

LEGISLATIVE POST AUDIT REPORT

WEST VIRGINIA DEPARTMENT OF AGRICULTURE

For the Period: July 1, 2011 - December 31, 2012

Audit Issues Summary

- The Rural Rehabilitation Loan Program
- The Inwood Farmer's Market Refrigeration Units
- The Mountaineer Food Bank
- The Former Administration's Travel
- Improper Classification of an Independent Contractor



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WEST VIRGINIA LEGISLATURE
Joint Committee on Government and Finance

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The Joint Committee on Government and Finance:

In compliance with the provisions of the W.Va. Code, §4-2, as amended, we conducted a post audit of the West Virginia Department of Agriculture (WVDA) for the period July 1, 2011 through December 31, 2012.

We have conducted our audit in accordance with Generally Accepted Government Auditing Standards (GAGAS). Our audit disclosed certain findings, which are detailed in this report. Findings deemed inconsequential to the financial operations of the agency were discussed with management. WVDA management has responded to the audit findings; we have included the responses at the end of the report.

Respectfully submitted,

A handwritten signature in blue ink that reads "Denny Rhodes".

Denny Rhodes, Director
Legislative Post Audit Division

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INTRODUCTION

POST AUDIT AUTHORITY

This is the report on the follow-up post audit of the West Virginia Department of Agriculture (WVDA) for the period of July 1, 2011 – December 31, 2012. Any deviations from the audit period can be found in the Audit Scope section. The audit was conducted pursuant to §4-2, as amended, of the W.Va. Code, which requires the Legislative Auditor to “make post audits of the revenues and funds of the spending units of the state government, at least once every two years, if practicable, to report any misapplication of state funds or erroneous, extravagant or unlawful expenditures by any spending unit, to ascertain facts and to make recommendations to the Legislature concerning post audit findings, the revenues and expenditures of the State and of the organization and functions of the State and its spending units.”

PRIOR AUDIT

This is a follow-up audit to the post audit of the WVDA for the period of July 1, 2011 through December 31, 2012 which was released to the public on February 10, 2014. In the prior report, we concluded the WVDA had significant internal control weaknesses and noncompliance in areas of high risk in both revenues and expenditures.

Additionally, for the items tested during the previous audit, we noted the WVDA did not comply with parts of the following: W.Va. Code, Purchasing Division’s Procedure Handbook, State Auditor’s Office P-card Policy, Expenditure Schedule Instructions, Legislative Rules, W.Va. State Treasurer’s Office Cash Receipt Handbook, Statewide Contracts, Internal Revenue Service Publications and WVDA internal policies and procedures applicable for the period of July 1, 2011 through December 31, 2012. The aforementioned instances of noncompliance were related to cash handling, cottage leases, improper employee classification, farmer’s market leases, fixed assets, travel credit card transactions, hospitality expenditures, inspector cash advances, miscellaneous expenditures, miscellaneous revenues, purchasing expenditures, revenues, the Rural Rehabilitation Loan Program and travel expenditures.

Furthermore, we noted the WVDA failed to maintain an adequate system of internal controls over revenues; therefore, we were unable to determine if all revenues due to the WVDA were received and accounted for. The WVDA did not maintain adequate internal controls due to system/database limitations combined with a lack of segregation of duties and lack of management oversight and monitoring.

Most of the issues identified in the prior report resulted from inadequate recordkeeping, poor or nonexistent internal controls, a lack of segregation of duties, appearance of an unethical tone of upper management and a lack of oversight and monitoring on the part of the WVDA. Overall, the WVDA did not maintain adequate systems or have sufficient, reliable evidence to support certain significant information.

A copy of the February 2014 report can be found on the West Virginia Legislature's website under Post Audit Reports or at the following web address:

http://www.legis.state.wv.us/Joint/Postaudit/PA_Reports/audit_docs/PA_2014_528.pdf

EXIT CONFERENCE

We discussed this follow-up audit report with management of the WVDA on August 18, 2014. All findings and recommendations were reviewed and discussed as well as any items deemed inconsequential. Management's response has been included at the end of the report in Appendix D.

SCOPE

We conducted a post audit of the WVDA for the period of July 1, 2011 through December 31, 2012 in accordance with the standards applicable to performance audits contained in Generally Accepted Government Auditing Standards (GAGAS). Our audit scope included a review of applicable internal control and compliance with the W.Va. Code, Purchasing Division's Procedure Handbook, Expenditure Schedule Instructions, Legislative Rules, Statewide Contracts, IRS Publications, best business practices, and WVDA internal policies and procedures applicable for the period of July 1, 2011 through December 31, 2012 necessary to answer the audit objectives.

As part of the follow-up audit, we investigated the instances of possible fraud and abuse items reported to us during the prior audit in the responses to the fraud inquiries we sent out to various WVDA employees. We determined if they were, in fact, instances of possible fraud and/or abuse. GAGAS Section 7.21 states when auditors conclude, based on sufficient, appropriate evidence, that fraud, noncompliance with provisions of laws, regulations, contracts or grant agreements, or abuse either has occurred or is likely to have occurred which is significant within the context of the audit objectives, they should report the matter as a finding. Additionally, W.Va. Code §4-2-4 and W.Va. Code §4-2-6 state it is the duty of the legislative auditor to report any misapplication of state funds or erroneous, extravagant or unlawful expenditures by any spending unit.

Furthermore, GAGAS Section 6.32 indicates in the event information comes to the auditors' attention indicating fraud significant within the context of the audit objectives may have occurred, the auditors should extend the audit steps and procedures, as necessary, to (1) determine whether fraud has likely occurred and (2) if so, determine its effect on the audit findings. Additionally, GAGAS Section 6.34 indicates in the event auditors become aware of abuse that could be quantitatively or qualitatively significant to the program under audit, they should apply audit procedures specifically directed to ascertain the potential effect on the program under audit within the context of the audit objectives.

Due to several issues noted over travel during our previous audit of the WVDA released on February 10, 2014¹, we extended our review of travel expenses paid by the WVDA, travel reimbursements, and fuel purchases for the former Commissioner of Agriculture for the period of February 1, 2008 through June 30, 2013, one of the former Deputy Commissioners of Agriculture for the period of July 1, 2009 through June 30, 2013 and the former Assistant Commissioner of Agriculture for the period of July 1, 2009 through June 30, 2013.

WVDA's management is responsible for establishing and maintaining effective internal control. Internal control is a process designed to provide reasonable assurance objectives pertaining to the reliability of financial records, effectiveness and efficiency of operations including safeguarding of assets, and compliance with applicable laws, rules, and regulations are achieved. Because of inherent limitations in internal control, errors or fraud may nevertheless occur and not be detected.

The scope over internal controls involved only assessing those controls significant to the objectives listed in this report. To conclude on the adequacy of internal controls regarding the WVDA as a whole

¹ A copy of the report can be found on the West Virginia Legislature's website under Post Audit Reports.

was not a specific objective of this audit. Any internal control weaknesses discovered have been reported in findings if they were significant to our audit objectives.

Due to the issues noted in Finding 6 – Lack of Management Oversight over Grant Funds, we were unable to obtain sufficient, appropriate evidence to determine whether the Mountaineer Food Bank (MFB) appropriately spent the funds it received as a Sub-Recipient Agency through the WVDA for the Emergency Food Assistance Program (TEFAP) operated by the United States Department of Agriculture (USDA). Also, we were unable to obtain sufficient, appropriate evidence to determine whether the Mountaineer Food Bank (MFB) appropriately spent the funds it received through the annual appropriation from the WV Legislature to be distributed to WV Food Banks². Aside from the aforementioned scope limitations, the auditors did not identify any other limitations or uncertainties in evidence that were significant to the audit findings and conclusions. Therefore, we did not need to apply additional procedures, as identified in Section 6.72 of the Yellow Book.

This report includes findings regarding significant instances of noncompliance with applicable laws, rules and regulations as related to the objectives. Instances of noncompliance deemed insignificant to warrant inclusion in the report, but still required the attention of the WVDA management, were communicated in a letter to the WVDA management.

² See Finding 6 – Lack of Management Oversight over Grant Funds on page 24 for more details.

AGENCY CONTACTS

PRESENT STAFF

Walt Helmick..... Commissioner (January 2013 – Present)

Chris Ferro..... Chief of Staff (February 2013 – Present)

Robert “Bob” Tabb..... Senior Manager (January 2013 – Present)

Mike Teets..... Director of Eastern Operations (January 2013 – Present)

Sandra “Sandi” Gillispie..... Director of Administrative Services (November 2001 – Present)

Jewell Plumley, DVM, State Veterinarian Director of Animal Health (April 2011 – Present)

Butch Antolini Director of Communications (July 2013 – Present)

Jonathan “Jon” Adkins Acting Director of Information Technology (September 2013 – Present)

Jean “Jeanie” Smith..... Director of Marketing and Development (August 2001– Present)

Robert Pitts, DVM Director of Meat & Poultry Inspection (February 2008 – Present)

Eric Ewing..... Director of Plant Industries (November 2013 – Present)

Herma Johnson Director of Regulatory & Environmental Affairs (August 2002 – Present)

FORMER STAFF

Gus Douglass..... Commissioner of Agriculture (January 1965 – 1988 & 1993 – January 2013)

Steve Miller Assistant Commissioner (January 2010 – January 2013)

Janet Fisher Deputy Commissioner (June 1996 – January 2013)

Robert “Bob” Tabb..... Deputy Commissioner (November 2009 – January 2013)

Christina Kelley-Dye Director of Communications (December 2003 – May 2013)

Sherri Hutchinson Director of Plant Industries (July 2011 – October 2013)

OBJECTIVES & CONCLUSIONS

OBJECTIVE 1:

Further investigate several instances of possible fraud and/or abuse items reported to us in our fraud inquiries sent out to various employees during our previous audit and found in our previous audit to determine if they were in fact instances of possible fraud and/or abuse. For several sub-objectives, we will expand the scope of our audit to include dates outside our audit period to determine if those issues existed prior to and/or after our audit period.

CONCLUSION:

See the conclusions listed below with each corresponding sub-objective.

Sub-Objectives:

- i. Determine if the former Commissioner's travel amounts paid on the WVDA's travel credit card during the period of February 1, 2008 through June 30, 2013 were in compliance with the WVDA Travel Policy and Statewide Contract TCARD06.

CONCLUSION:

Based on the audit of the former Commissioner's travel credit card transactions and the procedures documented from agency interviews, we concluded his travel credit card transactions were not in accordance with sections of the WVDA's Travel Policy, WVDA's Policy and Procedure, W.Va. Code, the WV Expenditure Schedule Instructions and WV Statewide Contract TCARD06. Additionally, we determined the WVDA is not adequately monitoring and tracking travel credit card transactions.

Furthermore, we noted other instances of noncompliance, while not significant enough to warrant inclusion in this report, still required the attention of WVDA management. These items were communicated in a separate letter to WVDA management.

