

Full Performance Evaluation

Tourism Functions Within the Development Office

**The Tourism Functions within the Development
Office Provide a Valuable Service to West Virginia and
Should be Continued**

**The Tourism Commission's Lack of Promulgation of
Legislative Rules Denies the Legislature the Oversight
It Intended to Have Over the Distribution of Tourism
Promotion Funds**

**The Tourism Commission and its Grantees Receiving
\$15,000 or More in State Funds Are Not Following
the Independent Audit Requirements of West Virginia
Code §12-4-14(a)**

**Documentation to Support Grant Recipient Scoring is
Not Retained By the Tourism Commission**

**According to a Legal Opinion, the Tourism Commission Does
Not Follow a Legal Process of Resolving Audit Findings on
Grantees**



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OFFICE OF THE LEGISLATIVE AUDITOR

Aaron Allred
Legislative Auditor

John Sylvia
Director

Denny Rhodes
Research Manager

Paul Barnette
Senior Research Analyst

Performance Evaluation and Research Division

Building 1, Room W-314

State Capitol Complex

Charleston, West Virginia 25305

(304) 347-4890

WEST VIRGINIA LEGISLATURE
Performance Evaluation and Research Division

Building 1, Room W-314
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0610
(304) 347-4890
(304) 347-4939 FAX



John Sylvia
Director

December 5, 2004

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

The Honorable J.D. Beane
House of Delegates
Building 1, Room E-213
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0470

Dear Chairs:

Pursuant to the West Virginia Sunset Law, we are transmitting a Full Performance Evaluation of the *Tourism Functions Within the Development Office*, which will be presented to the Joint Committee on Government Operations on Sunday, December 5, 2004. The issues covered herein are "The Tourism Functions Within the Development Office Provide a Valuable Service to West Virginia and Should be Continued;" "The Tourism Commission's Lack of Promulgation of Legislative Rules Denies the Legislature the Oversight It Intended to Have Over the Distribution of Tourism Promotion Funds;" "The Tourism Commission and its Grantees Receiving \$15,000 or More in State Funds Are Not Following the Independent Audit Requirements of West Virginia Code §12-4-14(a);" "Documentation to Support Grant Recipient Scoring is Not Retained By the Tourism Commission;" and "According to a Legal Opinion, the Tourism Commission Does Not Follow a Legal Process of Resolving Audit Findings on Grantees."

We transmitted a draft copy of the report to the West Virginia Development Office on November 15, 2004. We held an exit conference with the Development Office on November 16, 2004. We received the agency response on November 24, 2004.

Let me know if you have any questions.

Sincerely,

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

John Sylvia

JS/wsc

Joint Committee on Government and Finance

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Executive Summary

Issue 1: The Tourism Functions within the Development Office Provide a Valuable Service to West Virginia and Should be Continued.

According to the United States Bureau of Economic Analysis, the tourism industry provides billions of dollars of spending each year. Furthermore, the National Conference of State Legislatures has indicated that the competition among states for tourists will continue to become more competitive as states attempt to capture tourism dollars. This is especially true in times of budget shortfalls. The consequences of not having a central entity charged with tourism promotion has been well documented. Therefore, it is clear that the state needs an entity charged with promoting tourism in the state. The Division of Tourism within the Development Office has achieved a number of accomplishments, has infrastructure in place, and has in place a number of vital industry contacts. Therefore, the Legislative Auditor recommends that the Tourism functions within the Development Office should be continued.

The state needs an entity charged with promoting tourism in the state.

Issue 2: The Tourism Commission's Lack of Promulgation of Legislative Rules Denies the Legislature the Oversight It Intended to Have Over the Distribution of Tourism Promotion Funds.

In 1995, the Legislature created the Tourism Promotion fund to promote tourism in the state by providing monetary assistance to for-profit and nonprofit organizations in their advertising campaigns. Over \$70 million has been distributed since 1995. This program grants and denies significant benefits to a large segment of the state's various tourism industries. Consequently, it is the opinion of the Legislative Auditor that the Legislature intended to have some oversight of the program by clearly indicating in statute (§5B-2-12) that the distribution of the funds was to be done pursuant to legislative rules. **However, instead of promulgating legislative rules, the Tourism Commission promulgated procedural rules.**

Instead of promulgating legislative rules, the Tourism Commission promulgated procedural rules.

When the Legislature requires an agency to file legislative rules, it is imposing a restriction on the agency to seek the Legislature's permission to promulgate rules that specify the manner in which the agency will exercise its authority (§29A-3-9). The legislative rule-making process allows the Legislature to review the Tourism Commission's proposed administration of the Tourism Promotion fund, and it allows citizens of the state who may be affected by the manner in which these funds are distributed to communicate

their concerns to the Legislature. The promulgation of procedural rules does not require legislative oversight, although the Legislature may review procedural rules if it desires (§29A-3-16). The commission has made several decisions without legislative approval on how these promotional funds will be distributed, **some activities and industries have been denied access to funds, some restrictions and requirements could be objectionable to the Legislature, and the commission has made several changes over the years that have affected several industries in the state. Since the Legislature has not reviewed the commission's rules, it is not clear if the distribution of the Tourism Promotion fund meets the intent of the Legislature.** Given these deficiencies that result from the Tourism Commission promulgating procedural rules instead of legislative rules, the Legislative Auditor recommends that the Tourism Commission promulgate legislative rules as required by law.

The commission has made several decisions without legislative approval on how tourism promotional funds will be distributed.

Issue 3: The Tourism Commission and its Grantees Receiving \$15,000 or More in State Funds Are Not Following the Independent Audit Requirements of West Virginia Code §12-4-14(a).

According to West Virginia code §12-4-14(a), any organization that receives \$15,000 or more in state funded grants is required to file an audit with the Legislative Auditor's Office within two years of the disbursement of funds. Senate Bill 456 (SB 456), which was passed March 13, 2004, amended West Virginia code §12-4-14 to require state agencies issuing grants to notify grantees of their requirement to comply with the audit requirement. SB 456 also requires state agencies to cease issuing grants to grantees who are not in compliance with the audit requirement. However, the Tourism Commission has not notified grantees of the audit requirement since the passage of SB 456. Furthermore, the Legislative Auditor has no audits on file for Tourism Commission grantees. Therefore, the Legislative Auditor recommends that the Tourism Commission notify grantees of the audit requirement as required. The Legislative Auditor further recommends that the Tourism Commission receive a copy of the audits in order to sanction grantees that are not complying with the audit requirement.

The Tourism Commission has not notified grantees of the audit requirement since the passage of SB 456.

Issue 4: Documentation to Support Grant Recipient Scoring is Not Retained By the Tourism Commission.

Documentation supporting these project scores are not retained.

The commission must choose whether it will continue to fund all projects at a reduced rate, or whether it will deny funding projects based on project scores as originally designed.

Although the commission has established a legal process for resolving noncompliance matters, the process is “used infrequently” according to the commission.

Each year, the Tourism Commission receives hundreds of applications for direct advertising grants. These grants are divided into 3 categories: large grants; small grants; and fair and festival grants. Small grants and fair and festival grants are evaluated by Tourism Commission staff to ensure compliance with applicable rules and guidelines and are then funded as they are received. Large grants are reviewed by a subcommittee of the commission. Subcommittee members evaluate applications and assign them a score based on criteria contained in rules. However, documentation supporting these project scores are not retained. The commission has had ample funding in the past to fund all projects submitted for funding that conform to grant guidelines. Therefore, the project scores are a matter of formality and have no real significance.

Beginning in fiscal year 2005, the revenue received by the Tourism Commission will be reduced by more than half. The commission anticipates having more requests for funds than funds available. It is likely that the commission will no longer be in a financial position to continue to fund all projects at the current level of funding. As such, the commission must choose whether it will continue to fund all projects at a reduced rate, or whether it will deny funding projects based on project scores as originally designed. If the commission chooses to award funding for projects based on project scoring, then documentation representing how those scores were achieved must be retained.

Issue 5: According to a Legal Opinion, the Tourism Commission Does Not Follow a Legal Process of Resolving Audit Findings on Grantees.

The Tourism Commission implemented an auditing function in which some grantees are reviewed for compliance with grant requirements. Since the auditing function began in October 2002, the commission has conducted nine audits. Five of these audits have revealed noncompliance issues and potentially fraudulent activity by grantees. Although the commission has established a legal process for resolving noncompliance matters, the process is “used infrequently” according to the commission, and evidence also indicates that there are times when the process is not used. The commission’s process indicates that an audit subcommittee will review the findings of audits and recommend to the full commission any action to be taken against grantees.

However, commission minutes do not reflect all of the actions taken by the audit subcommittee, which suggests that the subcommittee has implemented action against violating grantees and informs the full commission after the fact. This practice is illegal according to a legal opinion from Legislative Services. The legal opinion indicates that the full commission may not delegate to a subcommittee any responsibility that requires full commission action.

Recommendations

1. *The Legislative Auditor recommends that the Tourism Function of the Development Office be continued.*
2. *The Legislative Auditor recommends that the Tourism Commission propose legislative rules in compliance with WV Code §5B-2-12.*
3. *The Legislative Auditor recommends that the Legislature consider amending WV Code §5B-2-12 to grant the Tourism Commission emergency rule making authority until legislative rules can be promulgated.*
4. *The Legislative Auditor recommends that the Legislature consider reviewing the Tourism Commission's current procedural rules and proposed changes, by authority of West Virginia code §29A-3-16.*
5. *The Legislative Auditor recommends that the Tourism Commission notify grantees receiving over \$15,000 of the independent audit requirements as required by West Virginia code §12-4-14.*
6. *The Legislative Auditor recommends that the Tourism Commission require grantees to provide the commission with a copy of independent audits and that the commission sanction grantees who do not comply with §12-4-14 as required by code.*
7. *The Legislative Auditor recommends that the Tourism Commission maintain a database to track whether or not grant recipients have complied with the audit requirements of §12-4-14.*
8. *The Legislative Auditor's Office recommends that the Legislature consider the development of a state debar list which would include all organizations sanctioned from receiving grants from state agencies.*

9. *The Legislative Auditor recommends that the Tourism Commission develop a plan on funding projects under a reduced revenue scenario.*

10. *The Legislative Auditor recommends that documentation supporting funding decisions be retained in accordance with the Records Management and Preservation Act.*

11. *The Legislative Auditor recommends that the audit committee notify the full commission of all audit findings and make recommendations to the full commission for disposition.*

12. *The Legislative Auditor recommends that the Tourism Commission notify CSI about all instances of potential fraudulent activity for investigation and resolution.*

Review Objective, Scope and Methodology

This Full Performance Evaluation of the Tourism Functions within the Development Office (Division of Tourism) is required and authorized by the West Virginia Sunset Law §4-10-4 of the West Virginia Code, as amended.

Objective

The objective of this review is to determine if the Division of Tourism issues Cooperative Tourism Promotion Fund grants in a manner that is consistent with West Virginia Code.

Scope

The scope of this review covers the period of 1999 to present.

Methodology

Information used in compiling this report was gathered from the Division of Tourism, the Tourism Commission, the West Virginia Auditor's Office, and the Development Office. The methodology included a review of Division of Tourism grant files, Tourism Commission minutes, internal audits conducted by the Division of Tourism, vendor payments made by the Division of Tourism, as well as a review of information provided by the National Conference on State Legislatures. Every aspect of this review complied with Generally Accepted Government Auditing Standards (GAGAS).

