/or penalties assessed each licensee. The specific results of our review are set out as follows:

### **Summary of Audit Finding Noted in Audit**

#### **FINDING #3 - FEE SCHEDULE FOR ASSESSMENT OF FINES AND PENALTIES**

The lack of a formal fee schedule provides the opportunity for licensees who commit the same violation(s) to be fined on an unequal basis. This same finding was reported in the previous audit. Also, the ABCA had no written procedures for case dismissals.

We Recommended:

The ABCA should comply with Chapter 60, Article 7, Section 13 of the West Virginia Code, as amended. Also, the ABCA needs to implement, by legislative rule, a fee schedule establishing guidelines for fines and penalties as well as developing a written procedure providing for the dismissal of pre-hearing cases as they agreed to do in their responses to our last post audit.

**Agency Action:**

**No action has been taken. According to Commissioner Moats, a fee schedule is not logical due to the diverse nature of violations. Also, Commissioner Moats told us a written procedure for case dismissals is unnecessary since the discretion whether or not to dismiss a case rests with the commissioner.**

**Post Audit Division Comments:**

The ABCA should implement, by legislative rule, a fee schedule for fines and penalties to ensure licensees are not fined on an unequal basis, as well as, developing a written procedure for case dismissals.

### **Summary of Review Performed on Violations Processed Between January 2000 & Present**

- After Hours Sale/Consumption. We reviewed five violation cases where licensees were assessed a fine and/or penalty for After Hours Sale/Consumption. The results of our review were as follows:
  1. Violations Processed Before July 1, 2003 - Three of four licensees charged with this offense had no prior violations. Of these three licensees, one licensee was issued a warning, one licensee received a \$150 fine, and the third licensee received a \$350 fine. The fourth licensee (with 2 prior violations for selling to underage /permitting consumption of alcohol by underage) was assessed a \$550 fine. There was no documentation present to justify the variance in the fines assessed.
  2. Violations Processed After July 1, 2003 - During April 2004, one licensee (with two prior violations for gambling) who was charged with this offense was assessed a fine of \$350. This fine amount corresponds to the fine amount for a first offense for After Hours reflected on the informal fine schedule currently being utilized by

the ABCA. We noted these two prior violations occurred during November 2002 and January 2003. There was no documentation indicating why the fine assessed was not in compliance with the fine schedule. An ABCA employee stated she was not aware of the time between violations being a factor in the assessment of fines by the commissioner. She told us the amount fined each licensee is up to the discretion of the commissioner.

- Alcohol on Premise. We reviewed three violation cases where licensees were assessed a fine and/or penalty for Alcohol on Premise. The results of our review were as follows:
  1. Violations Processed Before July 1, 2003 - One of two licensees charged with this offense had three prior violations. This licensee was assessed a fine of \$150 while another licensee with no prior violations was assessed a fine of \$1,050 and levied a three-day suspension. There was no documentation present to justify the variance in the fines assessed.
  2. Violations Processed After July 1, 2003 - During March 2004, one licensee with no prior violations who was charged with this offense was only given a warning and not assessed any fine. There was no documentation indicating why the warning was issued in lieu of a fine. Also, we noted this specific offense was not reflected on the informal fine schedule currently being utilized by the ABCA.
- Sell/Give, Furnish Underage. We reviewed five violation cases where licensees were assessed a fine and/or penalty for Selling or Furnishing Alcohol or Beer to Underage . The results of our review were as follows:
  1. Violations Processed Before July 1, 2003 - Two of three licensees charged with this offense had no prior violations. Of these two licensees, one licensee received a \$550 fine while the other licensee received a \$50 fine and a seven-day suspension. The third licensee (with seven prior violations for selling alcohol/beer to underage ) was assessed a \$1,550 fine and levied a three-day suspension. The fine amount exceeded the maximum fine amount of \$1,000 which can be assessed for a single violation. There was no documentation present to justify the variance in the fines assessed.
  2. Violations Processed After July 1, 2003 - Two licensees charged with this offense each had one prior violation for selling alcohol to underage . One licensee was assessed a \$200 fine while the other licensee was assessed a \$450 fine. The \$200 fine amount corresponds to the first offense fine amount on the ABCA's informal fine schedule while the \$450 fine amount corresponds to the second offense fine amount. The prior violation of the licensee fined \$200 occurred in January 2000, while the prior violation of the licensee fined \$450 occurred in March 2003. There was no documentation present to justify the variance in the fines assessed. An ABCA employee stated she was not aware of the time between violations being a

factor in the assessment of fines by the commissioner. She told us the amount fined each licensee is up to the discretion of the commissioner.

- Immoral Conduct. We reviewed two violation cases where licensees were assessed a fine and/or penalty for Immoral Conduct. The results of our review were as follows:
  1. Violations Processed Before July 1, 2003 - One of two licensees charged with this offense had three prior violations for permitting criminal acts. This licensee was issued a warning while another licensee with no prior violations was assessed a fine of \$1,000 for this offense along with a charge of permitting criminal acts (cited at same time as immoral conduct charge; part of same violation). There was no documentation present to justify the variance in the fines assessed.
  