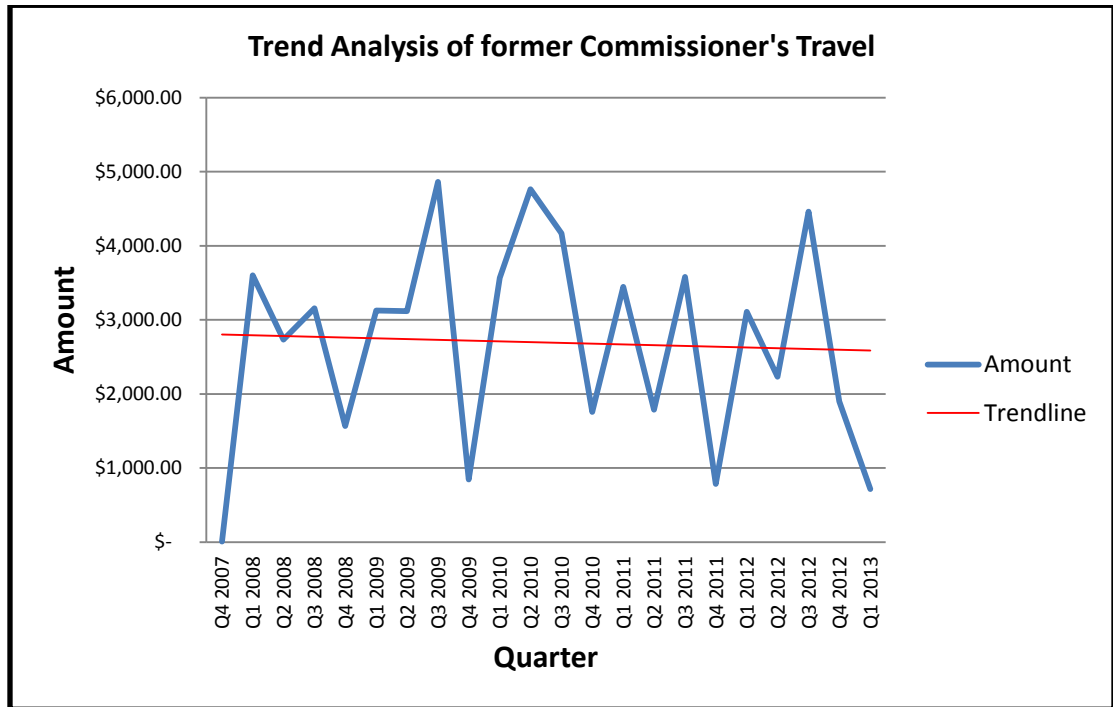
RELEVANT FINDINGS:

- Finding 10: Hotel Paid for Former Commissioner's Retirement Party
 - Finding 12: Conference Registrations Paid for Former Administration's Spouses
 - Finding 13: Improper Calculation of Taxable Income
 - Finding 14: Lack of Documentation over Travel
 - Finding 15: Internal Control Weaknesses over Travel Reimbursements
-

- ii. Determine if the former Commissioner incurred more and/or larger travel expenses during the end of his last term by performing a trend analysis using his travel reimbursements and travel amounts paid on the WVDA's travel credit card for the period of February 1, 2008 through June 30, 2013.

CONCLUSION:

By aggregating the data from the travel reimbursements test performed during the previous audit, WVDA’s travel credit card test, fuel card test and the direct bill transactions, we performed a trend analysis. From the graph below, it can be concluded the former Commissioner did not incur more travel expenses toward the end of our audit period. Furthermore, it should be noted the third quarter spikes in each year can be explained by the fact the West Virginia State Fair was held during this quarter.



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- iii. Determine if the former Commissioner’s taxable fringe benefit for personal use of his State vehicle was properly calculated using the proper Internal Revenue Service’s (IRS) valuation method for the period of February 1, 2008 through June 30, 2013.

CONCLUSION:

Based on the audit of the former Commissioner’s commuting logs, Employee Payroll Information Control System (EPICS) pay stubs, W2s, and the procedures performed by the agency, we concluded calculations of taxable fringe benefits were not in accordance with sections of IRS Publication 15-B. The WVDA not only used the incorrect formula when calculating the taxable fringe benefit, but also had several internal control weaknesses over the process.

RELEVANT FINDINGS:

- Finding 16: Inaccurate Reporting of Taxable Fringe Benefits
- Finding 17: Internal Control Weaknesses over Taxable Fringe Benefits

-
- iv. Determine if the former Commissioner’s fuel card (ARI & Exxon) purchases were properly accounted for and documented for the period of February 1, 2008 through June 30, 2013.

CONCLUSION:

Based on our audit and the review process performed by the agency, we concluded fuel card transactions were not performed in accordance with Legislative Rule 148-3-6, WVDA's Travel Policy, WVDA's Policy and Procedures and best business practices.

RELEVANT FINDINGS:

Finding 14: Lack of Documentation over Travel

Finding 18: Internal Control Weaknesses over Fuel Cards

- v. Determine if one of the former Deputy Commissioners' travel reimbursements and travel amounts paid on the WVDA's travel credit card were in compliance with the WVDA Travel Policy and Statewide Contract TCARD06 for the period of July 1, 2009 through June 30, 2013.

CONCLUSION:

Based on the audit of the former Deputy Commissioner's travel reimbursements, travel credit card transactions and the procedures documented from agency interviews, we concluded travel reimbursements and travel credit card transactions were not in accordance with sections of the WVDA's Travel Policy, WVDA's Policy and Procedure, W.Va. Code, the WV Expenditure Schedule Instructions and WV Statewide Contract TCARD06. Additionally, we determined the WVDA was not adequately monitoring and tracking travel reimbursement requests or travel credit card transactions.

Furthermore, we noted other instances of noncompliance, while not significant enough to warrant inclusion in this report, still required the attention of WVDA Management. These items were communicated in a separate letter to WVDA management.

RELEVANT FINDINGS:

Finding 8: Inappropriate Reimbursements to Former Deputy Commissioner

Finding 11: Excessive Travel Reimbursements to Former Administration

Finding 13: Improper Calculation of Taxable Income

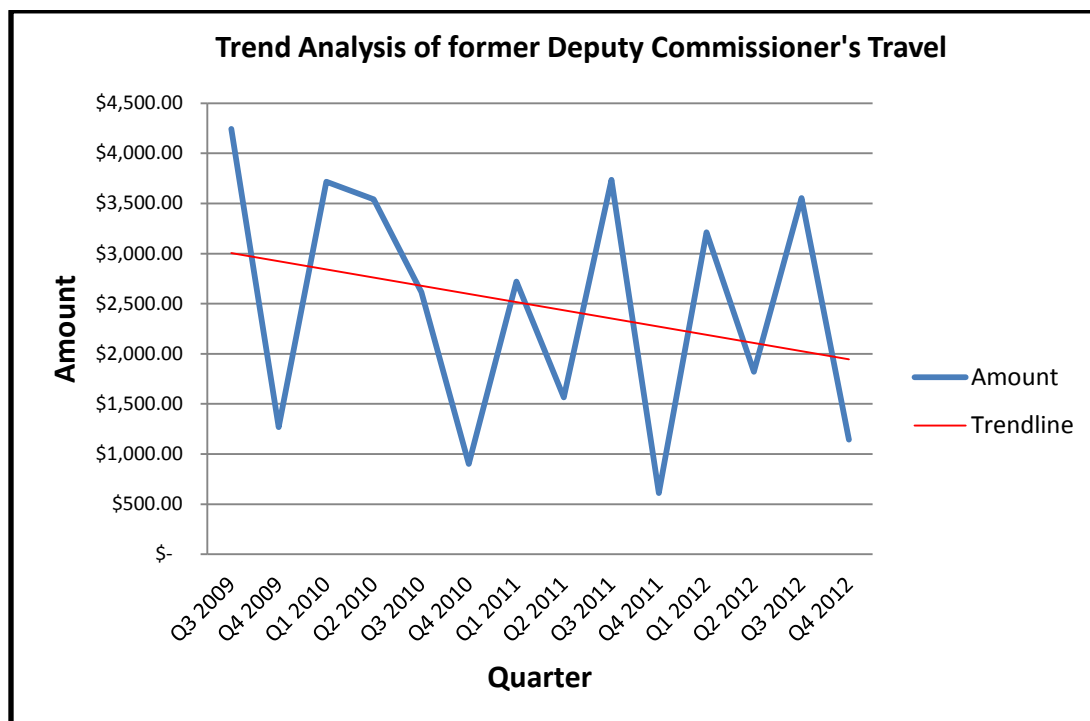
Finding 14: Lack of Documentation over Travel

Finding 15: Internal Control Weaknesses over Travel Reimbursements

- vi. Determine if one of the former Deputy Commissioners incurred more and/or larger travel expenses during the end of the former Deputy Commissioners' last term by performing a trend analysis using her travel reimbursements and travel amounts paid on the WVDA's travel credit card for the period of July 1, 2009 through June 30, 2013.

CONCLUSION:

By aggregating the data from the travel reimbursements test, WVDA's travel credit card test, fuel card test and the direct bill transactions, we performed a trend analysis. From the graph below, it can be concluded the former Assistant Commissioner did not incur more travel expenses toward the end of our audit period. Furthermore, it should be noted the third quarter spikes in each year can be explained by the fact the West Virginia State Fair and the North Carolina Christmas Show were held during this quarter.



- vii. Determine if the former Assistant Commissioner's travel reimbursements and travel amounts paid on the WVDA's travel credit card were in compliance with the WVDA Travel Policy and Statewide Contract TCARD06 for the period of July 1, 2009 through June 30, 2013.

CONCLUSION:

Based on the audit of the former Assistant Commissioner's travel reimbursements, travel credit card transactions and the procedures documented from agency interviews, we concluded travel reimbursements and travel credit card transactions were not in accordance with sections of the WVDA's Travel Policy, WVDA's Policy and Procedure, W.Va. Code, the WV Expenditure Schedule Instructions and WV Statewide Contract TCARD06. Additionally, we determined the WVDA was not adequately monitoring and tracking travel reimbursement requests or travel credit card transactions.

Furthermore, we noted other instances of noncompliance, while not significant enough to warrant inclusion in this report, still required the attention of WVDA management. These items were communicated in a separate letter to WVDA management.