Issue 1

The Tourism Functions within the Development Office Provide a Valuable Service to West Virginia and Should be Continued.

Issue Summary

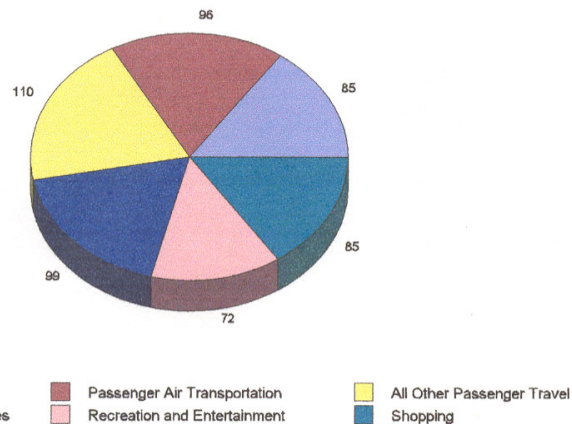
According to the United States Bureau of Economic Analysis, the tourism industry provides billions of dollars of spending each year. Furthermore, the National Conference of State Legislatures has indicated that the competition among states for tourists will continue to become more competitive as states attempt to capture tourism dollars. This is especially true in times of budget shortfalls. The consequences of not having a central entity charged with tourism promotion has been well documented. Therefore, it is clear that the state needs an entity charged with promoting the state. The Division of Tourism within the Development Office has achieved a number of accomplishments, has infrastructure in place, and has in place a number of vital industry contacts. Therefore, the Legislative Auditor recommends that the Tourism functions within the Development Office should be continued.

Estimated tourism related sales for 2004 are \$546 billion. This would translate into more than \$2 billion for West Virginia.

Direct Tourism Sales Account \$518 Billion Annually Nationwide

Each year the United States Bureau of Economic Analysis within the United States Department of Commerce provides data on the sales of United States tourism industries. According to the bureau, in 2003, direct tourism related sales accounted for \$518 billion annually. Estimated sales for 2004 are \$546 billion. If direct tourism sales were extrapolated to the individual states on the same basis of gross state product, this would translate into more than \$2 billion for West Virginia. Direct tourism sales are defined by the bureau as goods and services sold directly to visitors of a state. Figure 1 shows estimated Direct Tourism Sales for the U.S. for 2004.

Figure 1
Estimated Direct Tourism Sales for 2004
 In Billions of Dollars



It is clear that the tourism industry has the potential to significantly impact state economies.

Given the impact that tourism can have on a state's economy, the state needs some mechanism in place to promote tourism in the state.

In addition to direct tourism sales, the tourism industry generates indirect tourism sales. Indirect tourism sales are defined by the bureau as goods and services used to produce the products sold to tourists. For 2004, it is estimated that indirect tourism sales will reach \$418 billion. This means that total direct and indirect tourism sales for 2004 for the United States amounted to an estimated \$965 billion. It is clear that the tourism industry has the potential to significantly impact state economies. In order to capitalize on tourism sales, states need to be in a strong position to compete for tourists. According to the National Conference on State Legislators (NCSL),

It is the current practice in most states to expect the state tourism office to take the lead in developing tourism with the private sector. Before 1950, only 15 states were active in tourism development. Today, all states have an office dedicated to tourism development and promotion. (emphasis added)

West Virginia Development Office's Division of Tourism

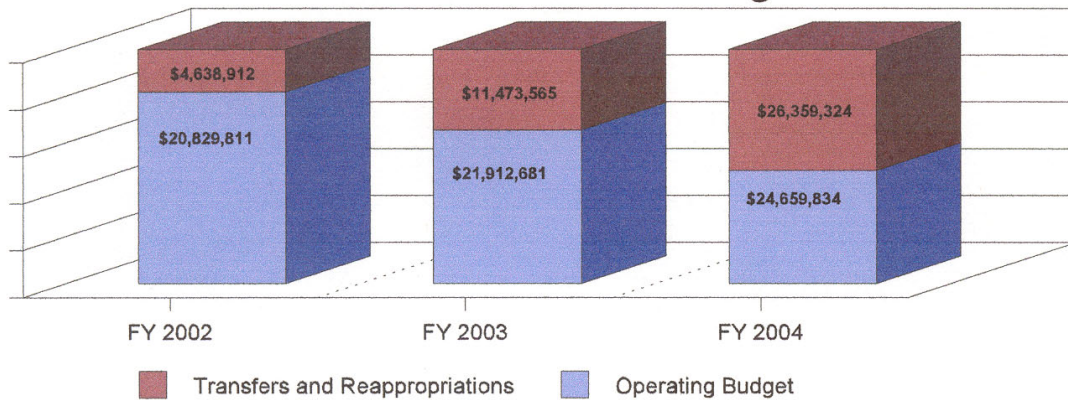
Given the impact that tourism can have on a state's economy, the state needs some mechanism in place to promote tourism in the state. The state's primary means of attracting tourists is through the Division of Tourism within the West Virginia Development Office. According to the Division of Tourism, the mission of the division is:

To cultivate a world-class travel and tourism industry in West Virginia through creation of jobs, stimulation of investment, expansion of current tourism attractions and promotion of a positive state image, thereby improving the way of life for West Virginians.

The division operates on a combination of general revenue funds and appropriated special revenue funds of which the primary source is racetrack video lottery funds. Figure 2 shows the Division of Tourism Budget for the fiscal years 2002 - 2004.

Figure 2

Division of Tourism Budget



Tourism Commission Has Infrastructure in Place

The Division of Tourism already has an infrastructure in place which is a major reason that it should be continued.

One reason that supports continuing the Division of Tourism within the Development Office is that Tourism already has an infrastructure in place. The Division of Tourism is divided into 7 components:

- **Administration** - Administration provides support to all the departments within the Division of Tourism.
- **Advertising** - The advertising program of the Division of Tourism improves the image of the state and increases consumer awareness of West Virginia as a vacation destination, resulting in increased visits and greater economic impact for the state.
- **Cooperative Tourism** - The cooperative tourism section of the Division of Tourism educates and assists the tourism industry in branding West Virginia as a premier vacation

destination through application for direct advertising grants, resulting in greater economic impact and economic development for the state.

- **Marketing** - To develop a comprehensive marketing, public information, and advertising strategy to achieve the mission set forth by the West Virginia Tourism Commission.
- **Public Information** - The public information section works in partnership with other sections of the Division of Tourism and with tourism industry members to develop and implement programs that promote the state as a premier travel destination, with emphasis on the unique and diverse travel opportunities the state offers. The section uses these programs along with its daily media activities to achieve editorial coverage of tourism - both for travel and economic development recognition - in media markets within West Virginia and in regional, national, and international publications that reach consumers and travel trade industry members.
- **Telemarketing, Research and Development** - The call center and the fulfillment center provide timely and useful information to residents and prospective visitors calling 1-800-CALL-WVA. This section provides a toll-free call transfer service to West Virginia State Parks and private tourism facilities and conducts database research and outbound marketing activities.
- **Welcome Centers** - The welcome centers provide travel information and assistance to travelers at strategic locations throughout West Virginia.

Division of Tourism provides staff for the WV Tourism Commission which is predominantly composed of industry representatives.

Division of Tourism Has Established Industry Contacts

Another benefit for continuation is that the Division of Tourism provides staff for the WV Tourism Commission which is predominantly composed of industry representatives. This group has awarded hundreds of grants to private industry and nonprofit organizations whose goal is to promote the state of West Virginia and its attractions.

Division of Tourism Markets WV Tourism

In addition to having an established infrastructure and industry contacts, it is the opinion of the Legislative Auditor's Office that the Division of Tourism is necessary to market West Virginia tourism. According to the division's 2003 Annual Report, the following was accomplished in 2003:

- A record number of 403,000-plus travel guides were distributed to residents in all 50 states, the District of Columbia and 37 countries (compared to 345,684 travel guides mailed in 2002);
- A record number of 1.15 million user sessions on the callwva.com web site, an increase of 40 percent over 2002 and more than 4.4 million registered guests at the state welcome centers, an increase of two percent over 2002, which was then a record year.
- The median cost per inquiry of advertising is now less than \$15. Down from about \$200 per inquiry in 1999.
- West Virginia partners with: Travel South USA to promote southern travel; is participating in an Appalachian Regional Commission tourism development project; and joined the Mid-Atlantic Tourism Public Relations Association.
- In partnership with Division of Natural Resources, Tourism has worked with programs designed to promote more interest in hunting, fishing and wildlife programs in the state. This includes working with the Outdoor Writers Association of America, the Governor's Youth Hunting and Fishing Challenge, the Challenged Hunters program at Snowshoe, National Hunting and Fishing Days at Stonewall Jackson Lake State Park and hosting national and regional travel writers.
- The West Virginia Division of Tourism received the Mercury Award for audio-visual programming at the Tourism Industry Association of America's educational conference in Asheville, N. C.
- In February, Tourism officials announced that 2002 was a record year for visitors at 23.9 million, an 8.5 percent increase over 2001 and direct spending by tourists jumped to \$3.53 billion, an increase of 13.9 percent over 2001.

It is the opinion of the Legislative Auditor's Office that the Division of Tourism is necessary to market West Virginia tourism.

-
- In 2003, the Call Center answered nearly 340,000 calls.

The Consequences of West Virginia Not Promoting Tourism

According to West Virginia code, part of the full performance review process is to determine if there is a continued need for the audited entity. Although it is often difficult to separate the impacts of the tourism function from the natural appeal of a state to attract visitors, eliminating the tourism function within the state can have significant consequences. According to the NCSL,

Eliminating the tourism function within the state can have significant consequences.

In 1993, residents of Colorado chose not to re-authorize the 10-year-old tourism tax levied on restaurants, ski lift tickets, lodging and attractions....Revenues from this .02 percent tax raised approximately \$12 million annually in funding for the Colorado Tourism Board to advertise and promote the state to tourists across the nation. Since the loss of state funding, Colorado fell from one of the top five most popular tourism destinations to 12th. According to an economic impact report prepared by Longwoods International, 1998, Colorado lost 30 percent of its tourism market share since losing the tourism tax. Between 1992 and 1997, tourism spending in Colorado dropped \$847 million, according to the report.

In times when budgets are tight, West Virginia cannot afford the type of decrease in tourism revenues suffered by Colorado when it eliminated the funding for the Colorado Tourism Board.

After the state refused to renew the funding, the state created two different entities, neither of which were funded at any significant level. In 1999, the Colorado Legislature appropriated \$6 million in funding. In 2000, the Colorado Tourism Office was created. As of 2001, Colorado ranked 37th in tourism marketing budgets, and ranked 18th out of the 50 states with a 1.8% share of U.S. tourism. In times when budgets are tight, West Virginia cannot afford the type of decrease in tourism revenues suffered by Colorado when it eliminated the funding for the Colorado Tourism Board.

