

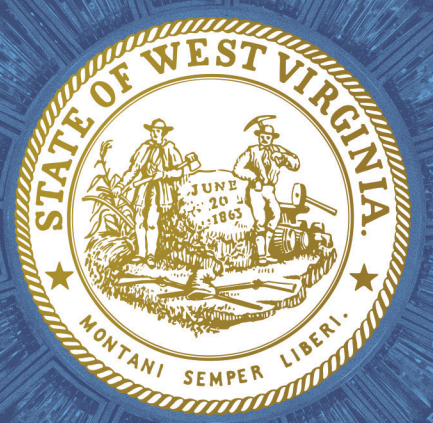
JOINT COMMITTEE ON GOVERNMENT AND FINANCE
WEST VIRGINIA OFFICE OF THE LEGISLATIVE AUDITOR

POST AUDIT DIVISION

LEGISLATIVE AUDIT REPORT

WV Alcohol Beverage Control Administration – Enforcement Division

Legislative Auditor: Aaron Allred
Post Audit Division Director: Justin Robinson



GENERALLY ACCEPTED GOVERNMENT
AUDITING STANDARDS STATEMENT

We conducted this performance audit in accordance with Generally Accepted Government Auditing Standards (**GAGAS**). Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

POST AUDIT DIVISION
Justin Robinson, Director

POST AUDIT DIVISION

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WV Alcohol Beverage Control Administration - Enforcement Division

May 7, 2023

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There is a lack of documentation regarding the assessment of fines and penalties for violations of W.Va. Code and Legislative Rule, thus making it difficult to determine if fines assessed to the licensees are consistent, fair, or reasonable.

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Enforcement Division details from 2022 ABCA Annual Report

This is the second and final Post Audit Division report resulting from the most recent audit of the Alcohol Beverage Control Administration (ABCA). A prior report that was a component of this overall audit was released in June 2022. The scope of this report is primarily limited to the ABCA's Enforcement Division. This report focuses on ABCA's response to several previous findings and recommendations issued in prior Legislative Auditor's reports on the ABCA.

Our review followed up on several issues presented in audit reports published since 2009. During the review, the Legislative Auditor identified previous findings and issues deemed significant for further analysis. For each finding or issue considered significant, the Legislative Auditor requested information necessary to determine the ABCA's compliance, partial compliance, or non-compliance with corresponding recommendations. Once provided by the ABCA, we performed various audit techniques to substantiate ABCA's assertions or actions taken regarding compliance. The Legislative Auditor's conclusions on ABCA's compliance to audit recommendations are detailed in this report.

Background

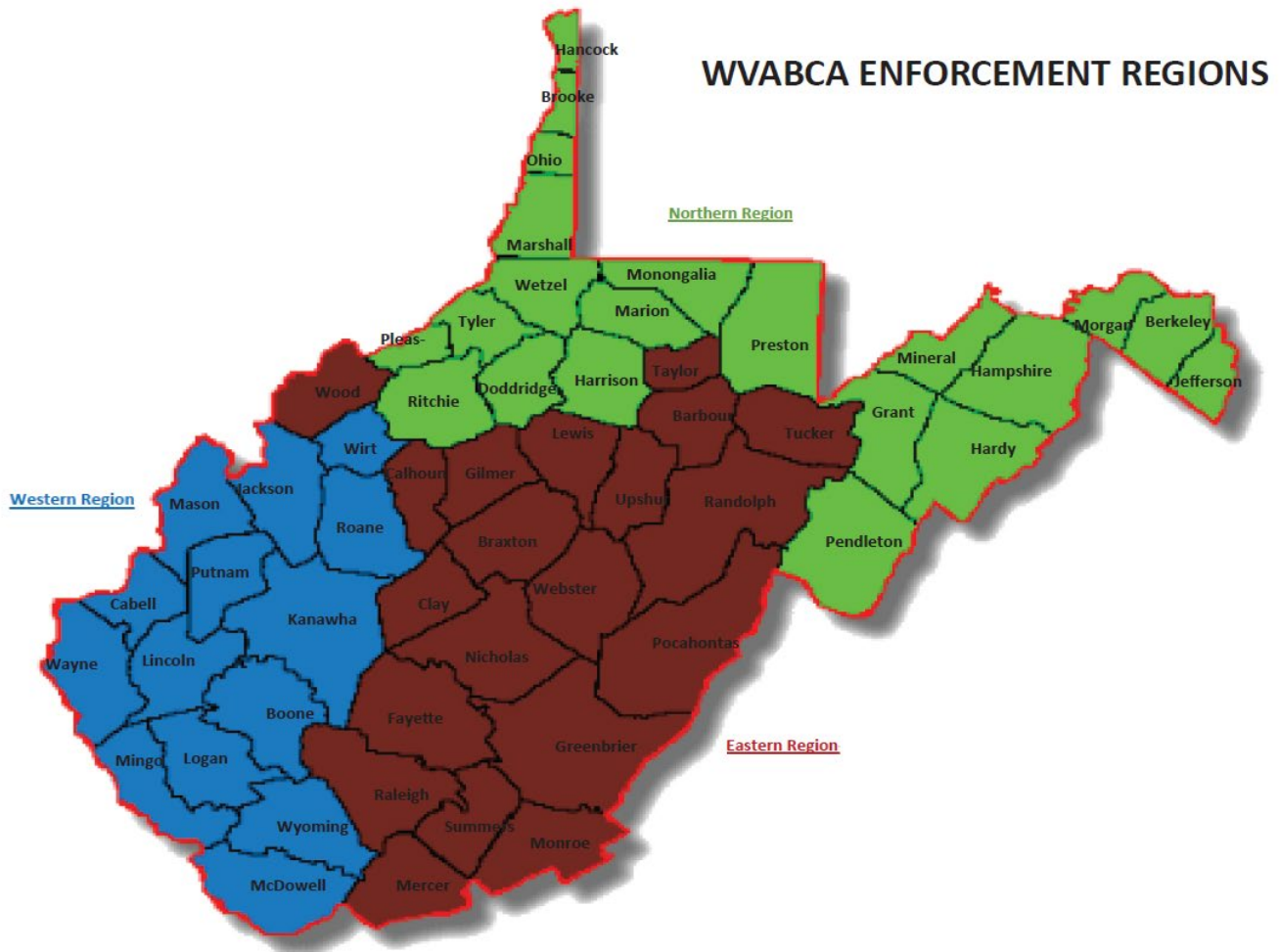
The West Virginia Alcohol Beverage Control Administration is the state agency tasked with regulating, enforcing, and controlling the sales, distribution, transportation, storage, and consumption of alcoholic beverages in West Virginia. According to the ABCA annual report, the agency was created in 1935 to give effect to the mandate of the people expressed in the repeal of the state prohibition amendment, and to assure the greatest degree of personal freedom that is consistent with the health, safety, and good morals of the people of West Virginia.