RELEVANT FINDINGS:

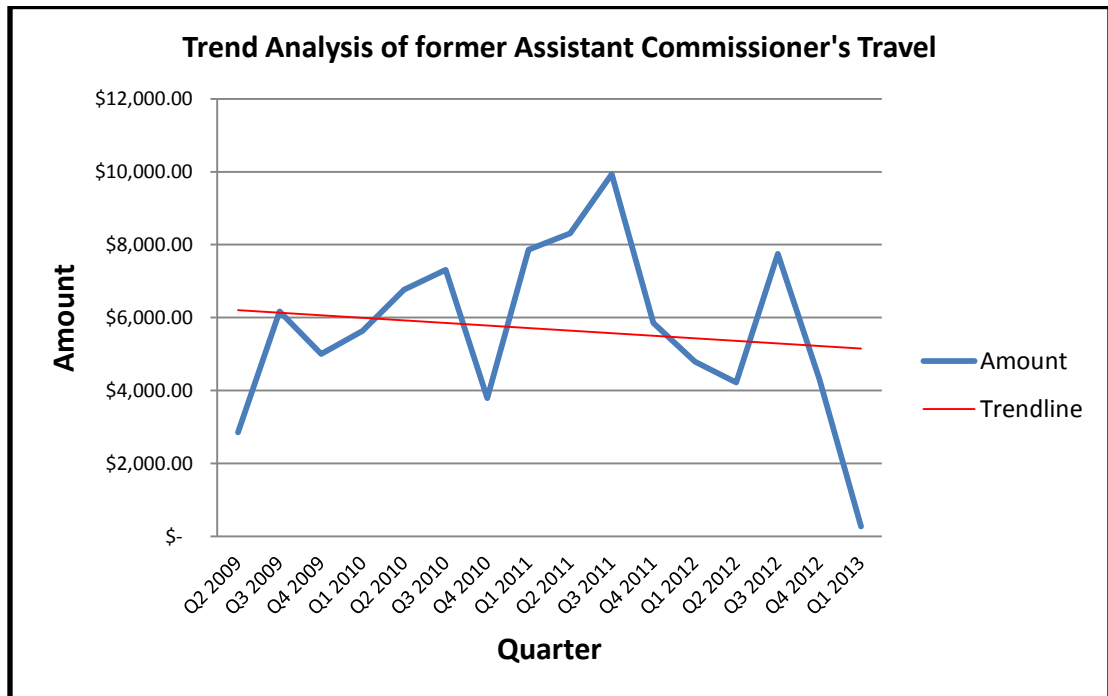
- Finding 9: Inappropriate Reimbursements to former Assistant Commissioner
- Finding 11: Excessive Travel Reimbursements to Former Administration
- Finding 12: Conference Registrations Paid for Former Administration's Spouses
- Finding 14: Lack of Documentation over Travel
- Finding 15: Internal Control Weaknesses over Travel Reimbursements

- viii. Determine if the former Assistant Commissioner incurred more and/or larger travel expenses during the end of the former Commissioner's last term by performing a trend analysis using his

travel reimbursements and travel amounts paid on the WVDA's travel credit card for the period of July 1, 2009 through June 30, 2013.

CONCLUSION:

By aggregating the data from the travel reimbursements test, WVDA's travel credit card test, fuel card test and the direct bill transactions, we performed a trend analysis. From the graph below, it can be concluded the former Assistant Commissioner did not incur more travel expenses toward the end of our audit period. Furthermore, it should be noted the third quarter spikes in each year can be explained by the fact the West Virginia State Fair and the North Carolina Christmas Show were held during this quarter.



- ix. Determine if one of the former Deputy Commissioner's and Assistant Commissioner's fuel card (ARI, Exxon, WEX) purchases were properly accounted for and documented for the period of July 1, 2009 through June 30, 2013.

CONCLUSION:

Based on our audit and the review process performed by the agency, we concluded fuel card transactions were not performed in accordance with sections of Legislative Rule 148-3-6, WVDA's Travel Policy, WVDA's Policy and Procedures, and best business practices.

RELEVANT FINDINGS:

Finding 18: Internal Control Weaknesses over Fuel Cards

- x. Determine if the Mountaineer Food Bank (MFB) maintained a separate account for all State funds received from the WVDA for the Food Distribution Program during the period of July 1, 2009 through December 31, 2012.

CONCLUSION:

Based on our inquiry with MFB’s executive director, we determined the MFB does not maintain a separate account for all State funds received from the WVDA for the Food Distribution Program. However, the MFB does maintain a general ledger of all expenditures made. Therefore, no finding was necessary.

- xi. Determine if the Mountaineer Food Bank was in compliance with The Emergency Food Assistance Program (TEFAP) – Sub-Recipient Agency Agreement to Participate – Food Distribution Program Agreement during the period of July 1, 2011 through December 31, 2012.

CONCLUSION:

Based on the work performed, we concluded the WVDA was not adequately overseeing and monitoring the Federal or State match TEFAP monies being distributed to the MFB. Additionally, we concluded although the MFB has all invoices and receipts on hand, the documentation was not organized in a way which would allow a proper audit of the monies expensed from TEFAP monies. Furthermore, the WVDA was not in compliance with the TEFAP Agreement to Participate because the WVDA failed to obtain copies of the 2012 independent auditors’ report of the MFB within 180 days of the end of the fiscal audit period.

RELEVANT FINDINGS:

- Finding 6: Lack of Management Oversight over Grant Funds
 - Finding 7: Noncompliance with TEFAP Agreement to Participate
-

- xii. Determine if the Mountaineer Food Bank was in compliance with the West Virginia Department of Agriculture – Donated Foods Program – Supplemental Agreement for State Funding during the period of July 1, 2011 through December 31, 2012.

CONCLUSION:

Based on the work performed, we concluded the WVDA was not adequately overseeing and monitoring the State monies being distributed to the MFB. Additionally, the WV Legislature does not provide specific guidance regarding the purpose of the appropriation of State funds to be split among the food banks. Therefore, we were unable to determine the intent of the WV Legislature and if the MFB was spending the funds consistent with the Legislature’s intentions.

RELEVANT FINDINGS:

- Finding 6: Lack of Management Oversight over Grant Funds
-

OBJECTIVE 2:

- Determine if the remaining 16 Rural Rehabilitation Loans not tested during the previous audit were properly managed during the period of July 1, 2011 through December 31, 2012.

CONCLUSION:

Based on the audits of the West Virginia Rural Rehabilitation Loan Program, in both this audit and the prior audit³, we concluded the program as a whole was not in accordance with sections of W.Va. Code, the WVDA's Procedure over the Rural Rehabilitation Loan Program, policy statement, cover letter and loan holder agreements. Additionally, we determined the WVDA was not adequately managing the program, maintaining/obtaining sufficient collateral, or receiving loan payments according to the loan terms. We also determined the WVDA's policy for the loan program lacks significant details including when a loan holder is eligible to refinance and requirements over eligibility/awarding of Rural Rehabilitation Loans.

Additionally, the WVDA has obtained guidance from the West Virginia Attorney General's Office concerning write-offs and other collection efforts. Therefore, we did not issue a finding for several loans which were in delinquency.

Sub-Objectives:

- i. Determine if deeds of trust or liens for collateral were received and maintained by WVDA personnel.

CONCLUSION:

Based on the audits of the West Virginia Rural Rehabilitation Loan Program, we concluded WVDA was not maintaining and/or obtaining sufficient collateral.

RELEVANT FINDINGS:

Finding 3: Lack of Documentation over Loan Program

- ii. Determine if loan payments were being received by the WVDA according to the loan terms.

CONCLUSION:

Based on the audits of the West Virginia Rural Rehabilitation Loan Program, we concluded WVDA was not receiving loan payments according to the loan terms. Although several loans were in delinquency, the WVDA has taken steps to either collect or write off the loans. We also found loan payment amounts were not calculated correctly for three of the Rural Rehabilitation loans.

RELEVANT FINDINGS:

Finding 2: Internal Control Deficiency over Loan Program

OBJECTIVE 3:

Determine if the Rural Rehabilitation Loan Committee should be considered a public body and therefore be subject to the Open Meetings Act.

CONCLUSION:

According to the language of the Open Governmental Proceedings Act, the West Virginia Department of Agriculture's Rural Rehabilitation Loan Committee is a governing body of a public

³ A copy of the report can be found on the West Virginia Legislature's website under Post Audit Reports.

agency. Therefore, the Loan Committee must comply with the requirements of the Act, including those procedures necessary for entering into an Executive Session.

RELEVANT FINDINGS:

Finding 1: Noncompliance with Open Meetings Act

OBJECTIVE 4:

Determine if the WVDA maintained effective internal controls over the processing of special handled checks during the period of July 1, 2011 through December 31, 2012.

CONCLUSION:

Based on the audit of the WVDA's special handled checks, we concluded the internal controls in place were adequate and functioning as intended. However, during our review, we noted it appears the former administration made a decision to replace the refrigeration units at the Inwood Farmer's Market without adequate consideration of cost to benefit or an alternative use of the grant funds due to the tight time constraints dictated by the grant agreement. In addition, we noted the WVDA's insurance policy on the Inwood Farmer's Market is not sufficient enough to cover the losses in the event the market was destroyed.

RELEVANT FINDINGS:

Finding 4: \$661,790 of Federal Grant Funds Spent on Unprofitable Farmer's Market
Finding 5: Underinsured Property of Inwood Farmer's Market

SUBSEQUENT EVENTS:

Subsequent events are events that occur between the end of the audit period and before the issuance of the audit report. During the audit, the auditors discovered the WVDA had entered into an agreement with an individual to perform services for the WVDA as an independent contractor. The agreement started after the end of the audit period but before the issuance of this report. The audit team was aware the individual was a former WVDA and WVU employee who had dealings with the West Virginia Conservation Agency (WVCA), a subdivision of the WVDA, when he worked for WVU. Because of the known relationship between the WVDA and the individual, the audit team reviewed the contractual agreement between the two parties.

CONCLUSION:

Based on the audit of the contract and a legal opinion⁴ obtained from the Legislative Auditor's counsel, we determined the WVDA improperly entered into a contract with an individual to perform services for the WVDA. The individual should have been classified as an employee. Further, we determined he WVDA entered into a purchasing agreement with an independent contractor without complying with the West Virginia's Purchasing Division Procedures Handbook for purchases exceeding \$25,000 in a 12 month period.

RELEVANT FINDINGS:

Finding 19: Individual Improperly Classified as an Independent Contractor
Finding 20: Noncompliance with Purchasing Procedures

⁴ See Appendix C –Legal Opinion over Independent Contractor on page 88.

FINDINGS & RECOMMENDATIONS

Finding 1: **Noncompliance with Open Meetings Act**

Condition: During the audit period, the WVDA's Rural Rehabilitation Loan Committee was not in compliance with the following requirements of the West Virginia Open Governmental Proceedings Act established by W.Va. Code §6-9A:

- Public notice of its scheduled meetings and agenda was not advertised;
- Meetings were not open to the public; and
- Written meeting minutes were not kept and made available to the public.

Based on a legal opinion⁵ obtained from the Legislative Auditor's counsel, we determined the WVDA's Rural Rehabilitation Loan Committee is considered a governing body of a public agency and, as such, is subject to the requirements of the aforementioned act. However, it should be noted as of January 31, 2014, the WVDA has implemented the requirements of the Act for all Rural Rehabilitation Loan Committee meetings.