Conclusion

Each year, tourism accounts for billions of dollars in the United States. Competition for these dollars among the states is very competitive. Eliminating the tourism function within West Virginia would likely give an unfair disadvantage to the state and cost West Virginia millions of dollars in tourism sales. Given that the Division of Tourism already has an established infrastructure, established industry contacts, and has effectively marketed West

Virginia, the Legislative Auditor recommends that the Tourism Functions of the Development Office be continued.

Recommendation

1. *The Legislative Auditor recommends that the Tourism Functions of the Development Office be continued.*

Issue 2

The Tourism Commission’s Lack of Promulgation of Legislative Rules Denies the Legislature the Oversight It Intended to Have Over the Distribution of Tourism Promotion Funds.

The distribution of the funds was to be done pursuant to legislative rules. Instead of promulgating legislative rules, the Tourism Commission promulgated procedural rules.

Issue Summary

In 1995, the Legislature created the Tourism Promotion fund to promote tourism in the state by providing monetary assistance to for-profit and nonprofit organizations in their advertising campaigns. Over \$70 million has been distributed since 1995. This program grants and denies significant benefits to a large segment of the state’s various tourism industries. Consequently, it is the opinion of the Legislative Auditor that the Legislature intended to have some oversight of the program by clearly indicating in statute (§5B-2-12) that the distribution of the funds was to be done pursuant to legislative rules. **However, instead of promulgating legislative rules, the Tourism Commission promulgated procedural rules.**

The commission has made several decisions without legislative approval on how tourism promotional funds will be distributed,

When the Legislature requires an agency to file legislative rules, it is imposing a restriction on the agency to seek the Legislature’s permission to promulgate rules that specify the manner in which the agency will exercise its authority (§29A-3-9). The legislative rule-making process allows the Legislature to review the Tourism Commission’s proposed administration of the Tourism Promotion fund, and it allows citizens of the state who may be affected by the manner in which these funds are distributed to communicate their concerns to the Legislature. The promulgation of procedural rules does not require legislative oversight, although the Legislature may review procedural rules if it desires (§29A-3-16). The commission has made several decisions without legislative approval on how these promotional funds will be distributed, **some activities and industries have been denied access to funds, some restrictions and requirements could be objectionable to the Legislature, and the commission has made several changes over the years that have affected several industries in the state. Since the Legislature has not reviewed the commission’s rules, it is not clear if the distribution of the Tourism Promotion fund meets the intent of the Legislature.** Given these deficiencies that result from the Tourism Commission promulgating procedural rules instead of legislative rules, the Legislative Auditor recommends that the Tourism Commission promulgate legislative rules as required by law.

West Virginia Tourism Offers Grants from the Cooperative Tourism Promotion Fund

In July 1999, the National Conference on State Legislatures (NCSL) published the Legislator Guide for Travel and Tourism. In it, NCSL states:

*With the increased competition for travelers, states have realized the importance of using advertising to capture a greater share of the travel market. **Advertising is the single most critical function of the state tourism office and, therefore, the greatest expense in most offices.** (Emphasis Added)*

Furthermore, the travel and tourism guide states that:

Cooperation between government agencies and the private sector is essential to help states promote new tourism to new markets and develop new attractions.

In keeping with these themes, the West Virginia Tourism Commission offers grants from the Cooperative Tourism Promotion Fund (CTPF). According to the Commission, *“The CTPF enables businesses within West Virginia to apply for matching grants for advertising programs specifically promoting tourism in West Virginia.”*

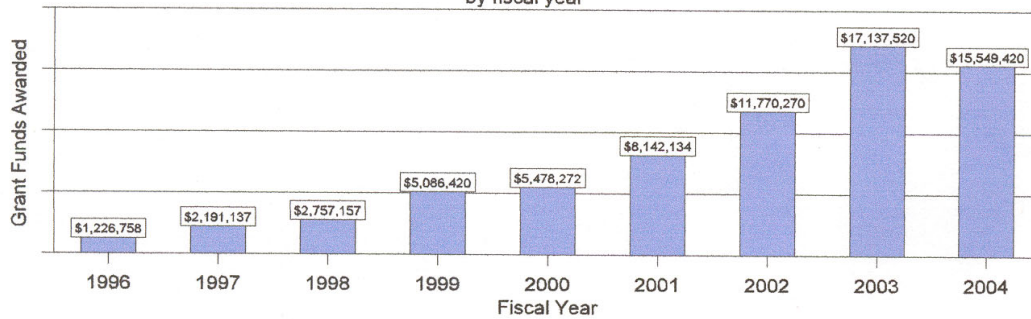
An important part of state tourism is advertising and partnering with the private sector.

According to the Tourism Commission, the mission is:

To cultivate a world-class travel and tourism industry in West Virginia through creation of jobs, stimulation of investment, expansion of current tourism attractions and promotion of a positive state image, thereby improving the way of life for West Virginians.

As stated previously, an important part of state tourism is advertising and partnering with the private sector. The Tourism Commission began awarding direct advertising grants in 1996 and has awarded millions of dollars of state grant funds each year. Figure 3 shows the amount of grant funds awarded by fiscal year.

Figure 3
WV Tourism Cooperative Grant Funds Awarded
 by fiscal year



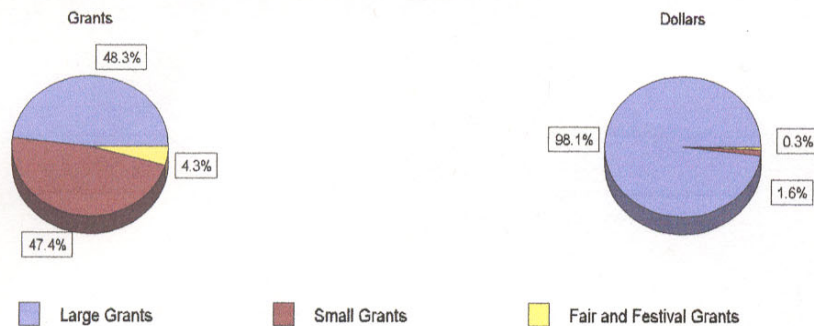
The Tourism Commission divides grants into three categories: large grants, small grants, and fair and festival grants.

The Tourism Commission divides grants into three categories: large grants, small grants, and fair and festival grants. Large grants are grants where the applicant’s share of the cost is at least \$10,000. Small grants are grants where the total amount of the grant awarded does not exceed \$2,500. Fair and festival grants are for fair and festivals only, and the total grant award amount cannot exceed \$5,000. Figure 4 shows the total grants issued as a percentage of grants.

Since 1995, the commission has issued:

2. 892 large grants for a total of \$69,071,519;
3. 875 small grants for a total of \$1,104,752; and,
4. 80 fair and festival grants for \$214,961.

Figure 4
Grants Issued



Tourism Commission Promulgated Procedural Rules Instead of Legislative Rules

The Tourism Commission is mandated to administer the grants distributed from the Cooperative Tourism Promotion Fund in accordance with legislative rules.

According to WV Code §5B-2-12, the Tourism Commission is mandated to administer the grants distributed from the Cooperative Tourism Promotion Fund in accordance with legislative rules. The code states:

The funds shall be made available...according to legislative rules promulgated by the tourism commission: Provided, That emergency rules for the distribution of funds for the fiscal year ending the thirtieth day of June, one thousand nine hundred ninety-six, are specifically authorized.

Instead of promulgating legislative rules, as required by code, the Tourism Commission promulgated procedural rules to administer the program.

However, instead of promulgating legislative rules, as required by code, the Tourism Commission promulgated procedural rules to administer the program. According to the Tourism Commission, this was done because the initial legal counsel to the Tourism Commission advised them to operate under procedural rules. In addition to the procedural rules, the Tourism Commission currently enforces a set of guidelines not contained in the rules to further clarify the program. The commission states that part, but not all, of these guidelines are being added to the procedural rules.

Promulgating procedural rules instead of legislative rules denies the Legislature an intended desire to have oversight over how the distribution of the Tourism Promotion fund would be conducted.

One consequence of promulgating procedural rules instead of legislative rules is that it denied the Legislature an intended desire to have oversight over how the distribution of the Tourism Promotion fund would be conducted. When the Legislature gives authority to an agency to grant or deny a specific benefit, legislative rules are required (§29A-1-2(d)). This gives the Legislature some oversight in how the program will grant or deny such benefits. The legislative rule-making process establishes a mechanism in which **the agency is requesting permission from the Legislature to administer a program in the manner specified in the proposed legislative rules (§29A-3-9).** The promulgation of procedural rules does not require legislative oversight, although the Legislature may review procedural rules if it so desires (§29A-3-16). Another consequence of not promulgating legislative rules is that it denies citizens of the state who may be affected by the manner in which these funds are distributed to communicate their concerns to the Legislature as it considers the proposed legislative rules.

Furthermore, since the commission's rules do not have legislative approval, it is not certain that legislative intent is being followed.

Furthermore, since the commission's rules do not have legislative approval, it is not certain that legislative intent is being followed. This is compounded by the fact that the Tourism Commission regularly changes the rules to adjust to changing circumstances. Legislative approval of these modifications ensure that legislative intent is continued. Since there have been

significant reductions in video lottery revenues to the Tourism Promotion fund, the Tourism Commission elected to restrict access to the program, and restrict reimbursement to specific expenditures in order to compensate for reduced funding. According to representatives of the tourism industry, these changes will have a significant effect on certain industries. Thus, with these recent changes, it is important that the commission's rules go through the legislative rule-making review process.

Changes and Requirements May Be Objectionable to the Legislature

The Tourism Commission elected to restrict access to the program, and restrict reimbursement to specific expenditures in order to compensate for reduced funding.

Since the administration of the Tourism Promotion fund involves granting or denying limited money for advertising campaigns, the Tourism Commission had to make decisions concerning the following:

- Who will be eligible to participate in the program?
- What types of expenditures will be eligible for reimbursement?
- What level of reimbursement will be provided? and,
- What criteria will be used to evaluate applications for funding?

Obviously, these requirements have a significant impact on who will receive or be denied Tourism Promotion funds. Since the necessary criteria to determine who would receive grants for advertising campaigns has not been reviewed by the Legislature, it is possible that some of the criteria may be objectionable to the Legislature. Specifically, the Tourism Commission has decided the following requirements without legislative approval.

Since the necessary criteria to determine who would receive grants for advertising campaigns has not been reviewed by the Legislature, it is possible that some of the criteria may be objectionable to the Legislature.

Who is a Qualified Applicant?

A qualified applicant is: *“Two or more entities or organizations whose purpose, in whole or in part, is to promote the tourism industry of West Virginia.”*

What Defines an Advertising Campaign?

What defines a campaign or program? Multiple partners promoting a common tourism theme or destination. Theme must have a message that includes all partners. This theme must be included in all marketing pieces.

As you can see from the above criteria, a single tourism entity or destination is not eligible to participate in the program.

What Constitutes a Destination?

Place, area, or region that contains several “attractions” or activities, or an independent activity that attracts a minimum of 85% of its visitors from outside the local market.

Again, it is clear that a single entity would not be eligible for the program, or an entity which draws less than 85% of its visitors from outside of the local market would not be eligible.

A single entity would not be eligible for the program, or an entity which draws less than 85% of its visitors from outside of the local market would not be eligible.

In addition to the above criteria, the Tourism Commission has decided that certain types of entities are not eligible to participate in the program even though they may satisfy the above criteria.