One fundamental way the ABCA ensures the health and safety of the citizens of West Virginia is through constant monitoring of licensees and their compliance with applicable state laws and Legislative Rules pertaining to the sale, purchase, transportation, manufacture, consumption, and possession of alcoholic beverages. These functions are largely the responsibility of ABCA's Enforcement Division, which is typically comprised of one Enforcement Director, three Enforcement Supervisors, and approximately eighteen Enforcement Agents. This Division is responsible for performing operations necessary to ensure that each licensee is providing a safe and healthy environment. General responsibilities performed by the Enforcement Division to monitor compliance with applicable rules and laws are as follows:

- Initial Inspections
- Background Checks
- Routine Inspections
- Responding to Complaints
- Compliance Checks
- Walk Throughs
- Compliance Sweeps
- Investigations
- Undercover Detail

For more details regarding the Enforcement Division's duties and functions refer to Appendix D.

According to the 2022 ABCA Annual Report, the ABCA was responsible for the enforcement of approximately 6,988 licensees located throughout the state. These licensees include, but are not limited to, retail liquor outlets, restaurants, bars, clubs, golf courses, and breweries. To assist the ABCA in the assignment of duties of the Enforcement Division staff, the ABCA has demarcated the state into three distinct enforcement regions: The Eastern Region, the Western Region, and the Northern Region as depicted in the following illustration:



Each region is assigned an Enforcement Supervisor and employs a team of Enforcement Agents to carry out the aforementioned duties of the Division.

According to the ABCA Annual Report, licensed locations are visited a minimum of two times per year. The report also stated that in FY 2022 agents achieved an inspection rate of 98%. During these inspections, agents provide educational and training materials to ensure that licensees are empowered with the information necessary to operate their establishments in compliance. Further, the ABCA provides licensees with posters outlining proper carding techniques to mitigate the risk of underage drinking. Also, ABCA disseminates educational materials to licensees, such as Blood Alcohol Content (BAC) charts, Fetal Alcohol Syndrome (FAS) posters, and the Human

Trafficking posters—all of which are required to be posted by licensees in accessible locations to facilitate patron viewing.

Issue 1: There is a lack of documentation regarding the assessment of fines and penalties for violations of W.Va. Code and Legislative Rule, thus making it difficult to determine if fines assessed to the licensees are consistent, fair, or reasonable.

As part of our audit of the ABCA, we followed up on several recommendations made in prior audit reports to assess any corrective actions made; some of which were discussed in our prior report in June 2022. The Enforcement Division was the last outstanding area of the ABCA in our audit objectives. One prior audit issue we followed up on concerned a lack of a defined fee schedule for how the ABCA assesses fines for violations through the Enforcement Division, as well as difficulty in determining why some fines were assessed at a higher amount than others for the same violation. Further, during our review of previously released Post Audit reports on the ABCA, the Legislative Auditor noted a finding repeated in multiple reports pertaining to the inability for auditors to determine if fines levied against various licensees were issued equitably for identical violations. This finding, originally reported in a 1999 audit report on the ABCA, was subsequently repeated four additional times in reports published in 2003, 2004, 2006, and 2009. Additionally, we noted two reports in 2006 and 2009 that specifically cited significant differences in the fine amounts levied against licensees for the same violation where there was no documented reasoning for the differences.

Each of the previously released audit reports cite an inability to determine if said fines were issued equitably. Further, all five reports specified the lack of utilizing a fee schedule as a contributing cause for uncorroborated disparities in penalties assessed for identical violations. The audit report issued in 2009 illustrated the differing fine amounts for violations of W.Va. Code §11-16-18(a)(3), which prohibits selling, furnishing, or providing beer to any person less than 21 years old:

| Violation Data from 2009 Post Audit Report | | | |
|---|-----------------------------|----------------------|-----------------------|
| Violation Code | Number of Violations | Dollar Amount | # of Instances |
| 11-16-18(a)(3) | 1st Offense | \$ 100.00 | 1 |
| 11-16-18(a)(3) | 1st Offense | \$ 150.00 | 18 |
| 11-16-18(a)(3) | 1st Offense | \$ 500.00 | 10 |
| 11-16-18(a)(3) | 2nd Offense | \$ 150.00 | 2 |
| 11-16-18(a)(3) | 2nd Offense | \$ 300.00 | 2 |
| 11-16-18(a)(3) | 2nd Offense | \$ 500.00 | 1 |

The 2009 report stated the lack of a formal fee schedule provides opportunities for licensees to be fined inequitably and, in turn, recommended the ABCA implement a fee schedule via Legislative Rule that would establish guidelines for fines and penalties.

In addition, in recent years we have received several complaints from licensees alleging potential inequitable enforcement actions or fine amounts. These complaints stated claims such as inequitable treatment, vague rules, inconsistent application, and at least one complainant wanted to remain anonymous for fear of retaliation by the ABCA. Our audit did not set out to determine the validity of each allegation we received; however, these were taken into account in our audit procedures. As a result of the repeated finding reported in five previously released audit reports and multiple licensee complaints of potential inequitable treatment, the Post Audit Division was tasked with reviewing fines and penalties imposed by the ABCA on licensees.

ABCA Authority to Assess Fines and Procedures for Fines and Appeals

The ABCA authority for assessing fines and penalties is outlined in W.Va. Code §60-7-13. Since the release of the previous reports, the statute has remained relatively unchanged¹. The statute grants the ABCA Commissioner authority to revoke or suspend a license, place a licensee on probation for a period not to exceed 12 months, and/or impose a monetary penalty not to exceed \$1,000. Specifically, W.Va. Code §60-7-13 states, in part:

(a) Upon a determination by the commissioner that a licensee has: (i) Violated the provisions of §11-16-1 et seq. of this code or of this chapter; (ii) acted in such a way as would have precluded initial or renewal licensure; or (iii) violated any rule or order promulgated by the commissioner, the commissioner may impose any one or a combination of the following sanctions:

(1) Revoke the licensee's license;

(2) Suspend the licensee's license;

(3) Place the licensee on probationary status for a period not to exceed 12 months; and

(4) Impose a monetary penalty not to exceed \$1,000 for each violation where revocation is not imposed....