Criteria: **W.Va. Code §6-9A-3, as amended, states in part:**

"... Except as expressly and specifically otherwise provided by law, whether heretofore or hereinafter enacted, and except as provided in section four [§6-9A-4] of this article, **all meetings of any governing body shall be open to the public...**" (Emphasis Added)

W.Va. Code §6-9A-2, as amended, states in part:

"... (3). "Governing body" means the **members of any public agency having the authority to make decisions for or recommendations to a public agency on policy or administration, the membership of a governing body consists of two or more members**; for the purposes of this article, a governing body of the Legislature is any standing, select or special committee, except the Commission on Special Investigations, as determined by the rules of the respective houses of the Legislature..." (Emphasis Added)

Cause: WVDA management did not consider the Rural Rehabilitation Loan Committee a governing body of a public agency which was subject to the West Virginia Open Governmental Proceedings Act established by W.Va. Code §6-9A.

⁵ See Appendix B – Legal Opinion over Loan Committee on page 81.

Effect: Because the statute of limitations has expired, the WVDA will not face civil liability for violating the West Virginia's Open Governmental Proceedings Act. However, the potential for abuse and/or fraud within the committee was increased because the Rural Rehabilitation Loan Committee was not meeting the requirements of the Open Meetings Act. In addition, the citizens of the State were not informed about the actions of their government as intended by the Act.

Until a year has passed since the last unlawful meeting of the WVDA Rural Rehabilitation Loan Committee, any member of the Committee who intentionally violated the Act could face a misdemeanor charge and a fine of up to five hundred dollars. Any future meetings violating the Act could pose serious financial consequences for the WVDA, as the courts are empowered to enjoin or annul any transactions resulting from decisions taking place during an unlawful meeting.

Recommendation: We recommend the WVDA comply with W.Va. Code §6-9A as amended. In addition, we recommend the WVDA obtain advice from legal counsel concerning the status of any new committees to be formed under the West Virginia Open Governmental Proceedings Act.

**Spending Unit's
Response:**

See Appendix D

Finding 2: Internal Control Deficiency over Loan Program

Condition: As previously reported in the February 2014 report, we were unable to obtain sufficient, appropriate evidence to determine whether or not the balances on all outstanding Rural Rehabilitation Loans were accurate in the WVDA's loan tracking system⁶. The WVDA's loan tracking system indicated a total outstanding balance on all loans of \$4,065,370⁷ as of December 31, 2012.

However, we were unable to perform a test which would allow us to accurately recalculate outstanding balance amounts. The internal control issues were described in greater detail in the audit report issued in February 2014.

In addition to the issues previously reported⁸, we noted loan payment amounts were calculated incorrectly for three of the 16 loans tested (19%). We were unable to determine how the WVDA calculated the payments in the loan agreements.

Criteria: **W.Va. Code §5A-8-9 states in part:**

"The head of each agency shall...

(a). Establish and maintain an active, continuing program for the **economical and efficient management of the records of the agency.**

(b). Make and maintain records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency designed to furnish information to **protect the legal and financial rights of the state and of persons directly affected by the agency's activities.**" (Emphasis Added)

Management is responsible for establishing and maintaining effective internal controls. A fundamental concept of internal control is adequate segregation of incompatible duties. For adequate segregation of duties, management should ensure responsibilities for authorizing transactions, recording transactions, maintaining custody of assets and reconciliations are assigned to different employees.

Cause: The incorrect loan payment amounts were due to the lack of policies and procedures over the Rural Rehabilitation Loan Program, lack of management oversight and lack of internal controls. Prior to the implementation of the WVDA's loan tracking system in 2011, the loan payments may have been calculated improperly due to the inexperience of the WVDA employee responsible for the calculation.

⁶ The WVDA's loan tracking system, Trakker, is a computer program used to calculate loan amortization schedules, record loan payments, and monitor loan balances.

⁷ During our risk assessment, it was determined the loans given solely by the WVDA were a higher risk than loans given in conjunction with the USDA. Our population of 35 loans included loans given solely by the WVDA. In our previous audit we chose, using auditor judgment, 19 loans for testing. For this follow-up audit we selected the remaining 16 loans for testing.

⁸ A copy of the February 2014 report can be found on the West Virginia Legislature's website under Post Audit Reports.

Effect: Loan holders were paying the WVDA the incorrect amount for their loan payments. Improper management of the loans could result in funds received not covering the full amount of the loan.

Recommendation: We recommend the WVDA assign properly trained personnel to handle loan payment calculations. Since the loan payment amounts are now calculated by the WVDA's loan tracking system, the risk of the incorrect amount decreases significantly.

**Spending Unit's
Response:** See Appendix D

Finding 3: Lack of Documentation over Loan Program

Condition: Sixteen loans⁹ with outstanding balances during the audit period were audited. The documentation issues found are noted below:

- Neither of the two loans which used equipment as collateral had a record of current Uniform Commercial Code (UCC) equipment liens¹⁰. We reviewed online UCC filings and determined the WVDA currently has no UCC filings for these two loans. Even if the UCCs had been re-filed, it is unlikely the equipment from the late 1990s would currently be worth the amount owed to the WVDA. The WVDA is in the process of turning these loans over to a collection agency; and
- Eleven loan holders did not provide documentation verifying they were denied a loan by a conventional lender prior to receiving a WVDA loan, as required by the Rural Rehabilitation Assets Use Agreement with the USDA. The remaining five loans were micro-loans and were not required to be denied by a conventional lender.

Overall, between the original audit released in February 2014 and the follow-up audit, none of the thirty loans which required proof of denial from a conventional lender had documentation showing the proof of denial in the loan holder files.

Criteria: W.Va. Code §5A-8-9(b), states in part:

“The head of each agency shall...

Make and maintain records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency designed to furnish information to protect the legal and financial rights of the state and of persons directly affected by the agency's activities.”

W.Va. Code §19-1-3a, as amended, states in part:

“The duties of the Marketing and Development Division are to establish marketing, promotional and development programs to advance West Virginia agriculture in the domestic and international markets...”

W.Va. Rural Rehabilitation Assets Use Agreement Section II, states in part:

“...Farmers or members of their families or other parties to whom loans or grants are made... must be **unable to provide the financing needed for such purposes from their own resources or to obtain it from conventional sources**

⁹ During our risk assessment, it was determined the loans given solely by the WVDA were a higher risk than loans given in conjunction with the USDA. Our population of 35 loans included loans given solely by the WVDA. In our previous audit we choose, using auditor's judgment, 19 loans for testing. For our follow-up audit we selected the remaining 16 loans for testing.

¹⁰ We reviewed the W.Va. Secretary of State's Office website and used the Online UCC Filings & Searches to determine the UCCs were not currently filed.

in the area at rates and terms they can reasonably be expected to meet..."
(Emphasis Added)

W.Va. Rural Rehabilitation Loan Fund Policy Statement, states in part:

"It is the purpose of the WV Rural Rehabilitation Loan Fund to consider participation... for loans to agricultural related enterprises **when applicant is denied loan by conventional lenders...**" **(Emphasis Added)**

WVDA Rural Rehabilitation Loan Fund Policy Statement, states in part:

"Loans to individuals may be secured by collateral as approved by WVRRLF [West Virginia Rural Rehabilitation Loan Fund] Committee and/or personal guarantees Additionally, loans may require ... Other collateral."

In addition, best business practices dictate loans should be collateralized by assets sufficient to secure the entire loan amount and official appraisals should be obtained to support the lender's decision to accept collateral as sufficient.

Cause: The lack of documentation was due to insufficient internal controls and insufficient program oversight.

Effect: Improper management of the loans could result in loss of funds further diminishing the financial status of the Rural Rehabilitation Loan Program. Loans not sufficiently collateralized present additional risk with regard to being able to recoup loan funds in the event of loan holder defaults. This could lead to the fund becoming insolvent and could cost the State unnecessary expense.

Recommendation: We recommend the WVDA maintain adequate records. Loans should be managed by qualified personnel who have an understanding of all documentation requirements needed to effectively run the program. In addition, we recommend the WVDA implement policies and procedures similar to the USDA Farm Service Agency, which provides specific guidelines as to what type of collateral is acceptable and stipulates appraisals will be obtained as support for the value of property being considered to secure each loan.

Spending Unit's Response: See Appendix D

Finding 4: \$661,790 of Federal Grant Funds Spent on Unprofitable Farmer’s Market

Condition: In March 2010, the WVDA was awarded \$250,000 through a grant contract with the West Virginia Division of Energy (WVDOE)¹¹ for its State Energy Program/American Recovery Reinvestment Act (ARRA) program to improve energy efficiency in state buildings. In February of 2011, the WVDOE notified the WVDA that it had been awarded an additional \$713,861, which increased the total WVDA award amount to \$963,861.

On June 2, 2011, the WVDA spent \$661,790 of the AARA award to replace the Inwood Farmer’s Market mechanical cooling units with more energy efficient units. These monies should not have been used for the Inwood Market upgrades since the market had consistent substantial losses every year for the last six years, as shown in the following table:

Calendar Year	Total Revenues¹²	Total Expenditures¹²	Total Profit (Loss)¹²
2008	\$141,355	\$241,474	(\$100,120)
2009	\$162,682	\$272,164	(\$109,483)
2010	\$184,631	\$277,202	(\$92,571)
2011 ¹³	\$181,473	\$260,229	(\$78,756)
2012	\$126,964	\$270,458	(\$143,494)
2013	\$152,467	\$246,739	(\$94,2723)
Totals	\$949,570	\$1,568,266	(\$618,695)

(Amounts rounded to the nearest dollar.)

We saw no evidence the WVDA considered the consistent and substantial Inwood Market losses in rendering the decision to commit the monies for the upgrades. If a proper cost/benefit analysis had been performed by WVDA, the analysis would have shown the savings produced by replacing the old units with more energy efficient units would not reduce energy costs enough to create a profit for the market. Therefore, the decision to replace the cooling units was not an effective use of ARRA grant funds.

As of April 1, 2014, the WVDA’s new administration has sought to alleviate the consistent loss of monies incurred by the Inwood Farmer’s Market by ceasing operation of the market and leasing the building and the State equipment in the building to a third party at an annual rate of \$48,000. Because the WVDA is now leasing the building to a third party, the WVDA is not paying the energy costs associated with the refrigeration units. Therefore, the WVDA is not receiving the benefit of the increased energy efficiency as intended by the federal ARRA grant funds.

Criteria: Best business practices dictate the decision to replace a piece of equipment should be the result of weighing the costs of keeping the old equipment against the cost of its replacement. The amount of time it would take to recover the

¹¹ The WVDOE received \$122,845,312 in ARRA grant funds from the federal government. The WVDOE distributed \$963,861 of these ARRA grants funds to the WVDA as a sub-recipient.

¹² Total Revenues and Total Expenditures do not include any ARRA grant funds received or expensed.

¹³ The decision to upgrade the refrigeration units at the Inwood Farmer’s Market was made during 2011; therefore, the 2011 Total Profit (Loss) would not have been available for consideration purposes.

amount of funds used during the upgrade process based on the increase in revenues associated with the upgrade should also be analyzed.