What groups are not eligible to participate in the grant program?

- Restaurants;
- Trade shows; and,
- Retail advertising with the exception of destination shopping that is able to produce verification that said destination attracts a minimum of 85% of its visitors from outside the local market.

What Types of Advertising Campaigns Are not Eligible?

The commission does not provide reimbursement for the following:

- Billboards are eligible for reimbursement but they must be outside of a 50 mile radius of the event or in major out of state markets;
- CD's and DVD's are not eligible for reimbursement;
- For large grants, ongoing marketing activities are not eligible.
- Collateral material that is intended for direct mail only is eligible, pieces designed to be handed out at a Convention or Visitors Bureau are not eligible; and,
- Price point advertising for a retail establishment that qualifies as a destination is not eligible.

What Level of Reimbursement will be Provided?

- All grants will be matching grants, and the applicant will provide at least 50% of the total project funding. (Emphasis Added)
- To qualify for the large grant program, the applicant's share of the cost after the grant must be at least \$10,000.
- For small grants program, the total amount of each individual grant will

not exceed \$2,500, and the total amount of funding for this program is limited to \$750,000 per year.

- Fair and Festival grants will not exceed \$5,000 per individual grant and the total amount of funds available for this program is limited to \$1,000,000 per fiscal year.

These guidelines awkwardly penalize marketing campaigns that are between \$5,000 and \$20,000 because such advertising campaigns will have to receive a grant that is less than 50% of the total advertising campaign costs.

These guidelines awkwardly penalize marketing campaigns that are between \$5,000 and \$20,000 because such advertising campaigns will have to receive a grant that is less than 50% of the total advertising campaign costs. For example, if an applicant had an advertising campaign of \$12,000, the maximum grant amount that the applicant could receive would be \$2,500, which is 21% of the total campaign amount. This explains why the criteria states that the applicant will provide at least 50% of the total project funding. In this particular example, the applicant would provide 79% of the total costs, as opposed to other advertising campaigns that would have to provide only 50% of the total costs. It is not clear if the Legislature would object to such a mechanism that has an inherent inequity.

What Criteria Is Used to Evaluate Applications for Funding?

Each project is evaluated and scored on a 100 point scale. The following scoring criteria will be used to evaluate projects:

1. The project demonstrates potential for a strong positive return on investment, is well researched and includes tracking and evaluation measures. (25 pts)
2. The project is appropriate to the market selected and complements or carries forward goals or objectives included in the Tourism Strategic Marketing Plan. (25 pts)
3. The project encompasses multiple attractions, municipalities, counties, or a regional development district or districts. (20 pts)
4. The project is creative, professional in quality and attainable with the funds requested or with additional identified and available funds. (20 pts)
5. The project is to a new market or media. (10 pts)

The commission may have to deny funding for advertising campaigns based on the scoring system, which has not been approved by the Legislature.

The commission has had adequate funding to fund all projects that have been submitted and satisfy the application criteria. However, with the passage of Senate Bill 197 during the 2004 legislative session, the Tourism Commission will likely not have adequate funding to continue to fund all applications, or if it does continue all projects, it will be at lower amounts. Because of reduced funding, the commission may have to deny funding for advertising campaigns based on the scoring system above, which has not been approved by the Legislature.

Conclusion

West Virginia code clearly states that the Tourism Commission is to promulgate legislative rules to administer the Cooperative Tourism Promotion fund. However, the Tourism Commission instead promulgated procedural rules. This has denied the Legislature the intended oversight of the distribution of these funds. Since the commission's rules have not been reviewed by the Legislature, it is not certain that legislative intent is being followed. There are requirements, restrictions, and criteria developed by the commission that may be objectionable to the Legislature. It is clear from the commission minutes that there are industries, particularly retail interests and trade shows, that have expressed their disappointment in how these funds are awarded. The legislative rule-making review process would allow the Legislature to become aware of these concerns. The Legislative Auditor recommends that the Tourism Commission comply with statute and promulgate legislative rules. In the meantime, the Legislature may want to consider reviewing the commission's current procedural rules and proposed changes.

The commission has denied the Legislature the intended oversight of the distribution of these funds.

Recommendations

2. *The Legislative Auditor recommends that the Tourism Commission propose legislative rules in compliance with WV Code §5B-2-12.*
3. *The Legislative Auditor recommends that the Legislature consider amending WV Code §5B-2-12 to grant the Tourism Commission emergency rule making authority until legislative rules can be promulgated.*
4. *The Legislative Auditor recommends that the Legislature consider reviewing the Tourism Commission's current procedural rules and proposed changes, by authority of West Virginia code §29A-3-16.*

Issue 3

The Tourism Commission and its Grantees Receiving \$15,000 or More in State Funds Are Not Following the Independent Audit Requirements of West Virginia Code §12-4-14(a).

Issue Summary

The Tourism Commission has not notified grantees of the audit requirement since the passage of SB 456.

According to West Virginia code §12-4-14(a), any organization that receives \$15,000 or more in state funded grants is required to file an audit with the Legislative Auditor's Office within two years of the disbursement of funds. Senate Bill 456 (SB 456) which was passed March 13, 2004 amended WV Code §12-4-14 by requiring state agencies issuing grants to notify grantees of their requirement to comply with the audit requirement. SB 456 also requires state agencies to cease issuing grants to grantees who are not in compliance with the audit requirement. However, the Tourism Commission has not notified grantees of the audit requirement since the passage of SB 456. Furthermore, the Legislative Auditor has no audits on file for Tourism Commission grantees. Therefore, the Legislative Auditor recommends that the Tourism Commission notify grantees of the audit requirement as required. The Legislative Auditor further recommends that the Tourism Commission receive a copy of the audits in order to sanction grantees that are not complying with the audit requirement.

No Tourism Commission grantees receiving more than \$15,000 have filed an audit with the Legislative Auditor.

Tourism Commission Grantees Are Not Filing Audits with the Legislative Auditor

According to West Virginia code §12-4-14(a), any organization that receives \$15,000 or more in state funded grants is required to file an audit with the Legislative Auditor's Office within two years of the disbursement of funds. The audit is to be conducted by an independent certified accountant at the expense of the organization, and the audit is to show that funds received were spent for the purposes intended by the grant. A review of files and databases within the Legislative Auditor's Office show that Tourism Commission grantees receiving more than \$15,000 have not filed an audit with the Legislative Auditor. Although not required by code, no grantee has filed an audit with the Tourism Commission.

The Legislative Auditor should have a significant number of audits filed, if commission grantees were following code. Since the requirement for the audit allows for a two year period to file the audit with the Legislative Auditor's

Office, the Legislative Auditor should have an audit on file for any grantee receiving grants in excess of \$15,000 from the programs inception in 1995 through October 2002 which would be approximately 387 audits.

Tourism Commission Has Not Been Informing Grantees of the Audit Requirements

Either organizations are not having such audits conducted, or the organizations are not aware of the requirement to submit the audits to the Legislative Auditor's Office.

Between 1995 and October 2002, the Tourism Commission issued 387 grants that were in excess of \$15,000. Since no audits on these grants have been received by the Legislative Auditor, this suggests that either the organizations are not having such audits conducted, or the organizations are not aware of the requirement to submit the audits to the Legislative Auditor's Office. Senate Bill 456 which was passed March 13, 2004, amended West Virginia code §12-4-14 by stating the following:

The state agency administering the funds or grants shall notify the grantee of the reporting requirements set forth in this section. A grantee failing to file a required audit within the two-year time period is barred from subsequently receiving state funds or grants until the grantee has filed the audit and is otherwise in compliance with the provisions of this section.

Since the passage of SB 456, state agencies are required to notify grantees of this requirement. Tourism is not notifying grantees of the audit requirement as required.

It is clear that the Legislature recognized the relationship between notifying grant recipients of the obligation to have audits conducted and grantees complying with the law. Since the passage of SB 456, state agencies are required to notify grantees of this requirement. Tourism has not notified grantees of the audit requirement as required.¹ **Therefore, the Legislative Auditor recommends that the Tourism Commission comply with code §12-4-14(a) and notify all grant recipients of their duty to comply with the audit requirements of §12-4-14.** Furthermore, since the amendment imposes grant sanctions on grantees who do not comply with the audit requirement, the Tourism Commission should have grantees provide the commission with a copy of the audit. This will assist the commission in being aware of which grantees are completing audits, and thus complying with code. The Legislative Auditor recommends that the commission maintain a database to track whether or not grant recipients have complied with the audit requirements.

¹HB 3012 was introduced in 2004 3rd Special Session and would have excluded grantees that received grants prior to July 1, 2004 from this requirement. The bill did not pass.

In addition to the Tourism Commission maintaining a database to monitor compliance with the audit recommendation, the Legislature should consider developing a central debar list for use by all state agencies. In June and September 2002, the Division of Culture and History awarded grants through the West Virginia Commission on the Arts. One of the grant recipients was also a grantee of the Tourism Commission. Given the diverse types of grants offered by West Virginia state agencies, a state debar list is necessary to ensure maximum compliance with §12-4-14.

Conclusion

Grantees of the Tourism Commission are not in compliance with the requirements set forth in §12-4-14 of the West Virginia code, which requires independent audits of entities that receive state funds in excess of \$15,000. Compliance with §12-4-14 is necessary to ensure that grant monies are being distributed for the intended purposes. Adherence to this law will also deter the potential for financial mismanagement of funds and/or improper use of the funds by grantees. In addition, the commission is not informing grantees of the audit requirements. The Legislative Auditor recommends that the commission and grantees adhere to the audit requirements outlined in West Virginia code §12-4-14.

Recommendations

5. *The Legislative Auditor recommends that the Tourism Commission notify grantees receiving over \$15,000 of the independent audit requirements stated in West Virginia code §12-4-14.*
6. *The Legislative Auditor recommends that the Tourism Commission require grantees to provide the commission with a copy of independent audits and that the commission sanction grantees who do not comply with §12-4-14 as required by code.*
7. *The Legislative Auditor recommends that the Tourism Commission maintain a database to track whether or not grant recipients have complied with the audit requirements of §12-4-14.*
8. *The Legislative Auditor's Office recommends that the Legislature consider the development of a state debar list which would include all organizations sanctioned from receiving grants from state agencies.*

Documentation to Support Grant Recipient Scoring is Not Retained By the Tourism Commission.

Issue Summary

Documentation supporting these project scores are not retained.

The commission must choose whether it will continue to fund all projects at a reduced rate, or whether it will deny funding projects based on project scores as originally designed.

Each year, the Tourism Commission receives hundreds of applications for direct advertising grants. These grants are divided into 3 categories: large grants; small grants; and fair and festival grants. Small grants and fair and festival grants are evaluated by Tourism Commission staff to ensure compliance with applicable rules and guidelines and are then funded as they are received. Large grants are reviewed by a subcommittee of the commission. Subcommittee members evaluate applications and assign them a score based on criteria contained in rules. However, documentation supporting these project scores are not retained. The commission has had ample funding in the past to fund all projects submitted for funding that conform to grant guidelines. Therefore, the project scores are a matter of formality and have no real significance.