While this section of W.Va. Code provides several options of penalties the Commissioner may utilize when issuing violations, it does not provide how these penalties are determined or calculated by the Commissioner. Additionally, a review of applicable Legislative Rules by the audit team found no additional guidance in determining penalties. Consequently, the Legislative Auditor requested all policies and procedures specific to enforcement duties and inquired as to the process used when determining punishment for violations. **It should be noted that none of the policies and procedures provided by the ABCA included information regarding the determination of fine amounts.** Additionally, the ABCA provided the following statement to a subsequent request:

"...the Commissioner has discretion to review the facts, circumstances and law, and apply that information to each licensee's violation and render a determination on a case-by-case basis. The process used to determine sanctions against licensees are as follows: the Commissioner reviews the facts of the violation, the violation history of the licensee, the duration between violations, the time period the licensee

¹ Since 1999, W.Va. Code 60-7-13 has only been amended once in 2018. The effect of the amendment was limited to a few minor stylistic changes and had no consequence on the statutory authority granted the ABCA relating to revocation or suspension of licenses, or the assessment of monetary penalties.

has been in business, and the severity of the violation. In addition, the Commissioner may consider any police reports or criminal citations from law enforcement or public safety issues. The Commissioner does review and has final authority over every violation but may consider recommendations from the Enforcement Director...”

Given the response above, the Legislative Auditor logged and reviewed violation settlements for calendar year 2019 to further assess the reasonableness and equitability of penalties issued while also considering the information included in the ABCA response. The auditors had difficulty in identifying fines associated with only one violation. Many of the fines were a single fine amount for a combination of violations that did not indicate the fine amount issued for each violation. This prohibited the auditors from making a similar comparison to the discrepant fine amounts noted in the 2009 report for which auditors could not determine why some licensees were fined more for the same violation than others, even as a first offense. Using professional judgement, the auditors selected instances of similar violations resulting in differing fines/penalties. One identified instance included two different licensees that had the same combination of violations resulting in two different fine amounts. **Additionally, one of the licensees had no prior violations and was fined more than the other licensee who did have previous violations.** Without additional information, it is unclear why these differences occurred or the justification for the differing amounts.

The Legislative Auditor requested all information specific to the two violations documenting the basis for determining the severity of the sanctions issued. In response, the ABCA provided violation reports for each licensee summarizing those inspections resulting in the violations. However, this documentation did not include information pertaining to the Commissioner’s rationale applied in determining the fine amounts. **Therefore, the Legislative Auditor could not determine if the Commissioner’s use of discretion in determining the variations in sanctions issued to licensees for the same statutory violation were fair and defensible in consideration of the specific circumstances of each violation and the previous violation history of each licensee.**

As previously mentioned, it was noted through the Legislative Auditor’s review that ABCA often issues one fine amount for multiple violations. For instance, a licensee may be found to have violated three separate sections of W.V. Code and, rather than having three separate fines for each violation, the ABCA will issue one overarching fine for all three violations. Issuing sanctions in this manner allows the agency to dole out punishment on the totality of a situation instead of outlining specific punishment for each violation identified. However, this practice further impedes the auditing process as it does not provide documentation that can be related to a specific violation. This, in turn, further complicates any conclusions that can be drawn regarding fairness and equitability for fines and penalties levied. This also reduces the transparency to the licensee who may not fully understand the full nature of the fine and penalty or its reasoning.

To further exemplify this issue, the Legislative Auditor attempted to assess violations in a similar manner as done in previous audits, specifically, in the manner as performed in 2009 in the table pictured on page 3 of this report. Utilizing violation data for calendar year 2019, it was identified that a violation coded as “U-002” and defined as “*Sell, Give, Furnish Underage,*” was cited on 197 instances. However, only eight of these instances were issued as singular fines where the dollar amount of the fine could be directly correlated to the “U-002” violation. The other 189 instances of violations coded as “U-002” issued singular fines for multiple violation codes.

Therefore, the audit team could not readily discern the portion of the fine attributable to the “U-002” violation. It is the Legislative Auditor’s opinion that issuing fines in this manner increases the possibility of inequitable punishment as it precludes auditors from comparing the equitability of singular violations between differing licensees. Should the ABCA decide to issue individual fines for each violation of W.Va. Code, it would allow for easier comparison of fine amounts among different licensees and provide clearer documentation for auditing purposes.

It is our understanding that the Commissioner, through his discretion, assesses these fine amounts as a whole and based on the evidence provided through the violation report and when necessary, through consultation with the Enforcement Agent or Enforcement Director. Yet, it is ultimately the Commissioner who decides the fine amount and assesses every fine and penalty against a licensee and this discretion is not delegated to any other ABCA employee. While the violation reports contain evidence and circumstances documented by the Enforcement Agent to support cause for a violation, the Commissioner indicated there are times when, based on his review of the evidence in the reports, the evidence does not support the violation. In these cases, the ABCA may drop a violation from the report. Additionally, some violation reports may be detailed in documenting these circumstances and evidence while others may not and provide minimal information concerning the violation, adding to the difficulty in determining if fine amounts were reasonable or how they were determined.

Issuance of Assessed Fines and Penalties to Licensees and the Current Appeals Process

Once the fines and penalties are determined, the licensee would then receive what is referred to as an “Option Letter”. The licensee may select one of two options. Option 1 is the settlement offer, which is essentially the acceptance of the fine assessed and/or the assigned days of suspension. Option 2 is a request for an administrative hearing which is essentially a non-acceptance of the fine assessed and/or the assigned days of suspension. However, it should be noted that this hearing is held before the ABCA Commissioner, who determined and issued the fines, or a person designated by the Commissioner as hearing examiner. Therefore, the licensee is essentially appealing to the same entity that passed the initial judgement with the final ruling of the hearing being made by the same entity that assessed the fine, providing no independent ruling on the matter. This along with the potential cost of pursuing an appeal against the amount of the fines may have a chilling effect on licensees’ desire to appeal. **It is the opinion of Legislative Services that this does not represent a true appeal process and may not provide the petitioner full due process.**

Regarding the appeals process, a hearing may be requested by a licensee but requires “A clear and concise assignment of each error that the petitioner alleges to have been committed by the Commissioner in the determination of a licensee’s violation or denial of application for license, with each assignment of error being shown in separately numbered paragraphs.” As previously noted, many of the violation reports lack sufficient detail concerning the fines assessed for each violation, the reasonings for fines that may be assessed excessively, and any knowledge of a fee schedule outlining how it assesses its fines. It would seem to preclude the petitioner the ability to provide a “clear and concise assignment of each error” if the circumstances causing the action by the Commissioner are not clear, and the assessed fine amount or the reasoning behind it for each violation for which a fine is assessed is not provided. In our review, we found over 30 states throughout the country (60%) whose alcohol beverage control organizations post publicly their fee schedule for how fines for violations of law or rule are assessed.