Cause: The WVDA was required to spend 50% of the ARRA funds before the June 30, 2011 deadline dictated in the grant agreement and 100% of the ARRA funds before the April 30, 2012 deadline or it would have had to return any unused grant funds to the WVDOE. It appears the former administration made a decision to replace the refrigeration units without adequate consideration of cost to benefit analysis or alternative uses of the grant funds due to the tight time constraints dictated by the grant agreement.

Effect: It appears the government funds could have been used on a more beneficial project because the WVDA spent the ARRA grant funds without adequate consideration of cost to benefit or an alternative use of the grant funds. Additionally, the WVDA is not receiving any benefit from the use of the funds since WVDA is now leasing the property to a third party.

Recommendation: The WVDA should adequately consider cost to benefit analysis and alternative uses of grant funds before making a decision on projects selected. In addition, the WVDA should review profit and loss statements for future projects to ensure the projects will be beneficial to the WVDA as a whole. Furthermore, we recommend the Legislature require all State agencies to notify the Board of Risk and Insurance Management (BRIM) in the event they enter into an agreement to lease state property to a third party.

Spending Unit's Response: See Appendix D

Finding 5: Underinsured Property of Inwood Farmer’s Market

Condition: During the audit of the ARRA grant funds¹⁴, it was noted the Inwood Farmer’s Market building was only insured under the WVDA’s Board of Risk and Insurance Management (BRIM) insurance policy for \$103,022 and its contents were only insured for \$200,000. The cost to replace the cooling units alone, which were purchased and installed at the Inwood Farmer’s Market in 2011 at a total cost of \$661,790, greatly exceeds the policy coverage for the building and contents combined.

In addition, the cost to replace a 17,000 square foot building would exceed the policy coverage of \$103,022. The building alone is only covered for \$6.06 per square foot which is unreasonable for the replacement cost. A BRIM employee stated a conservative estimate of the replacement cost for a commercial building alone (not considering the refrigeration units or loading dock) would be around \$100 per square foot meaning the coverage should be at least \$1.7 million.

Criteria: **W.Va. Code §29-12-5(a)(1), as amended, states in part:**

“The board has, without limitation and in its discretion as it seems necessary for the benefit of the insurance program, general supervision and control over the insurance of state property, activities and responsibilities, including:

...(C) Determination of the amount or limits for each kind of coverage...”

BRIM recommends and it is a best business practice for all state agencies to insure property at replacement cost. While BRIM has certain exceptions to the recommendation but the Inwood Farmer’s Market building would not fall into one of the exemptions.

Cause: The WVDA did not consider replacement costs when electing insurance coverage amounts through its BRIM policy. While BRIM does recommend state agencies insure property at replacement cost, insurance coverage amounts are ultimately the agency’s decision.

Effect: In the event the Inwood Farmer’s Market was destroyed (i.e. fire, natural disaster, etc.), the WVDA would not receive enough insurance proceeds to replace the building and its contents. Therefore, in order to replace the building and contents, the State would be responsible for paying any amount in excess of the insurance coverage.

Recommendation: We recommend the WVDA increase its BRIM policy coverage amounts to more accurately reflect replacement costs of the Inwood Farmer’s Market building and its contents. We also recommend the WVDA remove all equipment which is not permanently fixed to the building from the Inwood Farmer’s Market (i.e. – forklifts, electric pallet truck, display freezers, etc.).Finally, we recommend the

¹⁴ See Finding 4 – \$661,790 of Federal Grant Funds Spent on Unprofitable Farmer’s Market on page 20.

Legislature consider requiring all State buildings be insured either at replacement cost or at a minimum percentage of replacement cost.

**Spending Unit's
Response:**

See Appendix D

Finding 6: Lack of Management Oversight over Grant Funds

Condition: The WVDA was not adequately overseeing and monitoring the funds distributed to the Mountaineer Food Bank (MFB)¹⁵.

Federal Grant Funds

Under The Emergency Food Assistance Program (TEFAP) operated by the United States Department of Agriculture (USDA), the WVDA distributed the following funds to the MFB:

Grant Dates	October 1, 2010 – September 30, 2011	October 1, 2011 – September 30, 2012	October 1, 2012 – September 30, 2013
Federal Funds	\$236,800	\$236,800	\$236,800
State Match	\$12,800	\$12,800	\$12,800
Total	\$249,600	\$249,600	\$249,600

During the inquiry and review of the WVDA’s TEFAP maintenance and monitoring procedures, we noted the following significant weaknesses:

- The WVDA does not reconcile the expenditures claimed by the MFB to supporting documentation nor do they perform a review of the expenditures claimed by the MFB to ensure they were made in accordance with the TEFAP Agreement and all applicable state and federal regulations;
- The WVDA does not require the MFB to supply supporting documentation (i.e. itemized invoices for expenditures) to support its monthly TEFAP invoices. The MFB is only required to certify the expenditures reported were for costs incurred during the applicable period and were in accordance with the TEFAP Agreement and all applicable state and federal regulations; and
- The WVDA has not established official written procedures for reviewing or reconciling expenditures claimed by the MFB.

State Funds

In addition to the aforementioned TEFAP funds, the WV Legislature makes an annual appropriation of \$95,000 to the WVDA to be distributed to the two WV Food Banks. The MFB received \$62,251 and \$62,586 in fiscal years 2012 and 2013, respectively. The guideline states the allocation shall be split between the two food banks. However, the WV Legislature does not provide specific guidance regarding the purpose of the appropriation. Therefore, we were unable to determine the intent of the WV Legislature and if the MFB was spending the funds consistent with the Legislature’s intentions.

¹⁵ Mountaineer Food Bank is a non-profit hunger relief organization that provides emergency food services to 48 out of the 55 counties in West Virginia.

In addition to the funds distributed to the MFB, it should be noted the Huntington Food Bank received \$32,749 and \$32,414 in fiscal years 2012 and 2013, respectively, and the House of Hope food pantry received \$20,000 in fiscal year 2013 from the same allocation to the WV Food Banks from the WV Legislature. The above issues apply to all funds distributed from the WV Food Bank allocation.

Criteria:

Code of Federal Regulations Title 7, Agriculture, Section 251.10 (e), Monitoring, as amended, states in part:

“The State Distributing Agency has a responsibility to monitor activities of the Sub-Recipient Agency as necessary to provide reasonable assurance the Sub-Recipient Agency uses these grant funds for intended and authorized purposes; complies with law regulations and the provisions of contracts or grant agreements; and achieves performance goals.”

W.Va. Code §5A-8-9, states in part:

“The head of each agency shall...

... (a) Establish and maintain an active, continuing program for the economical and efficient management of the records of the agency.

(b) Make and maintain records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency designed to furnish information to protect the legal and financial rights of the State and of persons directly affected by the agency’s activities...” **(Emphasis Added)**

Management is responsible for establishing and maintaining effective internal controls. A fundamental concept of internal control is effective management oversight. Effective monitoring involves (1) establishing an effective foundation for monitoring, (2) designing and executing monitoring procedures prioritized based on risk, and (3) reporting the results, and following up on corrective action where necessary.

Cause:

The WVDA does not adequately monitor the expenditures made by the Sub-Recipient Agencies using monies received as part of the TEFAP grant. Additionally, the MFB does not maintain supporting documentation in a manner feasible to reconcile expenditures made using TEFAP funds without performing an audit of the entire food bank¹⁶.

Furthermore, the budget bills do not specifically clarify guidelines and/or restrictions on the uses of the funds allocated to the WVDA for distribution to the WV Food Banks. Additionally, the WVDA does not adequately monitor the expenditures made by the food banks using monies allocated to it from the WV Legislature because it considers itself a pass-through entity.

¹⁶ For more information of the scope of the audit, refer to the Scope section of this report on page 3.

Effect:

We were unable to determine if the MFB is spending TEFAP money in accordance with TEFAP – Sub-Recipient Agency Agreement to Participate – Food Distribution Program Agreement. As a result, it is possible TEFAP funds could have been spent on projects or expenses not in accordance with the grant agreement. Failure to comply with TEFAP agreement stipulations could cause a loss of funding from the USDA. In addition, we were unable to determine if the MFB is spending money allocated by the WV Legislature in a manner which is consistent with legislative intent.

The USDA monies were received by the WVDA to be expensed to the MFB. The MFB is the largest food bank in the state and provides a host of services and goods to the State’s taxpayers. Loss of federal funding could cause the MFB to close or reduce the number of citizens it serves.

In addition, defining and documenting processes with well-written procedures is important to ensure compliance with laws and regulations. Processes fundamental to an agency’s success should be properly guided by management and internal controls should be implemented in order to effectively manage risk.

Recommendation:

We recommend the WVDA establish and implement procedures to ensure compliance with the TEFAP Agreement to Participate. In addition, we recommend the WVDA require the MFB to provide copies of supporting documentation detailing expenditures using TEFAP monies be included with the TEFAP monthly invoice. Furthermore, we recommend the WVDA immediately begin monitoring the use of the funds, as required by the grant agreement.

We also recommend the WV Legislature consider issuing guidelines and/or restrictions for the use of the allocated funds similar to those issued by the USDA in The Emergency Food Assistance Program (TEFAP) Sub-Recipient Agency Agreement to Participate Food Distribution Program. Additionally, we recommend the Legislature require the WVDA to monitor how the funds are spent by requiring supporting documentation for all expenditures when State funds were used.