Beginning in fiscal year 2005, the revenue received by the Tourism Commission will be reduced by more than half. The commission anticipates having more requests for funds than funds available. It is likely that the commission will no longer be in a financial position to continue to fund all projects at the current level of funding. As such, the commission must choose whether it will continue to fund all projects at a reduced rate, or whether it will deny funding projects based on project scores as originally designed. If the commission chooses to award funding for projects based on project scoring, then documentation representing how those scores were achieved must be retained.

Cooperative Tourism Promotion Fund Grants

Grant applications submitted to the Tourism Commission are treated differently depending on the type of grant sought. Small grant applications, and fair and festival applications are reviewed internally by the Division of Tourism staff. If a small grant or a fair and festival grant conform to commission guidelines, are complete, and money is available, it is funded. Large grants are reviewed by a grant subcommittee composed of 3 commission members.

According to rules CSR §144-2-4.3,

Each application will be scored by the subcommittee on the basis of 100 points.... Individual scores will be totaled and averaged for each application to produce the final score.

The program originally intended eligibility to be broad, and that the best available projects would be selected for funding based on the scoring procedures.

It seems rather clear from the process outlined in rules that the program originally intended eligibility to be broad, and that the best available projects would be selected for funding based on the scoring procedures. Unless an application is withdrawn by the applicant or tabled by the commission for future action, it receives a score. An application may be tabled by the commission because it is incomplete, because the applicant was not available to answer questions from the commission, or because the application contains an element that is questionable as to whether or not it is appropriate.

Applications are scored based on 5 criteria laid forth in CSR §144-2-5. These 5 criteria along with highest points possible during the scoring are:

1. The project demonstrates potential for a strong positive return on investment, is well researched and includes tracking and evaluation measures. (25 points)
2. The project is appropriate to the market selected and complements or carries forward goals or objectives included in the Tourism Strategic Marketing Plan. (25 points)
3. The project encompasses multiple attractions, municipalities, counties, or a regional development district or districts. (20 points)
4. The project is creative, professional in quality and attainable with the funds requested or with additional identified and available funds. (20 points)
5. The project is to a new market or media. (10 points)

The grant subcommittee does not record minutes, and no other documentation relating to how the individual project scores are derived is retained.

During the meeting of the grant subcommittee, each of the 3 members issues an individual score for each application. The scores are then averaged which represents the final score assigned to the project. The final score along with the application is then presented to the full commission where it is recorded in the minutes of the Tourism Commission. The grant subcommittee does not record minutes, and **no other documentation relating to how the individual project scores are derived is retained.** If project scores were used to select projects for funding, then not retaining the scores would be a violation of the state Records Preservation Act, since the Records

Preservation Act dictates that documents that represent the exercise of authority of an office should be retained. Retaining individual scores would ensure public accountability for project selections. **However, project scores are currently irrelevant to project funding because all projects receiving a final score are funded by the commission.**

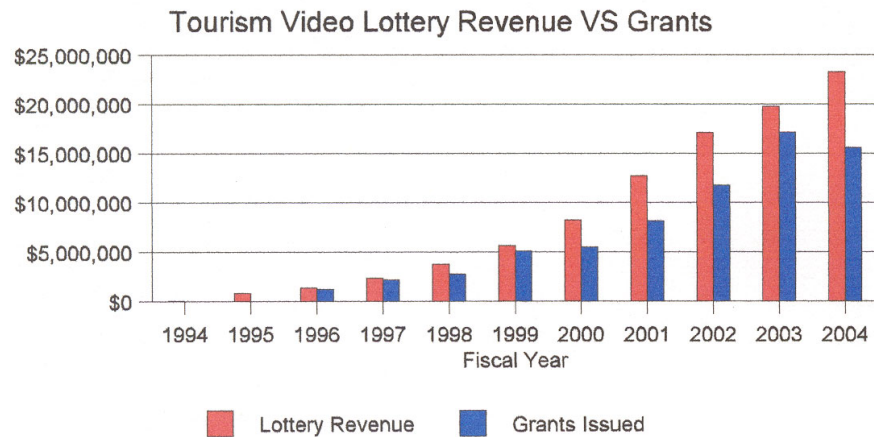
Retaining individual scores would ensure public accountability for project selections.

Tourism Commission Cooperative Tourism Promotion Fund Revenues May Decline

The Tourism Commission has had sufficient revenue to fund all projects submitted to the commission that are in accordance with commission guidelines. Revenue to fund projects from the Tourism Promotion Fund come from racetrack video lottery revenues. Until fiscal year 2005, the Tourism Commission received 3% of net terminal income from racetrack video lottery revenue. Of the 3% received, 5% is to be spent on marketing of the Tourism Commission and the Division of Natural Resources. The remainder of the funds is dispersed by direct advertising grants. Figure 5 shows video lottery revenues and grants issued for the Tourism Commission for fiscal year 1994 to 2004.

The Tourism Commission has had sufficient revenue to fund all projects submitted to the commission that are in accordance with commission guidelines.

Figure 5



As shown in Figure 5, video lottery revenues have greatly increased beginning in FY 2002. According to the 2004 House Finance Budget presentation made by the WV Lottery,

Racetrack video lottery sales increased dramatically, by \$121 million or 20.3% in 2003, and by \$158 million or 36.9% in 2002. The increase was a result of 3 factors, (1) the increase in the total number of machines (an increase of 2,622 machines or 37% from 7,021 to 9,643 in 2003 and

Revenues have greatly exceeded grants.

The revised percentage is less revenue than grants issued for either fiscal year 2004 or 2003 where they issued \$15 million and \$17 million in grants respectively.

The commission can no longer afford to fund every application received at the same level of funding as in the past (50%) assuming that applications are received at the same rate and for similar amounts.

an increase of 786 machines or 13% from 6,235 to 7,021 in 2002), (2) an increase in the number of coin out or “coin drop” machines (an increase of 2,371 machines or 37% from 6,327 to 8,698 in 2003 and in increase of 2,141 machines or 51% from 4,186 to 6,327 in 2002) and (3) the addition and/or modification of machines that permit an increased wager from \$2.00 to \$5.00 (an increase of 2,187 machines or 102.6% from 2,132 to 4,319 in 2003 and the addition of 2,132 machines in 2002).

For 2005, the Lottery Commission is predicting video lottery revenue to slightly decline due to competition from surrounding states like Pennsylvania where video lottery legislation was recently passed. A second factor which is evident is that grants issued have risen as lottery revenues have risen.

A final observation to be drawn from Figure 5 is that revenues have greatly exceeded grants. This did not go unnoticed by the Legislature. In FY 2004, SB 197 was passed which reallocated \$15 million in funds from the FY 2004 Tourism Commission racetrack video lottery revenue to other projects not related to tourism². Furthermore, for FY 2005 and beyond, the percentage of video lottery revenues to be received by the Tourism Commission was changed from 3% to 1.375%. This represents a decline of nearly 46%. If the Tourism Commission would have received this percentage in 2004, it would have received slightly more than \$12 million instead of \$23 million. **The revised percentage is less revenue than grants issued for either fiscal year 2004 or 2003 where they issued \$15 million and \$17 million in grants respectively.**

What this means for the commission is that they can no longer afford to fund every application received at the same level of funding as in the past (50%) assuming that applications are received at the same rate and for similar amounts as in the past years. It should be noted that the Tourism Commission does not track the number of applications that it receives each year. The Legislative Auditor’s Office attempted to determine this information from an electronic log maintained by the Tourism Commission to log applications, modifications, and revisions received. However, a single application may have multiple entries which are not noted as modifications or revisions making it impossible to determine the actual number of applications received each year.

²SB 197 allotted \$5 million to the WV Economic Development Authority, \$5 million to the Capitol Renovation and Improvement Fund, and \$5 million to the TRAFFIC fund.

The Tourism Commission is fully aware that this situation is before them. However, although 2 different solutions have been presented, the commission has not made a formal decision on how it intends to address the situation. This can be seen from following statements in commission minutes:

From November 21, 2002:

[The chairman] and [the finance director] talked about the money currently in the Fund, the increase in the number of grants being matched each month, and the fact that in the near future the Fund may not have enough money to match grants that are found to be acceptable. It is going to come down to the "scores" of the grants, i.e. someone with a grant that has been recommended for approval by the grant committee with a score of 80, for example, may not be approved by the full commission if it is a low score in comparison with other's scores - if there is insufficient money in the Fund at the time.

The commission has not made a formal decision on how it intends to address the situation of funding grants with reduced revenue.

From December 3, 2002:

[The chairman] talked about the funding situation and the fact that funds for grants will become less and less. Scoring will be extremely important.

An additional comment made along this line is after the passage of SB 197. From the June 17, 2004 meeting:

As the money in the fund gets less and less, the scoring will become even more critical.

However, after the passage of SB 197, the minutes indicate another method for dealing with the revenue shortfall. These comments are from April 15, 2004:

General comments from the chairman - With regard to some comments received yesterday regarding the possibility of dropping down to 35% instead of 50%, there are issues now that are making us lean toward keeping the matching percent at 50%. If we can tighten this program up a little, we will possibly have enough money to make this work. If this does not become a reality, then clearly we will have to consider reducing to 40%. We must keep in mind that we used to have 3% and now we have 1.375%. We do not

know whether or not it is going to grow. What happens in Maryland and Pennsylvania will have an impact on what happens here. There are no guarantees. Another general point is regarding gaming. Some gave defensive statements saying they would like to see the same amount of money they had in past. The consensus is we would like to keep them at 25- 30% [of total funds available]. The gaming people have been very good.

The philosophy before the cut in funding was that scoring would be used to select the best available projects from the applicant pool. After the cut in funding, the philosophy is to restrict access to the program and possibly fund all available projects at a lower level of funding.

Clearly the attitudes illustrated above represent a divergence from the thinking that existed prior to the cut in funding. The philosophy before the cut in funding was that scoring would be used to select the best available projects from the applicant pool. After the cut in funding, the philosophy is to restrict access to the program and possibly fund all available projects at a lower level of funding. The time for the commission to reach a consensus and decide how to address the issues of project funding is now. As the chairman of the grant subcommittee states: ***“I fully suspect that we will have more demand than supply.”*** (emphasis added)

Retention of Documentation is Necessary

Retention of documentation detailing the selection process is necessary.

The other alternative to addressing the increase in demand and decrease in supply is for the commission to evaluate all applications in accordance with criteria contained in its rules and select the projects for funding that score the highest. As previously stated, this was the philosophy of the commission prior to SB 197. If the commission chooses to select projects for funding from available applications and chooses not to fund all applications, then whether the commission uses the scoring method in rule or some other method to select the projects, **retention of documentation detailing the selection process is necessary.**

First, the retention of these types of documents are required by the Public Records Management and Retention Act contained in WV Code §5A-8-1 et seq. The Public Records Management and Retention Act describes what records should be retained in case something occurred and it is necessary to recreate decisions made by an agency from documentation retained. According to WV Code §5A-8-4, these types of records should be retained because they

...contain information necessary to protect the rights and interest of persons or to establish and affirm the powers and duties of governments in the resumption of operations after a disaster.