Furthermore, if a licensee disagrees with the Commissioner's final order, they may appeal this to the Circuit Court of Kanawha County. However, the appeal for a judicial review is limited, with code stating, "... in any such judicial review only the legality of the decision of the commission under the constitution and laws of this state and the United States shall be determined." It is unclear based on this language if a licensee could appeal on the grounds they felt they were fined inequitably or unfairly in relation to other licensees, or whether it is limited merely to a determination if the Commissioner's final order was issued legally. Moreover, the cost associated with these fines may be so low that the cost of pursuing such an appeal may outweigh the benefits in doing so. According to Legislative Services, a case in the Pennsylvania Supreme Court ruled that the Court can and must decide, on proper evidence, whether discretion is abused where administrative discretion is applied, in a case involving a license dispute with their state liquor control board. This case seems to indicate a further need to ensure proper documentation of fines, penalties, and the application of discretion.

In addition, Legislative Services highlighted the case of *Hornsby v. Allen*, 326 F.2d 605, 609 (5th Cir. 1964). The Supreme Court found in *Hornsby v. Allen*, a case in which the appellant (*Hornsby*) sought a liquor license and was refused because the state of Georgia had declared licenses to sell spirituous liquor to be a privilege, the licensing authority has an unreviewable discretion to grant or deny licenses. It is firmly established, of course, that the state has the right to regulate or prohibit traffic in intoxicating liquor in the valid exercise of its police power, see *Midwest Beverage Co. v. Gates*, 61 F. Supp. 688, 690 (N.D.Ind. 1945), but this is something quite different from a right to act arbitrarily and capriciously. Merely calling a liquor license a privilege does not free the municipal authorities from the due process requirements in licensing and allow them to exercise an uncontrolled discretion. The Court here determined that the unreviewable discretion that the state retained regarding liquor licenses violated the Fourteenth Amendment.

Here, by the nature of the court costs outweighing the possible maximum fines assessed, West Virginia has a related situation in that there is not a reasonable appeal available for any business that believes that its fines may have been inequitable. But without findings of fact and conclusions of law, which is required by the state rules, but often omitted from commission decisions, there is no way to know if the law has been applied equitably or if a violation of the Fourteenth Amendment has happened. Accordingly, it is required that the reasoning for the assessment of the fine in the amount determined by the Commissioner must be explained in the Order that is entered. Failing to do so increases the likelihood that an inequitable application of law and a violation of Fourteenth Amendment due process rights has transpired. It is also a violation of the very rules the ABCA established. Although the Supreme Court does not require full findings of fact and conclusions of law in federal cases, West Virginia's ABCA does.

175 CSR 4 Section 16.18 states:

Commissioner's decision. -- After the conclusion of the hearing, within ten (10) days of receipt of the transcript thereof or after receipt of briefs submitted in lieu of argument, **the person designated by the Commissioner as hearing examiner shall prepare a recommended decision supported by findings of fact and conclusions of law affirming, modifying or vacating the earlier order of the Commissioner.**

As previously stated, the cost of making an appeal in many times can outweigh the cost of the fines assessed. Also, many licensees may feel the process is not objective due to the hearing process

being controlled by the ABCA. For judicial abuse of discretion in other forums besides administrative hearings, the outcome is generally a reversal or a remand with instructions for different findings. In extreme cases, sanctions could be levied and reporting the judge to Judicial Ethics Commission. However, the ABCA Commissioner nor a designated hearing examiner would be subject to the judicial canons.

Our audit does not find any issue with how this discretion is currently being applied or the judgements made in arriving at these fine amounts. Rather our issue is with the lack of specific documented information that delineates each fine amount for each violation to arrive at the total assessed fine, and additional information that may be beneficial to licensees and auditors for the purpose of transparency. This precludes any other determination on the reasonableness or equitability of how these fines and penalties were assessed. This may also cause confusion to a licensee who, absent a fee schedule for how fines by the ABCA are assessed, may not understand the amount of the fine or the justification. If a licensee was potentially treated with bias or favoritism in how a fine was assessed, it is impossible for auditors to make this determination based on the documentation maintained by the ABCA that does not provide detail on the individual fine amounts, how they were determined, or the justification or evidence relied upon to assess the fine amount.

Currently, there is no requirement in W.Va. Code or W.Va. Legislative Rules for the Commissioner to consider objective criteria when weighing sanctions to ensure that such sanctions issued are based on fair and equitable considerations of all relevant factors. It is the opinion of the Legislative Auditor that one important step in ensuring fair and equitable sanctions is the establishment of minimum and maximum fine amounts for each type of violation along with parameters for how fines may be assessed beyond the minimum and what specific factors should cause a higher assessed fine, such as repeat offenses. Additionally, these fine ranges and parameters should be documented in a fee schedule and included in the policies and procedures for the Enforcement Division. Establishing such policy with more clearly defined fine amounts will help ensure consistency in enforcement while allowing the ABCA to maintain this consistency across multiple administrations. As previously stated, the establishment of such a fee schedule has been recommended multiple times in previous Legislative audit reports and is something available to licensees in 30 other states in the country already.

However, the Legislative Auditor recognizes the importance of the Commissioner having discretion to modify sanctions as circumstances dictate. Nevertheless, it is critical that all such deviations from established norms be based on careful deliberations of the specific facts of the investigation as well as the history of previously noted issues encountered with the applicable licensee. Further, if such deviations from the norms are applied by the Commissioner, it is paramount that those factors resulting in such deviations be clearly documented and readily accessible. Standardization of this process and increased documentation would aid in ensuring the equitable treatment of licensees while also providing documents necessary for auditing purposes. Additionally, implementing such processes would provide transparency to licensees and mitigate prospects of alleged inequitable treatment. It is the Legislative Auditor's opinion that a process as outlined above also preserves the Commissioner's authority and discretion when issuing sanctions.

An example of similar requirements for documentation supporting discretionary decisions made by the Commissioner are evident in recent amendments to ABCA Legislative Rules regarding the authority of licensees to provide alcoholic beverages for outdoor dining. Legislative Rule 175-2 Section 3.4.11.b, effective July 1, 2022, requires the Commissioner to provide a written

statement when declining authorization for a temporary outdoor street dining area. Specifically, CSR 175-2 Section 3.4.11.b states, in part:

*“...The Commissioner may, at his or her discretion, authorize entertainment or alcoholic beverage service in the private outdoor street dining area. The Commissioner may determine not to authorize entertainment **but must provide a written statement indicating why such entertainment is not authorized.**”*
(emphasis added)

The recent amendment outlined above is perhaps an indication that the Legislature recognizes the importance of documenting foundations applied by the ABCA Commissioner in making agency decisions by discretion. As previously stated, this practice provides transparency to licensees by standardizing processes, aids in third-party audits by providing additional documentation, and mitigates the risk of alleged unfair treatment. Therefore, it is the Legislative Auditor’s opinion, the ABCA should extend such practices to the ABCA Commissioner’s use of discretion when determining sanctions for violations, whether they be for monetary fines or the duration of revocations/suspensions of licenses.