Spending Unit’s

Response:

See Appendix D

Finding 7:	Noncompliance with TEFAP Agreement to Participate
Condition:	The WVDA failed to comply with The Emergency Food Assistance Program (TEFAP) Sub-Recipient Agency Agreement to Participate by failing to obtain copies of the 2012 Independent Auditors' Report of the Mountaineer Food Bank (MFB) within 180 days of the end of the fiscal audit period.
Criteria:	<p>TEFAP Sub-Recipient Agency Agreement to Participate, states in part:</p> <p>"10.B.iii The Sub-RA will furnish the WVDA...two copies of the audit report within 180 days of the end of the annual (fiscal) audit period...</p> <p>... 10.J.i...The Sub-RA will maintain an accounting system and a set of accounting records that, at a minimum, allows for the identification of the source of revenue and expenditures related to this Agreement..."</p> <p>Code of Federal Regulations (CFR) Title 7, Agriculture, Section 251.10 (e), Monitoring, as amended, states in part:</p> <p>"The State Distributing Agency has a responsibility to monitor activities of the Sub-Recipient Agency as necessary to provide reasonable assurance that the Sub-Recipient Agency uses these grant funds for intended and authorized purposes; complies with law regulations and the provisions of contracts or grant agreements; and achieves performance goals."</p> <p>W.Va. Code §5A-8-9, states in part:</p> <p>"The head of each agency shall...</p> <p>... (a) Establish and maintain an active, continuing program for the economical and efficient management of the records of the agency.</p> <p>(b) Make and maintain records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency designed to furnish information to protect the legal and financial rights of the State and of persons directly affected by the agency's activities..." (Emphasis Added)</p>
Cause:	The WVDA was unaware it had not received the audit report due to its lack of management oversight and review of the MFB.
Effect:	Failure to comply with TEFAP agreement stipulations could cause a loss of funding from the USDA. The MFB is the largest in the state and provides a host of services and goods to the state's taxpayers, loss of federal funding could cause the MFB to close or reduce the number of citizens it serves.
Recommendation:	We recommended the WVDA comply with the TEFAP Sub-Recipient Agency Agreement to Participate sections 10.B.iii and 10.J.i and CFR 7 - 251.10 (e).
Spending Unit's Response:	See Appendix D

Finding 8: Inappropriate Reimbursements to Former Deputy Commissioner

Condition: During the audit of the former Deputy Commissioner's travel reimbursements¹⁷, the following items were noted:

- Two instances where the former Deputy Commissioner re-submitted the same hotel invoice for a duplicate reimbursement:
 - On January 20, 2010, the former Deputy Commissioner received a reimbursement of \$501 for a stay in Charleston, WV to attend the 2010 West Virginia Annual Fairs and Festivals Meeting held on January 7th through the 11th. This reimbursement included her hotel bill, meals, and parking fees. Then, on February 24, 2010, she received a second reimbursement for the same travel dates including the same lodging expenses, meals and parking fees.
 - On June 28, 2010, the former Deputy Commissioner received \$117 for a stay in Martinsburg, WV to attend several meetings. However, on July 16, 2010, the former Deputy Commissioner received a second reimbursement for the same travel dates.
- One instance where the former Deputy Commissioner received a \$70 reimbursement using a copy of a hotel invoice which was paid directly by the WVDA using the agency's travel credit card. The former Deputy Commissioner submitted the invoice for reimbursement as if she had personally paid for the hotel stay.

Criteria: **W.Va. Code §5A-8-9, states in part:**

"The head of each agency shall...

(b) Make and maintain records containing **adequate and proper** documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency designed to furnish information to protect the legal and financial rights of the state and of persons directly affected by the agency's activities." **(Emphasis Added)**

The WVDA Travel Policy, states in part:

"...20.1 ...An employee traveling on Department/Agency business pursuant to these policies and procedures is expected to **exercise the care and judgment of a prudent person** traveling for personal reasons. Travel on business must be **conducted at a minimum cost** for achieving success of the mission... **(Emphasis Added)**

¹⁷ We tested the entire population of 34 travel expenditure documents from the period July 1, 2009 through June 30, 2013 submitted by the former Deputy Commissioner of Agriculture totaling \$14,537. (Amounts rounded to nearest dollar.)

“20.2 Compliance – It is the traveling individual’s primary responsibility to comply with these policies and procedures and the responsibility of the person signing the employee travel expense reimbursement form authorizing payment to ensure compliance with these procedures.”

“...20.6.a. Documentation - **Original itemized receipts should**, if at all possible, **accompany the Travel Expense Account Settlement forms**. Receipts are required for the following expenditures: **lodging**, air or rail transportation, rental car and event registration...” **(Emphasis Added)**

“20.6.c ...It is the responsibility of the approving official to review and approve employee’s expense accounts...”

Association of Certified Fraud Examiners (ACFE) defines Duplicate or Fictitious expenses as:

“...**the submission of a second** (or third or fourth) **claim for reimbursement for a single transaction**. Employees involved in this scheme might submit duplicate expenses using the same receipt or collude with another employee or third party to submit a duplicate expense. These fictitious expenses are usually submitted in separate expense reports so as to not raise suspicion...”

Cause:

Since duplicates were submitted one month apart, it would be difficult for the WVDA to ensure duplicate reimbursements did not happen. Additionally, the WVDA does not reconcile travel reimbursement forms to the WVDA’s travel credit card invoices to verify employees are not claiming a reimbursement for an expense paid for by the agency. However, the invoice did include the last four digits of the WVDA’s MasterCard number.

Finally, according to the West Virginia State Auditor’s Office (WVSAO), state agencies are responsible for reviewing travel reimbursement requests to prevent duplicate payments.

Effect:

These reimbursements caused unnecessary expenses to the State. Inappropriate expenditures by upper managements could cause a trickle-down effect where other employees are more prone to perpetrate inappropriate expenditure because they do not consider ethical conduct to be a priority within the agency.

Recommendation:

We recommend the WVDA comply with sections 20.1, 20.2 and 20.6.a. of its Travel Policy. Additionally, we recommend the WVDA comply with W.Va. Code §5A-8-9 and properly maintain adequate documentation. The WVDA should consider modifying its travel and expense policies to be more detailed with respect to supporting documentation for expenses by requiring original documentation and prohibiting credit card statements and/or photocopies. Such requirements would help prevent employees from submitting duplicate expenses for reimbursement.

Finally, we recommend the WVDA require the former Deputy Commissioner to repay \$716 for the duplicate reimbursements since it was an unnecessary

expense to the WVDA. In the event the former Deputy Commissioner fails to reimburse the WVDA for the duplicate payments, we recommend the WVDA consult the IRS to determine whether or not to file amended W-2s for the former Deputy Commissioner to account for the duplicate reimbursements.

Spending Units

Response: See Appendix D

Finding 9: Inappropriate Reimbursements to Former Assistant Commissioner

Condition: During the audit of the former Assistant Commissioner’s travel reimbursements¹⁸, we noted he received multiple reimbursements for the same day on three separate occasions. For each day, the former Assistant Commissioner submitted a reimbursement request and then submitted a second request for the same day approximately one month later. The WVDA was unable to provide any reason why the former Assistant Commissioner would have submitted duplicate travel dates with different locations for reimbursement. The reimbursements are summarized in the tables below:

<u>Travel Date</u>	<u>Departure /Arrival Time</u>	<u>Location</u>	<u>Mileage</u>	<u>Mileage Amount</u>	<u>Meals</u>	<u>Lodging</u>	<u>Total</u>
11/4/09	8:00 AM	From: Charleston, WV	280	\$141.40	\$15.00	\$0.00	\$156.40
	4:00 PM	To: Moorefield, WV					
11/4/09	8:00 AM	From: Moorefield, WV	110	\$55.55	\$24.00	\$85.12	\$164.67*
	6:00 PM	To: Inwood, WV					

(*Duplicate reimbursement.)

<u>Travel Date</u>	<u>Departure /Arrival Time</u>	<u>Location</u>	<u>Mileage</u>	<u>Mileage Amount</u>	<u>Meals</u>	<u>Lodging</u>	<u>Total</u>
11/5/09	7:00 AM	From: Moorefield, WV	230	\$116.15	\$0.00	\$0.00	\$116.15
		To: Martinsburg, WV					
		From: Martinsburg, WV					
		To: Charles Town, WV					
		From: Charles Town, WV					
11/5/09	10:00 PM	To: Moorefield, WV	80	\$40.40	\$15.00	\$0.00	\$55.40*
	8:00 AM	From: Inwood, WV					
	5:00 PM	To: Moorefield, WV					

(*Duplicate reimbursement.)

<u>Travel Date</u>	<u>Departure /Arrival Time</u>	<u>Location</u>	<u>Mileage</u>	<u>Mileage Amount</u>	<u>Meals</u>	<u>Lodging</u>	<u>Total</u>
7/30/11	8:00 AM	From: Moorefield, WV	0^	\$0.00	\$15.00	\$0.00	\$15.00
	5:00 PM	To: Moorefield, WV					
7/30/11	7:00 AM	From: Moorefield, WV	0^	\$0.00	\$24.00	\$84.16	\$108.16*
		To: Ripley, WV					
		From: Ripley, WV					
	10:00 PM	To: Charleston, WV					

(*Duplicate reimbursement; ^Employee drove State vehicle.)

Criteria: W.Va. Code §5A-8-9 states in part:

“The head of each agency shall...
 (b) Make and maintain records containing **adequate and proper** documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency designed to furnish information to protect the legal and financial rights of the state and of persons directly affected by the agency’s activities.” **(Emphasis Added)**

¹⁸ We tested the entire population of 64 travel expenditure documents from the period July 1, 2009 through June 30, 2013 submitted by the former Assistant Commissioner of Agriculture totaling \$58,306. (Amounts rounded to nearest dollar.)

The WVDA Travel Policy, states in part:

“...20.1 ...An employee traveling on Department/Agency business pursuant to these policies and procedures is expected to **exercise the care and judgment of a prudent person** traveling for personal reasons. Travel on business must be **conducted at a minimum cost** for achieving success of the mission... **(Emphasis Added)**

“20.2 Compliance – It is the traveling individual’s primary responsibility to comply with these policies and procedures and the responsibility of the person signing the employee travel expense reimbursement form authorizing payment to ensure compliance with these procedures.”

“20.6.c ...It is the responsibility of the approving official to review and approve employee’s expense accounts...”

“... 20.7.a. In-State Meal Allowance – Reimbursement will be made for meals while absent from official headquarters on overnight status with a maximum of thirty dollars (\$30) per day for travel within the State of West Virginia where the distance from the official headquarters is greater than twenty-five miles. Meals are allowed when lodging is listed as ‘gratis’ or ‘no charge’.”

“20.7.b. In-State Allocation – The following allocations are to be used in determining the amount of reimbursement to employees traveling in-state on State business when the full meal allowance cannot be claimed.

- 1) **In-State travel: Breakfast - \$6.00, Lunch - \$9.00, and Dinner - \$15.00. (Daily total cannot exceed \$30.00)”**

“20.7.c Out-of-State Meal Allowance – Reimbursement will be made for meals while absent from official headquarters on overnight status, with a maximum of sixty dollars (\$60) per day...”

- 1) **Out-of-State Allocation – Breakfast - \$12.00; Lunch - \$18.00 and Dinner - \$30.00”**

Cause: Lack of effective management oversight and review caused meal allowances and travel which did not comply with WVDA policy to be reimbursed to employees. Additionally, according to the West Virginia State Auditor’s Office (WVSAO), state agencies are responsible for reviewing travel reimbursement requests to prevent duplicate payments.

Effect: Since the WVDA did not verify the information reported on the Travel Reimbursement Request forms, the WVDA paid out travel expenses in excess of the amounts actually necessary. All unnecessary purchases cause expenses to the State that could diminish the financial standing of the WVDA.

Recommendation: We recommend the WVDA require all employees, including upper management and the Commissioner of Agriculture, to follow its Travel Policy and comply with each section’s requirements. Additionally, we recommend the WVDA comply with W.Va. Code §5A-8-9 and properly maintain adequate documentation and comply with sections 20.1, 20.2, 20.6, and 20.7 of its travel policy and properly

review the travel reimbursement form to ensure travel amounts claimed are correct based on the destination of the traveler and the times of the departure and return trips.