The requirement to maintain these types of records is consistent with the opinions of the West Virginia Supreme Court of Appeals according to the attorneys of the Legal Services Division. The West Virginia Supreme Court of Appeals in the case, *State ex rel. Charleston Mail Association v. Kelly*, states:

Whenever a written record of the transactions of a public officer[,] in his office, is a convenient and appropriate mode of discharging the duties of his office, it is not only his right but his duty to keep that memorial, whether expressly required to do so or not; and when kept it becomes a public document. 149 W.Va. At 769, 143 S.E. 2d at 139 (Emphasis added)

Maintaining documentation of the commission's authority is necessary to ensure public accountability.

Documentation is Necessary for Public Accountability

Furthermore, maintaining documentation of the commission's authority is necessary to ensure public accountability. This idea is further propagated by the West Virginia Development Office. The Development Office recently awarded a contract for a statewide advertising slogan but the process used to award the contract is being questioned by applicants whose bids were turned down. According to a statement released by the Development Office:

In order to further public confidence in the procedures used by the West Virginia Development Office in the proposal review process, all of the scoring and background materials produced by the Evaluation Committee are available for public review at the Division of Purchasing.

If the Tourism Commission were forced to select projects for funding using the current method of scoring, there would be no documentation available for review if questions arose regarding the selection process.

If the Tourism Commission were forced to select projects for funding using the current method of scoring, there would be no documentation available for review if questions arose regarding the selection process. Another important factor to consider is that the commission's decisions will likely be scrutinized more than in the past because companies affiliated with commission members are eligible to receive grant funding. Should companies affiliated with the commissioners receive grant funds and other companies not affiliated be denied grant funds, documentation for the basis of these decisions will be invaluable to protect the commission and the state. Table 1 shows amount of grant funds received by companies affiliated with commission members.

	Grant Funding	% of Total Funds Awarded
Commissioner A	\$617,040	.9%
Commissioner B	\$275,088	.4%
Commissioner C	\$17,429	N/A
Commissioner D	\$389,672	.6%
Commissioner E	\$1,902,943	3%
Commissioner F	\$1,765,919	2.8%
Commissioner G	\$2,123,255	3.4%
Commissioner H	\$3,248,067	5.1%
Total	\$10,339,413	16%**
<small>*Source West Virginia State Auditor's Office ** Actual percentage is higher because the above information is limited to current commissioners only</small>		

Conclusion

The ability of a state to partner with the private sector to effectively market the state is important.

The commission must decide what approach it will use to fund projects under a scenario of reduced funding.

Tourism plays a vital role to the state's economy. Also, the competition for tourists between states is increasing. The ability of a state to partner with the private sector to effectively market the state is important. As such, the direct advertising grant program plays a vital role to the state. Documentation and direct observation by the Legislative Auditor's Office suggests that the Tourism Commission endeavors to ensure that grant funds are spent efficiently. However, the commission must decide what approach it will use to fund projects under a scenario of reduced funding, whether it will continue to fund all projects at a reduced rate or whether it will fund projects selected on the basis of projects scores. If the commission decides to select projects based on a scoring system, then documentation supporting those scores must be retained.

Recommendations:

9. *The Legislative Auditor recommends that the Tourism Commission develop a plan on funding projects under a reduced revenue scenario.*
10. *The Legislative Auditor recommends, that documentation supporting those funding decisions be retained in accordance with the Records Management and Preservation Act.*

According to a Legal Opinion, the Tourism Commission Does Not Follow a Legal Process of Resolving Audit Findings on Grantees.

Issue Summary

Five of these audits have revealed noncompliance issues and potentially fraudulent activity by grantees. Although the commission has established a legal process for resolving noncompliance matters, the process is “used infrequently” according to the commission.

The Tourism Commission implemented an auditing function in which some grantees are reviewed for compliance with grant requirements. Since the auditing function began in October 2002, the commission has conducted nine audits. Five of these audits have revealed noncompliance issues and potentially fraudulent activity by grantees. Although the commission has established a legal process for resolving noncompliance matters, the process is “used infrequently” according to the commission, and evidence also indicates that there are times when the process is not used. The commission’s process indicates that an audit subcommittee will review the findings of audits and *recommend* to the full commission any action to be taken against grantees. However, commission minutes do not reflect all of the actions taken by the audit subcommittee, which suggests that the subcommittee has implemented action against violating grantees and informs the full commission after the fact. This practice is illegal according to a legal opinion from Legislative Services. The legal opinion indicates that the full commission may not delegate to a subcommittee any responsibility that requires full commission action.

Tourism Commission Performs Audits on Grantees and Establishes Audit Committee

In May 2002, the Division of Tourism hired an auditor to work for the division and perform audits on grantees. According to the Division of Tourism:

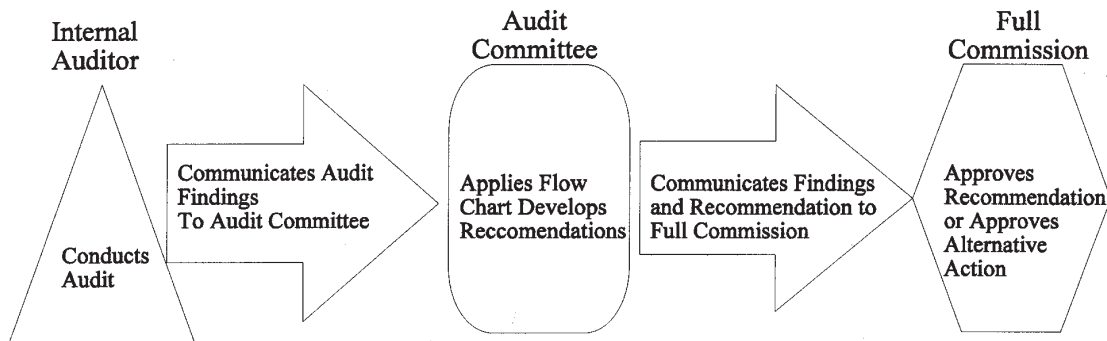
At the time the grant program was developed, all administration costs were absorbed by the division. Following the tremendous growth in the program, the commission saw the need for additional funding of administrative costs. The Legislature increased funding which included a position for internal auditor. The commission endorsed establishing such a position which would not only review the State’s side of the transaction, but the applicant’s side as well.

The auditor began conducting audits on grantees in October 2002. Since that time, the auditor has conducted nine audits. In May 2003, the Tourism Commission realized that a mechanism would be needed to deal with issues

The audit committee developed a process whereby it would deal with noncompliance issues discovered by the internal auditor.

that arise from audits on grantees. The commission began discussion on the formation of an audit committee. The audit committee met for the first time on July 7, 2003. The audit committee developed a process whereby it would deal with noncompliance issues discovered by the internal auditor. Figure 6 below shows the process that the Division of Tourism developed to respond to audits that discovered discrepancies.

Figure 6



The Legislative Auditor commends the Division of Tourism and the Tourism Commission for recognizing the need for fiscal responsibility and conducting audits on grantees.

The Tourism Commission’s Audit Committee Does Not Resolve Audit Findings Legally

In July 2003, the audit committee presented the above process to the full commission. However, according to the minutes, one member of the audit committee stated,

*The **flow chart** being developed by the audit committee will probably be used infrequently because most of the time everyone is straight, and , if it is used, by far the majority of the time this process would allow the grantees to come up with something that would explain the discrepancy in a way that would satisfy the audit committee. (emphasis added)*

The Legislative Auditor commends the Division of Tourism and the Tourism Commission for recognizing the need for fiscal responsibility and conducting audits on grantees. Furthermore, the process represented by the flow chart mentioned in the above statement is an appropriate method of resolving audit findings. However, the above statement indicates that the process described by the flow chart “*will probably be used infrequently.*”

Based on a review of the commission minutes, it appears that the audit committee is not always using the process as defined by the flow chart. According to the flow chart, the audit committee is to make recommendations to the full Tourism Commission who will then review the recommendation and vote on the final action. This is consistent with statements received from the Director of the Division of Tourism who states:

It appears that the audit committee is not always using the process as defined by the flow chart.

The Tourism Commission relies on their Audit Committee for recommendations on how to address findings discovered by the Internal Auditor. The Internal Auditor conducts audits, reports findings to the applicants, gathers applicant's responses, then reports all of this information to the Audit Committee.

This concept is further supported by statements from the internal auditor who is also on the audit committee. According to the internal auditor:

Of the five audits that had issues of noncompliance, the full commission was notified of only two of the instances.

Please note that findings are reviewed by the Audit Committee, and they then make a recommendation to the full commission on what action, if any, to take. The Audit Committee serves in an advisory capacity.

Of the five audits that had issues of noncompliance, the full commission was notified of only two of the instances. Both cases involved potentially fraudulent activity by grantees. In one of the two instances, the commission voted to release remaining funds to the grantee pending the submission of proper paperwork. The second instance was not resolved until two months later. At that time, the commission voted to place the grantee on a repayment plan.³

In two other instances of noncompliance not only is the full commission not notified by the audit committee, but the audit committee decided that no disciplinary action was necessary.

However, in two other instances of noncompliance by grantees, the evidence suggests that not only is the full commission not notified by the audit committee, but the audit committee decided that no disciplinary action was necessary. According to a legal opinion from the Legislative Services:

*Although the Tourism Commission may establish subcommittees to assist it in performing its duties, **it may not delegate to a subcommittee any responsibility that requires Commission action**, nor may one of its subcommittees take any action that would bind the Commission, unless authorized by law or valid rule. (emphasis added)*

³The repayment plan between Tourism and the grantee contains no provisions for interest charges and is for repayment of principle only.

In these two instances, the grantee had stated that a grant would involve specific partners. When the grant was awarded, the contributions by the partners never occurred. This is significant since according to commission rules an application must be submitted by more than one entity. Furthermore, one of the scoring criteria of the commission is that the campaign encompasses multiple attractions.

According to the legal opinion received by the Legislative Auditor, the decision was for the full commission to make, not the audit committee.

In one of these two instances, the grant had already been fulfilled, so the only disciplinary action which the commission could have taken would be to sanction the grantee from future grants. However, as previously stated, the audit committee decided without a vote by the full commission that no action was necessary. The grantees involved in both of the instances have since been awarded additional grant funds. Had the full commission been notified of the noncompliance, the result may not have been different; however, according to the legal opinion received by the Legislative Auditor, the decision was for the full commission to make, not the audit committee.

Tourism Commission Is Not Reporting Possible Fraudulent Activity to CSI

Three of the audits performed by the Tourism Commission have discovered problems of noncompliance with grant guidelines and do not appear to be of a fraudulent nature.

Of the nine audits conducted by the division's internal auditor, five have noted instances of noncompliance with grant guidelines. The most frequent instance is when a grant is approved based on a grantee's statement in the application that the grant is going to have specific partners in the grant, and the partners do not participate in the grant or do not participate at the stated level. If these instances of noncompliance were reported to the full commission, the audit committee could help assist the commission in making future funding decisions. According to a letter from the director of the Division of Tourism:

The Tourism Commission uses their discretion in deciding whether to issue new grants with applicants that have had findings in the past.

Three of the audits performed by the Tourism Commission have discovered problems of noncompliance with grant guidelines and do not appear to be of a fraudulent nature. The results of these audits and the action by the commission are summarized below:

- Company A - Partners stated in the grant application were not able to participate in the grant. No action taken by the commission. The commission was not notified because the audit committee decided that no action was warranted

-
- Company B - Invoices for marketing do not indicate how the amounts charged were arrived at. The auditor was unable to determine contributions made by partners in the grant. Information was requested by the audit committee and the grantee provided the necessary documentation.