By further defining the Commissioner’s discretion in assessing fines and penalties and establishing a fee schedule, policies, and procedures to ensure consistency in the application of this discretion, the ABCA can ensure consistent enforcement actions across multiple administrations. As the Commissioner of the ABCA is appointed by the Governor and is subject to change, such a change could also cause a change in the judgements made in applying discretion by a new Commissioner. Without any established guidelines for how such discretion should be applied, it is possible that licensees are faced with uncertainty and more confusion should the new Commissioner apply their discretion differently. The possibility that a new Commissioner may take an opposing view to the way the previous Commissioner assessed fines and penalties could result in fines being assessed at much higher amounts simply as the result of a change in discretionary judgement—without alteration of any other factors.

The potential disparity for how fines can be assessed differently under different ABCA Commissioners is not wholly hypothetical as there is some evidence that this has occurred in the most recent change in ABCA Commissioners. As shown in the table below, which is also presented on page 3 of this report, the audit released in 2009 highlighted fines ranging from \$100 to \$500 dollars for first and second offense violations of W.Va. Code §11-16-18(a)(3).

| Violation Data from 2009 Post Audit Report | | | |
|---|-----------------------------|----------------------|-----------------------|
| Violation Code | Number of Violations | Dollar Amount | # of Instances |
| 11-16-18(a)(3) | 1st Offense | \$ 100.00 | 1 |
| 11-16-18(a)(3) | 1st Offense | \$ 150.00 | 18 |
| 11-16-18(a)(3) | 1st Offense | \$ 500.00 | 10 |
| 11-16-18(a)(3) | 2nd Offense | \$ 150.00 | 2 |
| 11-16-18(a)(3) | 2nd Offense | \$ 300.00 | 2 |
| 11-16-18(a)(3) | 2nd Offense | \$ 500.00 | 1 |

To compare current fine trends to those outlined in the 2009 report, the current audit team performed a review of sole violations of W.Va. Code §11-16-18(a)(3) utilizing data recorded from Monthly Violation Settlement reports for calendar year 2019. This review identified nine violations where the fines levied, that in the Legislative Auditor's opinion, appear to be less harsh than similar fines outlined in the 2009 report. Overall, the nine violations from the 2019 data resulted in one \$350 fine, four \$150 fines, and four warning letters. While advantageous to licensees, these lesser fines, when compared to fines issued for the same violation code in 2009, highlights how the use of discretion may vary across different ABCA Commissioners. Additionally, future administrations may decide to utilize discretion in a more stringent fashion as opposed to the example above, which would consequently be a disadvantage for licensees and overall causes potential unnecessary confusion.

Again, our audit found no issues with the current application of discretion by the Commissioner. However, it is our opinion that transparency and the assurance of equitability in the treatment of licensees would be better achieved through enhanced documentation of the specific fine amounts associated with each violation. These processes can help ensure consistency in the actions of the ABCA and may also promote consistency across administrations who can better rely on the documented justifications of the prior administration. Finally, as these assessed fines are subject to appeal, it provides transparency to the licensee as to why the actions against them were taken and why fines were assessed to better inform them prior to initiating an appeal.

To further clarify the use of discretion and ensure equitability among changing ABCA administrations, the Legislative Auditor recommends such discretion be defined and documented in a fee schedule and policies and procedures outline how such discretion is to be applied.

Recommendations

1. The Legislative Auditor recommends the ABCA establish via Legislative Rule, a fee schedule that would create minimum and maximum fine amounts for each type of violation, along with parameters for how fines may be assessed beyond the minimum and what specific factors should cause a higher assessed fine.
2. The Legislative Auditor further recommends that, on those occasions when the Commissioner exercises discretion to deviate from the baseline norm for fines and other sanctions, the Commissioner should provide detailed documentation supporting the basis for such deviations in a readily accessible format.
3. The Legislative Auditor recommends the ABCA develop policies and procedures specific to the Enforcement Division that include a copy of the fee schedule recommended above. Additionally, such policies and procedures should clearly document parameters for how fines may be assessed beyond the minimum and what specific factors should cause a higher assessed fine.
4. The Legislative Auditor recommends the Legislature and the ABCA consider modifying statutes and rules pertaining to the appeals process for licensees that ensures conformity to the 14th Amendment standards for due process where applicable.

Other Follow-Up on Previous Post Audit Recommendations

In addition to the follow-up work outlined in Issue 1, analysis and follow-up procedures were also performed on several other previously issued audit recommendations. To identify previously issued recommendations for the audit, all Post Audit reports dating back to 2009 that included recommendations specific to the operations of the ABCA were reviewed. **It should be noted that all issues/recommendations from previous reports were not included in the review as some issues reported did not pertain to current audit objectives, the issues/recommendations were determined to be resolved, or the finding was determined to be immaterial.** Through the process outlined above, two reported issues and related recommendations, in addition to the finding detailed in Issue 1, were selected for review.

One of two previous findings selected for follow-up concerned the ABCA's compliance with internal controls regarding the Enforcement Division's Imprest Funds. These funds are essentially bank accounts maintained by Enforcement Supervisors where withdrawals may be made for cash used for ID compliance, underage stings, and other enforcement duties. The other finding selected for review related to overtime payments made to overtime exempt employees as defined by the federal Fair Labor Standards Act. The Legislative Auditor conducted audit procedures to assess compliance with recommendations, statutes, and Legislative Rules applicable for these two findings and **found no instances of internal control deficiencies or of noncompliance.**

The Legislative Auditor commends the ABCA on the actions taken to address these previous recommendations. Both imprest funds and payroll can be considered as significant business processes of the ABCA. Specifically, imprest funds carry a high level of inherent risk as the funds are often used for cash purchases made by Enforcement Agents during undercover stings. Therefore, proper internal controls and adequate documentation are crucial to ensure that these areas of business are properly safeguarded and tracked by the agency. It is evident through audit processes performed by the Legislative Auditor, the ABCA has made conscious steps since the previous recommendations to address these issues.