Finally, we recommend the WVDA require the former Assistant Commissioner to repay \$328.23 for the duplicate reimbursements since it was an unnecessary expense to the WVDA. In the event the former Assistant Commissioner fails to reimburse the WVDA for the duplicate payments, we recommend the WVDA consult the IRS to determine whether or not to file amended W-2s for the former Assistant Commissioner to account for the duplicate reimbursements.

Spending Units

Response:

See Appendix D

Finding 10: Hotel Paid for Former Commissioner’s Retirement Party

Condition: During the audit of travel card expenditures¹⁹, we noted the WVDA paid \$282 for the former Commissioner of Agriculture and \$258 for the former Assistant Commissioner of Agriculture to stay two nights at a hotel in Charleston, WV when the former Commissioner’s retirement party was held.

Criteria: **W.Va. Code §6B-2-5(b)1, as amended, states in part:**

“A public official or public employee may not **knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain** or that of another person...” (Emphasis Added)

The WVDA Travel Policy states in part:

“20.1 ...An employee traveling on Department/Agency business pursuant to these policies and procedures is expected to exercise the care and judgment of a prudent person traveling for personal reasons. Travel on business must be conducted at a minimum cost for achieving success of the mission. All travel expenditures shall be within budgetary allowance for the Division/Agency for which the trip is taken.” (Emphasis Added)

The West Virginia Ethics Commission Guideline for Retirement Gifts and Events states in part:

“... Absent specific legislative authority, **public funds may not be used to underwrite rental or related fees associated with an event which is held at an off-site location.**” (Emphasis Added)

“... any recognition ceremonies that are conducted **during** an agency’s **normal workings hours** should be **limited in duration** so that an employee who wishes to participate **may do so during his or her lunch period or scheduled break time.**” (Emphasis Added)

Cause: The appearance of an unethical tone set by the upper level of management led employees to believe they were unable to question the expenses. Employees stated they felt nothing would be done about the expenses if they were questioned and there was fear among employees they would lose their job if expenses were questioned.

Effect: Extravagant and/or unlawful purchases cause unnecessary expenses to the State and potentially diminish the financial standing of the WVDA. The unethical tone of upper management could cause a trickle-down effect where other employees may be more prone to perpetrate extravagant unlawful

¹⁹ The population consists of 130 WVDA’s travel credit card documents totaling \$620,216. For transactions occurring between February 1, 2008 and June 30, 2009, only transactions involving the former Commissioner of Agriculture were reviewed. For transactions occurring between July 1, 2009 and June 30, 2013, only transactions involving the former Commissioner of Agriculture, the former Assistant Commissioner of Agriculture, and one of the former Deputy Commissioners of Agriculture were reviewed. There were 143 transactions on 39 Ghost Account documents totaling \$39,478. (Amounts rounded to nearest dollar.)

expenditures because they do not consider ethical conduct a priority within the agency.

Recommendation: We recommend the WVDA comply with W.Va. Code §6B-2-5(b)1. We also recommend the WVDA follow the West Virginia Ethics Commission Guideline on Retirement Gifts and Events. Further, we recommend the WVDA require all employees, including upper management and the Commissioner of Agriculture, to follow its Travel Policy and comply with each section's requirements. In addition, the WVDA should be cognizant of the amount of monies spent on travel and not make purchases a prudent person would consider unreasonable and unnecessary given the facts and circumstances.

Furthermore, we recommend the WVDA require the former Commissioner to repay the \$282 since it was unnecessary because the stay was to attend his own retirement party in Charleston, WV. We also recommend the WVDA require the former Assistant Commissioner to repay the \$258 for the hotel stay since it was for him to attend the former Commissioner's retirement party and was not necessary for WVDA business. In the event the former Commissioner or the former Assistant Commissioner fails to reimburse the WVDA for the hotel stays, we recommend the WVDA consult the IRS to determine whether or not to file amended W-2s for them to account for the hotel stays.

**Spending Unit's
Response:** See Appendix D

Finding 11: Excessive Travel Reimbursements to Former Administration

Condition: During the audit of travel reimbursements, the following issues regarding lack of compliance with the WVDA’s Travel policy were noted:

Former Assistant Commissioner of Agriculture²⁰

- One hundred forty-nine instances (27%) where the former Assistant Commissioner claimed a mileage amount in excess of the recalculated distance for one or more trips²¹. The largest mileage difference for one trip was 204 miles and the smallest was 12 miles.

	Number of Miles	Total Reimbursed
Actual Mileage Claimed	28,151	\$14,145
Audited Mileage	21,490	\$10,798
Difference	6,661	\$3,347

(Amounts rounded to nearest dollar)

Former Deputy Commissioner of Agriculture²²

- Eleven instances (6%) where the former Deputy Commissioner claimed a mileage amount in excess of the recalculated distance for one or more trips²¹. The largest mileage difference for one trip was 33 miles and the smallest was 12 miles.

	Number of Miles	Total Reimbursed
Actual Mileage Claimed	808	\$411
Audited Mileage	600	\$305
Difference	208	\$106

(Amounts rounded to the nearest dollar)

- Thirty-five instances (18%) where the former Deputy Commissioner drove her personal vehicle and received a mileage reimbursement totaling \$724 instead of driving her assigned State vehicle as required by the WVDA Travel Policy. The WVDA was unable to give a justifiable business reason the former Deputy Commissioner drove her personal vehicle for these trips.

Criteria: The WVDA Travel Policy, states in part:

“20.1 ...An employee traveling on Department/Agency business pursuant to these policies and procedures is expected to exercise the care and judgment of

²⁰ We tested the entire population of 64 travel expenditure documents with a total of 561 different travel dates from the period July 1, 2009 through June 30, 2013 submitted by the former Assistant Commissioner totaling \$58,306. (Amounts rounded to nearest dollar.)

²¹ In order to determine mileage reasonableness, we used the mileage calculated by Google Maps for the most reasonable/common route and gave a 10 mile allowance per trip.

²² We tested the entire population of 34 travel expenditure documents with a total of 199 different travel dates from the period July 1, 2009 through June 30, 2013 submitted by the former Deputy Commissioner totaling \$14,537. (Amounts rounded to nearest dollar.)

a prudent person traveling for personal reasons. **Travel on business must be conducted at a minimum cost for achieving success of the mission.** All travel expenditures shall be within budgetary allowance for the Division/Agency for which the trip is taken.” (Emphasis Added)

“20.6.c ...It is the responsibility of the approving official to review and approve employee’s expense accounts...”

20.9.h. “...employees should use State vehicles whenever practical in their travel. Employees should also use the fuel credit card assigned to each State vehicle for the purchase of fuel for the vehicle to maximize the discount to the Department.” (Emphasis Added)

Association of Certified Fraud Examiners (ACFE) defines inflating business expenses as:

“... using inflated mileage totals when seeking reimbursement for auto travel...”

Cause: The WVDA was not effectively reviewing and monitoring employee travel reimbursements. Lack of effective management oversight and review caused the agency to reimburse personal mileage claims which could have been avoided had the WVDA complied with its Travel Policy regarding use of State vehicles.

Effect: The WVDA reimbursed personal mileage amounts more than actually necessary. All unnecessary purchases cause expenses to the State that could diminish the financial standing of the WVDA. An unethical tone of upper management could cause a trickle-down effect where other employees may be more prone to perpetrate unallowable expenditures because they do not consider ethical conduct a priority within the agency.

Recommendation: We recommend the WVDA comply with its Travel Policy by requiring a daily location list which includes a stop-by-stop report from any individual driving a state vehicle or claiming mileage reimbursement for use of a personal vehicle. We also recommend the WVDA properly review travel reimbursement forms to ensure personal mileage amounts claimed are justified and necessary. Furthermore, we recommend the WVDA compare claimed distance to a calculated distance using mapping software such as Google Maps or MapQuest and verify all mileage claims for reasonableness before reimbursement is issued.

Spending Unit’s Response: See Appendix D

Finding 12: Conference Registrations Paid for Former Administration’s Spouses

Condition: During the audit of travel expenditures made on the WVDA travel credit card²³, we noted the WVDA paid \$250 for a registration for the 2009 National Association of State Departments of Agriculture (NASDA) Annual Meeting for the former Commissioner of Agriculture’s spouse and \$200 for a registration for the 2010 NASDA Annual Meeting for the former Assistant Commissioner of Agriculture’s spouse. We were unable to find evidence the former Commissioner or the former Assistant Commissioner reimbursed the WVDA for the expenses.

Criteria: **W.Va. Code §6B-2-5(b)1, as amended, states in part:**

“A public official or public employee **may not knowingly and intentionally use his or her office** or the prestige of his or her office for his or her own **private gain** or that **of another person...**” (Emphasis Added)

The WVDA Travel Policy states in part:

“20.1 Authority – Effective April 1, 2009, Revised December 1, 2009, costs incurred by **authorized employees of the West Virginia Department of Agriculture, Conservation Agency and contractors traveling on business** for and on behalf of the West Virginia Department of Agriculture or Conservation Agency shall be reimbursed in accordance with the following policies and procedures.” (Emphasis Added)

The WVDA Policy & Procedures Manual states in part:

“2.3 **“Employee” means a person who lawfully occupies a full-time position with the West Virginia Department of Agriculture...**” (Emphasis Added)

The West Virginia Expenditure Schedule Instructions state in part:

“026 - **Travel:** Payments for authorized in-state and out-of-state travel expenses in accordance with the State Travel Regulations as issued by the Travel Management Office, Division of Purchasing, Department of Administration and other approved travel plans. **This object code is applicable to state employees, board members, commission members, consultants, contractors, and students, patients, and inmates of state schools, hospitals and institutions...**” (Emphasis Added)

Cause: The WVDA is not adequately tracking all travel expenditures. Additionally, the appearance of an unethical tone by upper level of management led employees to believe they were unable to question the expenses. Employees stated they

²³ The population consists of 130 WVDA’s travel credit card documents totaling \$620,216. For transactions occurring between February 1, 2008 and June 30, 2009, only transactions involving the former Commissioner of Agriculture were reviewed. For transactions occurring between July 1, 2009 and June 30, 2013, only transactions involving the former Commissioner of Agriculture, the former Assistant Commissioner of Agriculture, and one of the former Deputy Commissioners of Agriculture were reviewed. There were 143 transactions on 39 Ghost Account documents totaling \$39,478. (Amounts rounded to nearest dollar.)

felt nothing would be done about the expenses if they were questioned and there was fear among employees they would lose their job if upper management's expenses were questioned.

Effect: The risk of inappropriate purchases is increased with the appearance of an unethical tone of upper management. This could cause a trickle-down effect where other employees are more prone to perpetrate inappropriate expenditures because they do not consider ethical conduct a priority within the agency. These purchases caused unnecessary expense to the State.