The two most significant instances in which the Tourism Commission has dealt inappropriately with noncompliance involve potential fraudulent activity on the part of the grantees.

- Company C - The auditor was unable to determine if contributions by grant partners were made. No action taken by the commission. The commission was not notified because the audit committee decided that no action was warranted.

The two most significant instances in which the Tourism Commission has dealt inappropriately with noncompliance involve potential fraudulent activity on the part of the grantees. These instances are summarized below.

- Company D - An employee was responsible for submitting invoices to the Division of Tourism for reimbursement. This individual was taking invoices that had already been paid by the division, manipulating them to make them appear as new invoices and submitting them for reimbursement.

After the company submitted invoices for the grant, the Tourism Commission released an additional \$404,460 in grant funds.

- Company E - A member on the Board of Directors was also a vendor involved in the grant contract. Commission rules indicate that a grantee must be responsible for at least 50% of the total cost of a campaign. Company E would contract with the vendor for services and would then receive a donation from the vendor in the amount of Company E's contribution to the campaign, which would result in the Division of Tourism funding the campaign 100%. In this particular instance, Company E entered a contract with the vendor for \$19,500. Artsbridge submitted invoices for reimbursement from the Division of Tourism for \$9,750. Artsbridge then received a donation from the vendor in the amount of \$9,750.

In the case of Company D, the company explained to the audit committee that the individual charged with submitting invoices was simply lazy and did not want to provide the additional work necessary to seek reimbursement for proper expenses. This explanation satisfied the audit committee who then recommended to the Tourism Commission that funds be released to the grantee. The commission unanimously voted to release the additional funding pending submission of documentation. The grantee submitted additional invoices for the \$48,612 that had been erroneously reimbursed to the grantee. After the company submitted invoices for the grant, the Tourism Commission released an additional \$404,460 in grant funds. Since this audit was performed, the company filed a civil suit against the employee in

question for a number of fraudulent activities committed against the company and was awarded in excess of \$2 million. This employee has since been hired by another Tourism grantee as a consultant.

In the case of Company E, the grantee was placed on a repayment plan for \$9,750, which the division determined that the grantee owed to the division. In both of the above situations, the commission did not report the instances of potential fraud to the Commission on Special Investigation (CSI) to determine if fraud actually occurred and to determine if prosecution on behalf of the State was necessary. Therefore, the Legislative Auditor has reported these issues to CSI.

However, the commission may not be resolving audit findings in a legal manner since it is not clear whether the audit committee is taking action on audit discrepancies instead of making recommendations to the commission for a vote to take a specific action.

Conclusion

The Division of Tourism and Tourism Commission has initiated internal audits on its grantees. The Legislative Auditor commends them for this. However, the commission may not be resolving audit findings in a legal manner since it is not clear whether the audit committee is taking action on audit discrepancies instead of making recommendations to the commission for a vote to take a specific action. Furthermore, in some instances the audit committee takes no action on audit findings. Finally, the commission has not reported potential fraudulent activity to CSI.

Recommendations

The commission has not reported potential fraudulent activity to CSI.

11. *The Legislative Auditor recommends that the audit committee notify the full commission of all audit findings and make recommendations to the full commission for disposition.*

12. *The Legislative Auditor recommends that the Tourism Commission notify CSI about all instances of potential fraudulent activity for investigation and resolution.*

Appendix A: Transmittal Letter

WEST VIRGINIA LEGISLATURE *Performance Evaluation and Research Division*

Building 1, Room W-314
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0610
(304) 347-4890
(304) 347-4939 FAX



John Sylvia
Director

November 18, 2004

Mr. David Satterfield, Executive Director
West Virginia Development Office
Building 6, Room 553
1900 Kanawha Blvd, East
Charleston, WV 25305-0311

Dear Mr. Satterfield:

This is to transmit a draft copy of the Full Performance Evaluation of the Tourism Functions within the Development Office. This report is scheduled to be presented during the December 5-7, 2004 interim meeting of the Joint Committee on Government Operations. We will inform you of the exact time and location once the information becomes available. 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.

We have already met with the Division of Tourism to discuss concerns with the report. If you would like to schedule an exit conference to discuss any concerns you may have with the report, please notify us. We request that your personnel not disclose the report to anyone not affiliated with your agency. Thank you for your cooperation.

Sincerely,

A handwritten signature in cursive script that reads "Denny Rhodes".

Denny Rhodes
Research Manager

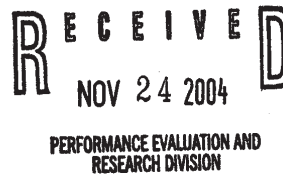
Joint Committee on Government and Finance

Appendix B: Agency Response



November 24, 2004

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



Re: *Response to Full Performance Evaluation of the Tourism Functions within the Economic Development Office*

Dear Mr. Sylvia:

The West Virginia Division of Tourism takes this opportunity, per your suggestion, to respond to the Full Performance Evaluation of the Tourism Functions within the Economic Development Office that the Division received November 16 and 23, 2004. My understanding is that this report covers all issues to be raised in this Evaluation. If any further issues are raised, I would reserve the right to respond to these future issues.

On behalf of the Division of Tourism, I would like to thank you for the recognition in your Evaluation of the vital role that tourism plays in West Virginia's economy and the success that the Division of Tourism has had in promoting and marketing West Virginia. The Division appreciates your recommendation that it be continued.

To summarize the attached response, the West Virginia Division of Tourism would first like to make it clear that the West Virginia Tourism Commission is a legislatively-created entity that is separate from the Division of Tourism, although the Commission and the Division certainly work hand in hand in many areas. The Division of Tourism is not authorized to speak for the Commission, but the Commission Chair and several members worked collaboratively with the Division in preparing this response. The Commission may wish to submit its own response or otherwise respond to the Full Performance Evaluation. Accordingly, the Division's response is meant to give the

Auditor's Office more information, from the Division's perspective, which may assist your office in its Evaluation.

The Division does recognize that W.VA. CODE §§ 5B-2-9(f) and 5B-2-12 requires the Commission to promulgate legislative rules. The Division also believes that the power to file emergency rules would be quite helpful to the Commission. The Division would note, however, that any legislative review of the procedural rules in effect would be premature since these rules will necessarily have to change when the legislative rules are filed. Moreover, the Division believes that the Legislative Auditor should hear from the Commission regarding the content of the procedural rules. Tourism Commissioners are required by W.VA. CODE § 5B-2-8(a) to meet qualifications such as representing a convention and visitors bureau, being a member of the tourism industry or from the council for community and economic development. As such, the Commissioners are uniquely qualified to assess the industry and the best use of funds for the maximum exposure for West Virginia tourism.

The Division of Tourism is already putting in place a comprehensive plan to notify grant recipients of the requirements of W.VA. CODE § 12-4-14(a). The Division of Tourism will also put into place a database to track those entities that have received funds and whether those entities have then provided copies of the audit required by W.VA. CODE § 12-4-14(a). The West Virginia Division of Tourism does have several questions and concerns as to how the newly enacted requirements of W.VA. CODE § 12-4-14(a) will affect grant recipients and future disbursements.

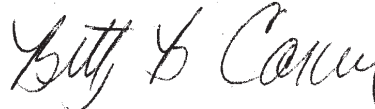
The West Virginia Division of Tourism believes that it fully complies with the West Virginia Records Management and Preservation Act. The Division appreciates the Auditor's analysis that future changes to the granting procedure could affect the Division's practices under that Act. The Division will continue to monitor its practices and procedures to ensure compliance with the Act, and will make appropriate modifications in response to any change in the granting procedure.

Finally, the Division sincerely appreciates the Auditor's attention to its audit procedures. This is an area that the Division takes seriously and is constantly striving to improve on its procedures. The Division will undertake the Auditor's recommendation that any potential fraudulent activity be reported to CSI and looks forward to meeting with CSI and the Auditor for a full understanding of that procedure. The Division does want to make the Auditor aware that in the past it has worked with law enforcement – or been aware of law enforcement involvement – in the two instances in which possible fraud occurred. The Division thinks that the proposed step of notifying CSI will be an efficient step in managing any potential fraudulent activity.

John Sylvia
November 24, 2004
Page 3 of 3

The West Virginia Division of Tourism's Response to the Full Performance Evaluation is attached to this letter. If you need any further information, or if I may be of any assistance, please let me know.

Sincerely yours,



Betty B. Carver
Commissioner
West Virginia Division of Tourism

Enc.

cc: Dave Arnold, Chairman of the West Virginia Tourism Commission
West Virginia Tourism Commission Members

WEST VIRGINIA DIVISION OF TOURISM'S RESPONSE
TO THE FULL PERFORMANCE EVALUATION OF THE TOURISM
FUNCTIONS WITHIN THE ECONOMIC DEVELOPMENT OFFICE
RECEIVED NOVEMBER 16 and 23, 2004

Issue Area 1: The Tourism Functions with the Development Office Provide a Valuable Service to West Virginia and Should Be Continued.

Response to Issue Area 1:

The West Virginia Division of Tourism appreciates the Legislative Auditor's recognition of the economic importance of tourism to the State of West Virginia and of the need to promote and develop that industry. Further, the West Virginia Division of Tourism concurs with the Legislative Auditor's observation that tourism is a competitive industry among the states, and that promotion requires expertise, focus and organization. To that end, the Division of Tourism has worked hard to implement the necessary infrastructure and to establish the necessary contacts to market and promote tourism in West Virginia.

Recommendations:

1. *The Legislative Auditor recommends that the Tourism Functions of the Development Office be continued.*

The West Virginia Division of Tourism concurs with this recommendation and believes that the best execution of this recommendation is to continue the work and existence of the West Virginia Division of Tourism.

Issue Area 2: The Tourism Commission's Lack of Promulgation of Legislative Rules Denies the Legislature the Oversight It Intended to Have Over the Distribution of the Tourism Funds.

Response to Issue Area 2:

The West Virginia Division of Tourism is a separate entity from the West Virginia Tourism Commission and does not purport to speak on the Commission's behalf with respect to this Issue. Indeed, the Commission may wish to be heard regarding its function and its promulgated rules. The Division of Tourism does wish to clarify the composition and purpose of the West Virginia Tourism Commission, perhaps one of the most unique legislatively-created bodies in state government.

The West Virginia Tourism Commission is charged with the weighty task of developing a comprehensive tourism promotion and development strategy for West Virginia. W.VA. CODE § 5B-2-9(a). Specifically, among many other things, that plan must “outline strategies and activities designed to continue, diversify or expand the tourism base of the state as a whole” *Id.* The only tools with which the Commission has to work are the tourism promotion fund – used for funding direct advertising – and the experience that the Commissioners bring to their position. The legislature was clearly cognizant of the burden placed on the Commission because it explicitly defined who was to be qualified to be a Commissioner.