Conclusion

In conclusion, it is apparent the ABCA has made recent strides to address recommendations issued in previous reports. However, the Legislative Auditor is still unable to determine if sanctions for violations are being issued on a fair and equitable basis. Given the information outlined above, it is the Legislative Auditor's opinion that the ABCA generate a fee schedule that establishes a baseline norm for fines and sanctions. Additionally, the Commissioner should adequately document in writing deviations from the norm as documented on the fee schedule. It is the Legislative Auditor's opinion that this process is a best business practice and aligns ABCA procedures with recent amendments to 175 CSR 2 Section 3.4.11.b, regarding temporary permits for serving alcohol at outdoor dining areas. Further, this practice would provide transparency to licensees by standardizing processes, aide in third-party audits by providing additional documentation, and mitigate the risk of alleged unfair treatment by the ABCA.

Appendix A

WEST VIRGINIA LEGISLATIVE AUDITOR'S OFFICE

Post Audit Division

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Charleston, WV 25305-0610
(304) 347-4880



Justin Robinson
Director

May 5, 2023

Fredric L. Wooton, Commissioner
WV Alcohol Beverage Control Administration
900 Pennsylvania Ave., 4th Floor
Charleston, WV 25302

Dear Commissioner Wooton:

This is to transmit a **revised** draft copy of the Post Audit Division's report on the West Virginia Alcohol Beverage Control Administration (ABCA). The Legislative Auditor chose to make revisions to further support our audit conclusions based on the response of the ABCA to the initial draft report at the exit conference on May 3, 2023. This report is scheduled to be presented to the Post Audits Subcommittee at the Sunday, May 7, 2023, Post Audits Subcommittee meeting at 12:00pm at the Marshall University Memorial Student Center in Huntington, WV, Room 2W22 on the second floor. We recommend a representative from ABCA be present at the meeting to respond to the report and answer any questions committee members may have during or after the meeting.

Since we are providing this draft late and want to provide the ABCA the opportunity to provide a written response, we will accept the ABCA's response up until Noon on Saturday, May 6, 2023, so that it may be incorporated into the report prior to publication. If you have any questions or concerns, please feel free to contact me. Thank you for your cooperation.

Sincerely,

A handwritten signature in blue ink that reads "Justin Robinson".

Justin Robinson



Appendix B

WEST VIRGINIA

ALCOHOL BEVERAGE CONTROL ADMINISTRATION
FREDRIC L. WOOTON, COMMISSIONER

May 6, 2023

VIA E-MAIL

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Charleston, WV 25305
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Dear Mr. Robinson:

In response to your 2nd updated draft audit report received on May 5, 2023, at 11:36 a.m. (the WVABCA had been prepared to provide a response to your April 28, 2023, report by noon on May 5, 2023, as requested by you), the WVABCA would concur with your report with respect to “Other Follow-Up on Previous Post Audit Recommendations” being resolved or immaterial to this audit and commending the WVABCA for its management of imprest funds. However, the WVABCA disagrees with your review and analysis with respect to the item you identify as Issue 1 (no other issues are referenced in the report).

Response to Issue 1: As stated in previous responses for previous audits, the WVABCA Commissioner is statutorily vested with discretion to determine whether a licensee should be revoked, suspended, placed on probation or imposed a penalty for up to \$1,000.00 per each violation set forth on the West Virginia Code and rules.

As Commissioner, I take a painstaking review of violations and attempt to be consistent when applying similar violations amongst various licensees. The facts and circumstances of a violation are key to my determination of a penalty. However, in many instances there are other factors weighed to determine a penalty whether monetary or not. Such factors include, but are not limited to: the licensee’s history, the severity of the violation, the number or counts of a violation, the licensee’s level of cooperation with the WVABCA, and other factors. Again, I take a measured approach to sanctioning licensees but when licensees violate the law and jeopardize public confidence and safety, then I as the Commissioner must act. Additionally, I may not have mentioned this before, but I do also consider what other licensees have been charged with for similar violations but then must also weigh the other facts and circumstances of a specific incident to determine the penalty. Although, violations or citations may be similar every instance has a different set of facts and circumstances. This is similar to any penalties handed down by a Judge or by other Commissioners who regulate licensees.

The reality is that a fine schedule does not and would not be appropriate for every situation that arises. As you and Stan Lynch stated in our exit conference on May 3, 2023, part of your review was challenging because it was difficult to find measurables from an audit perspective. I would counter to you that an audit of legal or judicial processes, rulings or penalties may not lend itself

to an apples to apples comparison for audit purposes. This would make auditing such processes difficult for courts or other agencies that license and penalize licensees.

Specifically, you should take note that licensees are afforded the option of requesting a hearing if they disagree with the WVABCA's assessed penalties for their violations. The process is as follows: the WVABCA sends a letter describing the alleged violations and also a hearing options letter for a licensee to return indicating the licensee could agree with the penalty or warning and that they committed the violation, or the licensee could request a hearing if they disagree with penalty or that they committed the violation. The Licensee gets multiple options to choose from, usually Option 1 a settlement offer with an admission of the violation or Option 2 to request an administrative hearing that is conducted in accordance with the law at W. Va. Code 60-1-1 *et seq.*, §11-16-1 *et seq.*, the WVABCA legislative rules with detailed administrative hearing processes, and the Administrative Procedures Act at W. Va. Code §29A-1-1 *et seq.* This administrative law process is tried and true and used by many other agencies with significant case law developed on the issue of providing due process. Note, the WVABCA does not issue criminal citations, only administrative citations.

The W. Va. Code and legislative rules require a legal or judicial process for the licensee.

The licensee has a right to "due process" to protest any penalty that they may perceive as you stated in your report as "unfair" and/or "inequitable". A licensee through the various processes in place in the W. Va. Code, legislative rules and the Administrative Procedures Act is given the highest level of due process. The WVABCA's reasoning and supporting documentation would be used as evidence in a hearing along with any evidence presented by the licensee. The licensee could prevail at the hearing or could be subject to the full penalties available under the law as the facts and circumstances would dictate the licensee's penalty as presented to a hearing examiner. At the conclusion of hearing (recorded by a court reporter), the hearing examiner issues a recommended decisions and the Commissioner may accept, reject or accept in part this recommended decision when issuing a final order to the licensee. The licensee would still have 30 days to appeal an unfavorable final order of the WVABCA to the newly created Intermediate Court of Appeals, and the licensee could ultimately attempt to take an unfavorable decision to the WV Supreme Court (as your report references W. Va. Code §60-7-13, See also W. Va. Code §60-7-13a and 175 CSR 2 § 5 and 6 where a detailed process is explained).