- Sell, Give, Permit Consumption & Sell/Require Proof of ID. We reviewed two violation cases where licensees were assessed a fine and/or penalty for Sell, Give, Permit Consumption to Underage & Sell/Require Proof of ID. The results of our review were as follows:
  1. Violations Processed After July 1, 2003 - One of two licensees charged with this offense had one prior violation for operating after hours. One licensee was assessed a \$300 fine while the other licensee (who had a prior violation) was assessed a \$500 fine and levied a three-day suspension. The \$300 fine amount corresponds to the first offense fine amount on the ABCA's informal fine schedule while the \$500 fine amount and three-day suspension does not correspond to the informal fine schedule. There was no documentation present to justify the variance in the fines assessed.
  
- Sell, Give, Permit Consumption & Hindering/Interfering with an Inspection. We reviewed two violation cases where licensees were assessed a fine and/or penalty for Sell, Give, Permit Consumption to Underage & Hindering an Inspection. The results of our review were as follows:
  1. Violations Processed Before July 1, 2003 - One of two licensees charged with this offense had eight prior violations for selling alcohol to underage /permitting consumption of alcohol by underage and other miscellaneous charges. This licensee was fined \$1,050. The other licensee charged with these offenses along with a charge of selling alcohol to underage without proof of ID had two prior violations for similar charges. This licensee received a fine of \$500 and was levied a ten-day suspension. There was no documentation present to justify the variance in the fines assessed.
  
- Liquor Purchase/Market Zone. We reviewed two violation cases where licensees were assessed a fine and/or penalty for having liquor on the premise which had not been purchased from an authorized vendor. The results of our review were as follows:

1. Violations Processed After July 1, 2003 - Neither of these licensees had prior violations. One licensee was only issued a warning while the other licensee was assessed a \$500 fine. This particular offense was not reflected on the informal fee schedule currently being utilized by the ABCA. There was no documentation present to justify the variance in the fines assessed.
- Hours of Operation/Clear Premise. We reviewed four violation cases where licensees were assessed a fine and/or penalty for operating after hours/not clearing premise. The results of our review were as follows:
    1. Violations Processed Before July 1, 2003. Three licensees charged with this offense each had two prior violations for selling alcohol to underage /permitting consumption of alcohol by underage and/or other miscellaneous charges. One licensee received a fine of \$100 while another licensee received a fine of \$350. The third licensee charged with this offense along with other offenses (cessation of entertainment, after hours sale/consumption, selling of alcohol to underage , and selling of alcohol to underage without proof of ID) received a fine of \$1,050. There was no documentation present to justify the variance in the fines assessed.
    2. Violations Processed After July 1, 2003 - One licensee charged with this offense had nine prior violations for selling alcohol to underage /permitting consumption of alcohol by underage and other miscellaneous charges. This licensee was assessed a \$50 fine. The \$50 fine amount does not correspond to the informal fine schedule currently being utilized by the ABCA. There was no documentation present to justify the variance in the fine assessed.
  - Stripping Violations (Immoral Conduct/Gambling, Physical Contact, and Separate and Apart.) We reviewed two violation cases where licensees were assessed a fine and/or penalty for stripping violations. The results of our review were as follows:
    1. Violations Processed Before July 1, 2003 - One licensee had three prior violations for similar offenses while the other licensee had one prior violation for similar offenses. The licensee with one prior violation was assessed a fine of \$1,050 while the other licensee was assessed a fine of \$2,050. Based on the number of prior violations for each licensee, the fine assessed seems reasonable. There was no documentation present to justify the variance in the fines assessed.
  - Stripping Violations (Physical Contact and Sexual Acts.) We reviewed three violation cases where licensees were assessed a fine and/or penalty for stripping violations. The results of our review were as follows:
    1. Violations Processed Before July 1, 2003 - Two of three licensees charged with these offenses each had three prior violations for similar offenses. In addition to these charges, one licensee was charged with separate and apart and fined a grand total of \$1,500 for all charges; second licensee was charged with separate and

apart, immoral conduct, and carry on or off premise and fined a grand total of \$2,000 for all charges; and the third licensee was charged with immoral conduct and permitting criminal acts and fined a grand total of \$3,000 and levied a ten-day suspension for all charges. Based on the combination of prior violations and/or additional charges, the fines assessed seem reasonable; however there was no documentation present to justify the variance in the fines assessed.

- Stripping Violations (Immoral Conduct/Gambling, Physical Contact and Sexual Acts.) We reviewed two violation cases where licensees were assessed a fine and/or penalty for stripping violations. The results of our review were as follows:
  1. Violations Processed After July 1, 2003 - One of two licensees charged with these offenses had four prior violations for similar offenses. In addition to these charges, one licensee was charged with adequate dress and fined a grand total of \$500 for all charges while the second was charged with separate and apart and fined a grand total of \$1,000 for all charges (plus \$600 for hearing costs). The fine amount of \$500 for the first licensee did not correspond to the informal fine schedule currently being utilized by the ABCA. The fine amount of \$1,000 assessed the second licensee did correspond to the informal fine schedule. Based on the combination of prior violations and/or additional charges, the fines assessed seem reasonable; however, there was no documentation present to justify the variance in the fines assessed.

## **EXHIBIT A**