Nine members of the Commission are appointed by the Governor with the advice and consent of the Senate. W.VA. CODE § 5B-2-8(a)(1). Immediately, the legislature has input into which individuals are to shape the future and administer the funds of tourism. Moreover, the qualifications of those nine members are further refined by statute: at least seven of the nine members are to be from the private sector; one shall represent a convention and visitors bureau; another shall be a member of a convention and visitors bureau. *Id.* To further insure that Commissioners are qualified to undertake the tasks with which they are legislatively charged, the West Virginia hospitality and travel association provides a list of qualified applicants to the governor to assist in his selection. *Id.* The legislature also took geography into consideration, mandating that of the nine members appointed, “no more than three shall be from each congressional district within the state and shall be appointed to provide the broadest geographic distribution which is feasible.” *Id.*

The remaining composition of the Tourism Commission is also dictated by statute. A member of the council for community and economic development is to be appointed by the governor. W.VA. CODE § 5B-2-9(a)(2). Similarly, one member of the Commission is to be appointed by the governor to represent public sector nonstate participants in the tourism industry. W.VA. CODE § 5B-2-9(a)(3). Both the secretary of transportation and the director of the division of natural resources are members of the Commission. W.VA. CODE §§ 5B-2-9(a)(4)-(5).

In short, the unique and specific composition of the Tourism Commission evinces the legislature’s intent to allow those with substantial experience in the tourism industry and state government, and from a wide geographical range encompassing all of West Virginia’s travel regions, to both chart the course for tourism promotion and administer the tourism promotion funds through the grants program. Frankly, the Division of Tourism feels that the collective experience of the Commissioners is invaluable in navigating the ever-increasing and ever-creative interpretations of “direct advertising” presented in grant applications. With the reduction in available funds for the tourism promotion fund, the expertise gained by those on the Commission, combined with the level of experience has produced some changes, as noted in the Draft Full Performance Evaluation, that are necessary to the continued expansion and success of tourism promotion in West Virginia. The Division of Tourism strongly encourages the Legislative Auditor to speak with the Commission on these changes before assuming that the Commission is arbitrarily excluding entities from participation. In fact, the

Commission has stated its goal time and time again to include as many entities as possible in the grants program.

Finally, the Division of Tourism would note that in its draft, the Legislative Auditor lists certain items under the heading of What Types of Advertising Campaigns Are Not Eligible? The Division would urge the Legislative Auditor to consider that only *direct advertising* is reimbursable by statute. Direct advertising is defined as “advertising which is limited to television, radio, mailings, newspaper, magazines and outdoor billboards, or any combination thereof.” Many, if not all of the items listed by the Legislative Auditor, are designed to require compliance with the spirit and letter of that legislative directive, combined with the maximization of advertising for the dollars available.

Recommendations:

2. *The Legislative Auditor recommends that the Tourism Commission propose legislative rules in compliance with W.VA. CODE § 5B-2-12.*

The West Virginia Division of Tourism concurs with this finding as stated by the relevant statutes. W.VA. CODE § 5B-2-9(a).

3. *The Legislative Auditor recommends that the Legislature consider amending W.VA. CODE § 5B-2-12 to grant the Tourism Commission emergency rule making authority until legislative rules can be promulgated.*

The West Virginia Division of Tourism concurs with this finding.

4. *The Legislative Auditor recommends that the Legislature consider reviewing the Tourism Commission’s current procedural rules and proposed changes, by authority of West Virginia Code W.VA. CODE § 29A-3-16.*

The West Virginia Division of Tourism concurs with this recommendation. Perhaps it would be more helpful to wait until the legislative rules have been promulgated to evaluate the procedural rules, should any remain.

Issue Area 3: The Tourism Commission and its Grantees Receiving \$15,000 or More in State Funds Are Not Following the Independent Audit Requirements of West Virginia Code § 12-4-14(a).

Response to Issue Area 3:

The West Virginia Division of Tourism has reviewed the changes to W.VA. CODE § 12-4-14(a) that went into effect June 10, 2004 and has begun to implement a notice procedure to notify all grant recipients of the Independent Audit Requirement. The notification process is quite complicated. Initially, it may seem a simple matter to quote the relevant portions of the statute in a publication targeted at grant recipients, but the

**WEST VIRGINIA DIVISION OF TOURISM’S REPOSENSE TO THE FULL PERFORMANCE
EVALUATION OF THE TOURISM FUNCTIONS WITHIN THE ECONOMIC DEVELOPMENT
OFFICE RECEIVED NOVEMBER 16 and 23, 2004**

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plain language of that statute – particularly the sanctions for failure to comply – raise a host of complicated issues directly affecting the grantees, and in many cases, the very existence of the grantees. The Division of Tourism is unable to answer many of these questions regarding application and compliance as these issues are governed by the Legislative Auditor, and is currently seeking guidance on how to advise grantees.

Recommendations

5. *The Legislative Auditor recommends that the Tourism Commission notify grantees receiving over \$15,000 of the independent audit requirements stated in West Virginia Code § 12-4-14.*

The West Virginia Division of Tourism agrees with this recommendation and will assist the Commission in this notification procedure. The Division of Tourism would request guidance and information from the Legislative Auditor in interpreting the statute and its application to grantees.

6. *The Legislative Auditor recommends that the Tourism Commission require grantees to provide the Commission with a copy of the independent audits and that the Commission sanction the grantees who do not comply with § 12-4-14 as required by Code.*

The West Virginia Division of Tourism agrees that its grantees should adhere to the laws of the State of West Virginia; however, the Division of Tourism is seeking guidance with the enforcement role as stated in the recommendation. As explained previously, the application of the new sanctions contained within § 12-4-14 is complicated, particularly as it relates to the grant process. However, it is the Division's position that it will carry out its duties under the law, and to that end, the Division is seeking guidance in the interpretation and application of § 12-4-14. Once the language of the statute is clearly explained, the Division will immediately implement its requirements.

7. *The Legislative Auditor recommends that the Tourism Commission maintain a database to track whether or not grant recipients have complied with the audit requirements of § 12-4-14.*

The West Virginia Division of Tourism agrees that a database to keep track of disbursements and whether or not the Division has received a copy of the independent audit required under § 12-4-14 within the two year period is an excellent recommendation. The Division seeks further guidance from the Auditor with respect to compliance. The Division has no wish to usurp the Auditor's role or to substitute its judgment for that of the Auditor. Additionally, the Division would only be able to track independent audits received for funds disbursed by the Tourism Commission, and would have no way of knowing whether a grantee was in compliance with § 12-4-14 for any other state funds a grantee may receive. The Division is fully prepared to carry out its responsibilities under the Code once guidance is provided.

Issue Area 4: Documentation to Support Grant Recipient Scoring is Not Retained by the Tourism Commission.

Response to Issue Area 4:

The West Virginia Division of Tourism believes that it currently complies with all of the requirements of the Public Records Management and Retention Act. The Division would point out that all of the final scores – the scores upon which the full Commission votes in determining whether or not to fund a grant – are not only recorded, but are a part of the minutes of a Tourism Commission meeting. Moreover, the Grants Committee meeting, typically held just prior to the full Commission meeting, is open to the public, and the Committee invites participation by any grantee in explaining or clarifying portions of the grant application that may be unclear. Additionally, the staff of the Division of Tourism works closely with grant applicants to ensure that the applications comply with the requirements of the Commission. As a result of this effort and the service provided, very few applications are rejected.

As the Auditor points out, so far, the Tourism Commission has not had to reject an application because of the scoring system. What the Division does not believe is clear in the Evaluation is the Commission's goal in attempting to ensure that this is always the case. The Auditor has excerpted quotes from various meetings, but the Division believes that it is more accurate to explain in full what the Commission is attempting to do in light of drastically reduced funds. The Commission desires to fund all grants. To that end, the Commission has attempted to tighten up the application of the statutory requirement that only direct advertising as defined in the Code can be reimbursed. Additionally, the Commission has prioritized the most effective methods of direct advertising in order to reach the greatest number of tourists and to spread the funding to as many participants as possible. Throughout this process, the Commission has solicited input for the tourism industry and provided copies of draft proposals to the industry. The Commission desires to leave as a last resort the possibility of funding grants solely based on scores. Obviously, the Commission has had to consider that reality, but the Division believes that it is inaccurate to characterize the Commission as having "a divergence from the thinking that existed prior to the cut in funding." The Commission has always taken its responsibilities in disbursing state funds seriously and has long had the goal of maximizing the advertising impact for the State's money.

With regard to Table 1, it should be noted that during the same time period that over 63 million dollars in grants were issued to the tourism industry. Further, the Commissioners are not allowed to speak to or vote on any grant affiliated with their companies.

Recommendations:

8. *The Legislative Auditor recommends that the Tourism Commission develop a plan on funding projects under a reduced revenue scenario.*

The Division of Tourism concurs with this recommendation and notes that the Commission has been working on this issue for well over a year.

9. *The Legislative Auditor recommends that documentation supporting those funding decisions be retained in accordance with the Records Management and Preservation Act.*

The Division of Tourism concurs with the Recommendation and believes that the Division and the Commission complies with the Records Management and Preservation Act. The Division agrees that changes in funding procedure or guidelines could impact the required preservation of documents under the Act, and the Division will make sure that it makes adjustments in document preservation accordingly. Overall, the Division will continue to be vigilant in the future regarding this Act.

Issue Area 5: According to a Legal Opinion, the Tourism Commission Does Not Follow a Legal Process of Resolving Audit Findings on Grantees.

Response to Issue Area 5:

The Division of Tourism is committed to continuing its work auditing the grants and use of state funds. The Division believes that the Audit Committee is attempting to diligently process the findings reported to it by the auditor. The Division does not fully agree with the characterization that the flow chart is used infrequently. The more accurate description is that the flow chart is not generally necessary as most of the discrepancies found by the auditor are resolved through further information from the grantee. To the Division's knowledge, any serious infraction discovered through the audit process has followed the flow chart. The Auditor does raise an excellent point when it notes that the Commission may not always have been formally notified of the resolution of an audit. The Division agrees that formal reports to the Commission are warranted.

The Division is aware of two instances of potentially fraudulent activity. While it is true that neither the Division nor the Audit Committee notified CSI of these potential infractions, the Division would like to reassure the Auditor that this does not mean that law enforcement was not involved. In the first instance, the Audit Committee worked through the local prosecutor's office in fashioning a resolution and fully reported its findings to the prosecutor, who was already aware of the situation. In the second instance, the Audit Committee was aware that various authorities had been notified of the activities of an individual who allegedly was responsible for the possible infractions. Moreover, the grantee was also deeply involved in litigation with that individual. The Division appreciates that suggestion of the Auditor to report potential fraudulent activity to CSI and will do so in the future. The Division would like to receive information from

CSI and the Auditor about this process to enable it to cooperate fully with CSI and to keep track of the investigation as the investigation will likely affect reimbursements of grants or future grants.

Recommendations:

10. *The Legislative Auditor recommends that the audit committee notify the full commission of all audit findings and make recommendations to the full commission for disposition.*

The Division of Tourism concurs with this recommendation.

11. *The Legislative Auditor recommends that the Tourism Commission notify CSI about all instances of potential fraudulent activity investigation and resolution.*

The Division of Tourism concurs with this recommendation, but believes it will be necessary for the Division and CSI – and perhaps the Legislative Auditor – to meet to ensure that all parties understand the process and the definition of “potential fraudulent activities.” The Division of Tourism wants to understand the process fully so that it can cooperate fully and meaningfully.