Note, a court reviewing the WVABCA's final order is limited in its review:

See W. Virginia Nonintoxicating Beer Com'r v. A & H Tavern, 181 W. Va. 364, 367, 382 S.E.2d 558, 561 (1989): The commissioner of each administrative agency is charged with interpreting the statutes which regulate it. It is well-settled law in West Virginia that an administrative agency's interpretation of its statutes is given great weight unless clearly wrong.

See Appalachian Power Co. v. State Tax Dept. of West Virginia, 195 W.Va. 573, 590, 466 S.E.2d 424, 441 (1995): In this matter, power companies brought an action against the Tax Commissioner and others challenging the legality of regulations implementing the electrical generation tax statute. Among other things, the Court held that "[g]iven the competing policy concerns behind the statute and the industries affected, the language of the statute suggests the Legislature intended

the Tax Commissioner to strike the appropriate balance of the goals of the statute...” Id. at 591, 442.

The Court in this case further opined: Our power to review the Tax Commissioner's decisions on policy grounds is extremely limited. We are not at liberty to affirm or overturn the Commissioner's regulation or decision merely on the basis of our agreement or disagreement with his policy implications, even when important issues of taxation are at stake. This Court has stressed the importance of liberally permitting administrative agencies to carry out legislative dictates; we have recognized that aggressive judicial intervention would disrupt agency processes and negate the legislative body's legitimate delegation of authority. See also *Frymier–Halloran v. Paige*, 193 W.Va. 687, 694, 458 S.E.2d 780, 787 (1995) (“[d]espite the absence of specific [constitutional] treatment, we have **developed doctrines that attempt to define the constitutional role for administrative agencies and to protect them from legislative and judicial overreaching**”). We are keenly aware of the invaluable role various agencies play in making government operate efficiently. Thus, we are loathe to engage in the arduous task of rewriting legislation, regulations, and agency structure simply on the whims of a few who have expressed dissatisfaction with an agency's action. We will not set aside a formally adopted legislative rule without clearcut evidence of an inconsistency between the rule and the authorizing statute.

See *CB&T Operations Co., Inc. v. Tax Commissioner of State*, 211 W. Va. 198, 564 S.E.2d 408 (2002): The Court had held that “[a]n inquiring court—even a court empowered to conduct de novo review—must examine a regulatory interpretation of a statute by standards that include appropriate deference to agency expertise and discretion.”

See also Syl. pt. 4, *Security Nat. Bank & Trust Co. v. First W.Va. Bancorp, Inc.*, 166 W.Va. 775, 277 S.E.2d 613 (1981): The Court held that “[i]nterpretations of statutes by bodies charged with their administration are given great weight unless clearly erroneous.”

See also Syl. Pt. 3, *In re Queen*, 196 W. Va. 442, 473 S.E.2d 483 (1996): “The ‘clearly wrong’ and the ‘arbitrary and capricious’ standards of review are deferential ones which presume an agency’s actions are valid as long as the decision is supported by substantial evidence or by a rational basis.” The Court further stated that “[n]either this Court nor the circuit court may supplant a factual finding of the Commission merely by identifying an alternative conclusion that could be supported by substantial evidence.”

My counsel finds that your May 5, 2023, draft report makes some bold legal assertions with respect to whether violations were reviewed fairly or equitably. As stated in your report, such legal assertions are not even qualified as a review conducted from an audit perspective which could be mistaken as a legal determination that has not been through the legal process.

In particular, the Legislative Services (I was not aware they are part of the Post Audit review) assertions in your letter with respect to licensees who request a hearing before the WVABCA, or its hearing examiner, being inherently unfair or having a chilling effect on the licensee are misplaced, if not outlandish. Licensees who come before the WVABCA for a hearing are given a full opportunity to present facts and evidence to prove their case. In West Virginia it is a privilege to hold an alcohol license and the Commissioner has full discretion to grant licenses (See CDS

Inc. v. Camper, 428 S.E.2d 44(1993), State ex rel. Steele v. Kopp, 305 S.E.2d 285 (1983), and See West Virginia Nonintoxicating Beer Com'r v. A & H Tavern, 181 W. Va. 364, 382 S.E.2d 558 (1989), Longwell v. Hodge, 171 W. Va. 45, 297 S.E.2d 820 (1982), and See also Op Att'y Gen. Mar. 6, 1972 - regarding the Commissioner's discretion). Further the WVABCA (the Commissioner) is granted the authority to exercise the police powers of the State as valid, necessary, and proper for the protection of public safety, welfare, health, peace, and morals. (See W. Va. Code §11-16-2 and see also W. Va. Code §60-1-1, W. Va. Const Art.VI, §46, and W. Va. Code §60-7-1).

Again, on an appeal, a court of competent jurisdiction would review the WVABCA's final order and have to reach a justifiable decision that the final order would be arbitrary and capricious or clearly erroneous before supplanting the court's judgment in place of the WVABCA. Since 1999, your position on requiring a fine schedule seems misplaced. Further, many other agencies issue penalties against licensees. Have fine schedules been recommended for those agencies?

Your report includes assertions that many licensees have lodged complaints against the WVABCA. However, your report does not indicate how many such licensees complained. It is possible that those who are complaining are bad actors themselves. Every licensee is well aware of the penalties provided in the W. Va. Code and rules of possible probation, up to \$1,000 monetary penalty per violation, suspension, and/or revocation.

Further, your charts from 2009 are confusing. I have been the Commissioner since 2017 and could not speak for the Commissioners who were in office from 2009 to my tenure in 2017.

Again, the way your May 5, 2023, report is worded it appears to make peculiar legal conclusions that are not accurate. Again, anytime a licensee felt its penalty for a violation was not appropriate, the licensee could request a hearing on the violation. In some instances, the licensee simply calls the Enforcement Director (who gets approval from the Commissioner) to discuss the facts and evidence and reach an alternative settlement to that noted in Options letter. Again, at different steps of the legal process the licensee is afforded great due process. Your assertions in the report are again confusing regarding assignment of specific error and detailed descriptions. If a licensee requests a hearing after receiving the violation letter (detailing the violations) and the options letter (with the settlement options or the ability to request a hearing), the WVABCA issues a Notice of Hearing with a clear and concise statement of each violation at least 10 days prior to the hearing (usually much more than 10 days) with clear and concise assignment of errors in determination of the licensee's violation (See 175 CSR 2 § 6.3.1.). Further, the parties can file oral or written briefs in the hearing to support their case. Again, the Legislative Auditor or Legislative Services do not appear to grasp the administrative legal process and is trying to audit a legal process that does not lend itself to numerical audits.

Your letter adds an assertion that 30 states use a fine schedule. West Virginia is a control state and utilizes one Commissioner and not a Commission with multiple individuals. Each state is organized differently, especially open states versus control states. This assertion again appears misplaced. Simply looking for a fee schedule on a state's website is not the same as researching how the other state's Constitution, code sections, and rules are written. Every state regulates alcohol differently.

Your letter cites cases from Georgia and Indiana where apparently no Notice of Hearing was issued by the regulatory authorities. These cases do not seem on point. Please note the West Virginia cases cited in my letter. In addition to issuing a Notice of Hearing, the parties can make opening and closing statements, present witnesses and evidence, and file briefs utilizing a written hearing transcript. Further, the hearing examiner issues a Recommended Order to the Commissioner with findings of facts, conclusions of law, and a recommended decision; the Commissioner can accept or reject the recommended order in whole or in part in the Commissioner's Final Order. I am unaware of any allegation or case where the WVABCA failed to comply with West Virginia law with respect to due process and the 14th Amendment of the US Constitution (your draft report does not make clear whether you reference the WV or US Constitution).

Your assertion of the costs of a hearing are prohibitive against a licensee are not accurate either. A licensee could represent themselves throughout the process and make their arguments. The WVABCA has many licensees represent themselves in a hearing. Additionally, the WVABCA also makes decisions based on facts and evidence and the costs of litigation to determine whether to settle a case or not.

In our May 3, 2023, audit exit conference you noted that the statements in your report were from an audit perspective and not a legal perspective. However, your revised May 5, 2023, report makes several legal statements and assertions that are not fair or supported by the facts. In the exit conference, you stated the crux of the Legislative Auditor's report is that you are trying to make the WVABCA's violations more auditable. Again, I would contend that the courts give great weight and deference to all commissioners and agencies' actions and the courts have the ability to supplant their judgment when such actions are "clearly erroneous" or "arbitrary and capricious". The legal process and due process protect licensees and applicants and this process may not lend itself to auditing standards or ease of auditing.

Further, the legislative rule section you cited establishes a requirement for the Commissioner to describe why entertainment would not be allowed in an outdoor street dining area is not analogous to justifying in writing a violation. A better analogy would be when the Commissioner denies a license and the WVABCA issues a denial order, which is again appealable through an administrative hearing, to circuit court, the Intermediate Court, and the WV Supreme Court.

With respect to your report stating that the software could better account for violations, I agree that the WVABCA's software should better account for multiple violations and multiple counts. I will endeavor to request a software upgrade from our current software provider or potentially pursue different software with such capabilities.

In conclusion, the WVABCA does not plan to implement a fine schedule.

Sincerely,



Fredric L. Wooton
Commissioner

Appendix C

Objective, Scope, and Methodology

The Post Audit Division within the Office of the Legislative Auditor conducted this audit as authorized by Chapter 4, Article 2, Section 5 of the *West Virginia Code*, as amended.

Objective

The objectives for this audit were:

1. To follow-up on prior audit issues identified and recommendations made in past audits performed by the Legislative Auditor.
2. To determine if the ABCA's policies and procedures for enforcement processes are efficient, effective, equitable, and are operating in compliance with applicable laws, rules, and regulations.

Scope

The scope of this audit consisted of a review of all documents pertaining to the objectives above, as well as all applicable W.Va. Code, Legislative Rules, and best business practices. Also included were reviews of payroll reports, imprest fund reports, monthly violation statements, and samples of alcohol licensees' violation history. The timeframe of these reviews spanned from calendar years 2018-2022.

Methodology

Post Audit staff gathered and analyzed several sources of information and assessed the sufficiency and appropriateness of the information used as evidence. Testimonial evidence was gathered through meetings with the ABCA and correspondence via email with department heads. The purpose for testimonial evidence was to gain a better understanding or clarification of certain issues, to confirm the existence or non-existence of a condition, or to understand the respective agency's position on an issue. Such testimonial evidence was confirmed by either written statements or the receipt of corroborating or physical evidence. Audit staff analyzed various source documents that were provided to us by the ABCA, were retrieved from wvOASIS, or were publicly available on the web.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Duties and Responsibilities

The mission of the WVABCA Enforcement Division is to ensure adherence to W.Va. State Code and Legislative Rules. The enforcement staff live and work in the communities they serve and are committed to enforcing state laws pertaining to the sale, purchase, transportation, manufacture, consumption, and possession of alcoholic beverages. The duties performed (see illustration below) are crucial to protecting the public, patrons, and licensees.

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| Initial Inspection <ul style="list-style-type: none">•Performs initial inspections for new applicants<ul style="list-style-type: none">•Special Events•Revised Floor Plans | Background Checks <ul style="list-style-type: none">•To identify criminal history of applicant•To ensure applicant is of good moral character | Inspections <ul style="list-style-type: none">•Performs inspections of Class A and Class B licensed establishments to ensure compliance with rules and regulations |
| Responding to Complaints <ul style="list-style-type: none">•Allegations received from an individual, group, or entity•Allegations received from law enforcement | Compliance Checks <ul style="list-style-type: none">•Underage Alcohol Compliance Checks are conducted to help protect the underage public and the public at large | Walk-throughs <ul style="list-style-type: none">•Walk-throughs are a technique carried-out to combat illegal underage drinking and identify other compliance issues |
| Compliance Sweeps <ul style="list-style-type: none">•Working together with other law enforcement agencies to perform compliance sweeps | Investigations <ul style="list-style-type: none">•Hidden ownership<ul style="list-style-type: none">•Complaints•Trade Practices•Underage and Overserving•Source (DUI Death) | Undercover Details <ul style="list-style-type: none">•Undercover operations are conducted to help protect the public by ensuring establishments are following rules and procedures |

Licensed locations are visited a minimum of two times per year. In FY22, agents achieved an inspection rate of 98% (inspections of licenses are impacted due to business closures, ownership changes, and seasonal closures). During these inspections, agents provide educational and training material to ensure that licensees are empowered with the information necessary to successfully operate their licensed establishment. The WVABCA provides posters for proper carding procedures and a carding video is available on the WVABCA website. The training video can be shown during inspections, or a DVD can be provided to licensees. Enforcement agents also disseminate educational materiel such the Blood Alcohol Content (BAC) chart, Fetal Alcohol Syndrome (FAS) poster, and the Human Trafficking poster, all of which are required to be posted by the licensee in a location accessible for patron viewing. In addition, the WVABCA Hours of Operation form and the EMS/Law Enforcement Notification posters are also provided to licensees.



Enforcement





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