Recommendation: We recommend the WVDA comply with W.Va. Code §6B-2-5(b)1, as amended and ensure the Commissioner does not use his office for private gain or for the private gain of another person. Additionally, we recommend the WVDA comply with section 20.1 of its Travel Policy, section 2.3 of the WVDA Policies & Procedures Manual and WV Expenditure Schedule Instructions and only pay travel expenses for authorized employees.

Finally, we recommend the WVDA require the former Commissioner to repay \$250 and the former Assistant Commissioner to repay \$200 for their wives' registrations since it was an unnecessary business expense to the WVDA. In the event the former Commissioner or the former Assistant Commissioner fails to reimburse the WVDA for the registrations, we recommend the WVDA consult the IRS to determine whether or not to file amended W-2s for them to account for the WVDA's purchase of conference registrations for their wives.

Spending Unit's Response: See Appendix D

Finding 13: Improper Calculation of Taxable Income

Condition: During the audit of travel expenditures made on the WVDA travel credit card,²⁴ there were three instances²⁵ on three documents where the former Commissioner of Agriculture stayed overnight in Charleston, WV in addition to the issues noted in Finding 10: Hotel Paid for Former Commissioner's Retirement Party²⁶. His headquarters was officially Guthrie, WV; therefore, a stay in Charleston, WV did not qualify for overnight status. These hotel expenses totaled \$690.

There was also one instance on one document where one of the former Deputy Commissioners of Agriculture stayed overnight in Charleston, WV. Her headquarters was officially Guthrie, WV; therefore, a stay in Charleston, WV did not qualify for overnight status. The WVDA paid for hotel expenses totaling \$184.

The WVDA was unable to provide a justified business reason for the expenses; therefore, the amounts should have been included in the employees' taxable income.

Criteria: **W.Va. Code §5A-8-9 states in part:**

"The head of each agency shall: ...

(b) Make and maintain records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency designed to furnish information to protect the legal and financial rights of the state and of persons directly affected by the agency's activities." **(Emphasis Added)**

W.Va. Code §6B-2-5(b)1, as amended, states in part:

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

The WVDA Travel Policy states in part:

"20.1 ...An employee traveling on Department/Agency business pursuant to these policies and procedures is expected to exercise the care and judgment of a prudent person traveling for personal reasons. **Travel on business must be conducted at a minimum cost for achieving success of the mission.** All travel

²⁴The population consists of 130 WVDA's travel credit card documents totaling \$620,216. For transactions occurring between February 1, 2008 and June 30, 2009, only transactions involving the former Commissioner of Agriculture were reviewed. For transactions occurring between July 1, 2009 and June 30, 2013, only transactions involving the former Commissioner of Agriculture, the former Assistant Commissioner of Agriculture, and one of the former Deputy Commissioners of Agriculture were reviewed. There were 143 transactions on 39 Ghost Account documents totaling \$39,478. (Amounts rounded to nearest dollar.)

²⁵ Multiple expenditures can be on each I-document tested; one travel expenditure document does not translate to one expense. Therefore, multiple instances can be on one document.

²⁶ See Finding 10: Hotel Paid for Former Commissioner's Retirement Party on page 34.

expenditures shall be within budgetary allowance for the Division/Agency for which the trip is taken.” (Emphasis Added)

“20.7.a ...while absent from official headquarters on **overnight status** with a maximum of thirty dollars (\$30) per day for travel within the State of West Virginia **where the distance from the official headquarters is greater than twenty-five miles**. Meals are allowed when lodging is listed as ‘gratis’ or ‘no charge’.” (Emphasis Added)

U.S. Government Accountability Office’s Generally Accepted Government Auditing Standards define abuse as:

“Abuse involves behavior that is deficient or improper when compared with behavior a prudent person would consider reasonable and necessary business practice given the facts and circumstances...”

Cause: The extravagant and inappropriate purchases were due to the unethical tone set by the upper level of management. This led employees to believe they were unable to question the expenses. Employees stated they felt nothing would be done about the expenses if they were questioned and there was fear among employees they would lose their job if upper management’s expenses were questioned.

Effect: Extravagant purchases cause unnecessary expenses to the State and potentially diminish the financial standing of the WVDA. The unethical tone of upper management could cause a trickle-down effect where other employees may be more prone to perpetrate extravagant expenditures because they do not consider ethical conduct a priority within the agency.

Recommendation: We recommend the WVDA require all employees, including upper management and the Commissioner of Agriculture, to follow its Travel Policy and comply with each section’s requirements. Additionally, we recommend WVDA comply with W.Va. Code §5A-8-9 and properly maintain adequate documentation. The WVDA should be cognizant of the amount of monies spent on travel and follow best business practices and not make purchases a prudent person would consider unreasonable and unnecessary given the facts and circumstances.

Finally, we recommend the WVDA require the former Commissioner to repay \$690 and the former Deputy Commissioner to repay \$184 for the hotel stays since it was an unnecessary business expense to the WVDA. In the event the former Commissioner or the former Deputy Commissioner fails to reimburse the WVDA for the hotel stays, we recommend the WVDA consult the IRS to determine whether or not to file amended tax returns for the former Commissioner or former Deputy Commissioner.

Spending Unit’s Response: See Appendix D

Finding 14: Lack of Documentation over Travel

Condition: During the audit of travel expenditures and fuel card transactions for the former Commissioner of Agriculture, the former Assistant Commissioner of Agriculture, and the former Deputy Commissioner of Agriculture, there were several instances where the WVDA failed to provide adequate documentation.

Travel Credit Card Purchases

We audited the WVDA travel credit card²⁷ transactions and noted the following documentation issues:

- Forty-seven instances²⁸ (33%) totaling \$7,135 where the WVDA was unable to provide any documentation as to the business purpose of the hotel stays indicating the trip's necessity or benefit to the WVDA. The employees failed to give specific information regarding the purpose of the hotel stays on their travel reimbursement forms. Also, the WVDA did not maintain copies of past event calendars that would have indicated why the employees were traveling;
- Four instances (3%) totaling \$1,246 where the WVDA was unable to provide documentation indicating an individual actually attended an event. The individuals did not submit a travel reimbursement for the events indicating he or she attended, nor did the WVDA receive a reimbursement from the host of the event or the individuals;
- Twenty-one instances (15%) totaling \$3,961 where the WVDA directly paid for 17 hotel stays, two flights and two conference registrations using the agency's travel credit card. However, we were unable to determine if the former Administration actually traveled to the locations because the individuals failed to complete Travel Reimbursement Request forms upon their return. Travel Reimbursement Request forms are used to account for the total costs associated with travel including all direct bill items, cash advances and reimbursements in order to determine whether the individual received the proper amount of travel and is not owed any further reimbursement or does not owe the State a reimbursement;
- One instance (1%) totaling \$481 where the WVDA did not receive reimbursement for the former Commissioner's unused flight for an event he did not attend. The WVDA was unable to provide

²⁷ The population consists of 130 WVDA's travel credit card documents totaling \$620,216. For transactions occurring between February 1, 2008 and June 30, 2009, only transactions involving the former Commissioner of Agriculture were reviewed. For transactions occurring between July 1, 2009 and June 30, 2013, only transactions involving the former Commissioner of Agriculture, the former Assistant Commissioner of Agriculture, and one of the former Deputy Commissioners of Agriculture were reviewed. There were 143 transactions on 39 Ghost Account documents totaling \$39,478. (Amounts rounded to nearest dollar.)

²⁸ Multiple expenditures can be on each I-document tested; one travel expenditure document does not translate to one expense. Therefore, multiple instances can be on one document.

documentation indicating the flight had been rescheduled or reassigned to a different employee.

Fuel Card Purchases

During the audit of the former Commissioner of Agriculture's fuel card expenses²⁹, we noted the WVDA failed to maintain copies of and/or obtain the former Commissioner's Monthly Commuting Logs for calendar year 2008, January 2012 and January 2013.

Date	Number of Fuel Purchases	Total Fuel Purchase Amount
Calendar Year 2008	58	\$3,614
January 2012	7	\$402
January 2013	3	\$109
Total	68	\$4,125

(Amounts rounded to the nearest dollar)

Because we were unable to review the former Commissioner's Monthly Commuting Logs for the aforementioned time periods, we were unable to determine if the fuel purchase location was reasonable. Thirty-one of the 68 instances were for purchases made near the former Commissioner's home. Without a commuting log, we were unable to determine whether the former Commissioner claimed commuting on the days when fuel was purchased near his home. These transactions totaled \$1,938.

Criteria:

W.Va. Code § 5A-8-9, states in part:

"The head of each agency shall...

(b) Make and maintain records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency designed to furnish information to protect the legal and financial rights of the State and of persons directly affected by the agency's activities..."

The WVDA Travel Policy states in part:

"20.1 ...An employee traveling on Department/Agency business pursuant to these policies and procedures is expected to exercise the care and judgment of a prudent person traveling for personal reasons. **Travel on business must be conducted at a minimum cost for achieving success of the mission.** All travel expenditures shall be within budgetary allowance for the Division/Agency for which the trip is taken." **(Emphasis Added)**

²⁹ We tested the entire population of 300 fuel card transactions executed on the former Commissioner's fuel cards (ARI, WEX, & Exxon) for the period of February 1, 2008 through June 30, 2013 totaling \$16,087. (Amounts rounded to nearest dollar.)

West Virginia Legislative Rule §148-3-6 Use of State Owned and Leased Vehicles:

"It is the responsibility of the spending unit to monitor vehicle use and to take appropriate action when an employee's use is determined to be inappropriate or is not in accordance with this rule."

Cause: The WVDA does not require specific information regarding the business purpose of travel be entered into Travel Reimbursement Request forms and accepts "meetings" and "WVDA business" as adequate reasoning for travel. Furthermore, the WVDA did not maintain copies of past event calendars which could have explained the business purpose of the travel. In addition, the agency was not effectively reviewing, obtaining and maintaining commuting logs.

Effect: The WVDA cannot ensure all purchases were made for official State business. Additionally, the agency would not be able to verify amounts claimed on the individual's travel reimbursement form. This could lead to the WVDA paying travel claims in excess of the amounts actually necessary.

Also, because the WVDA is not adequately maintaining copies of Monthly Commuting Logs the potential for abuse is greatly increased. The WVDA may not be aware when employees are commuting which would result in the WVDA failing to properly calculate the employee's taxable fringe benefit for personal use of their State vehicle. Furthermore, there is possibility the WVDA could be expensing fuel for personal mileage driven rather than work-related trips.

Recommendation: We recommend the WVDA require all employees, including upper management and the Commissioner of Agriculture, to follow its Travel Policy and comply with each section's requirements. Additionally, we recommend the WVDA comply with W.Va. Code §5A-8-9 and properly maintain adequate documentation. The agency must be cognizant of the amount of monies spent on travel and follow best business practices and not make purchases a prudent person would consider unreasonable and unnecessary given the facts and circumstances.

In addition, we recommend the WVDA monitor the commuting logs and investigate any abnormalities. Furthermore, we recommend the WVDA reconcile fuel card purchases back to travel and commuting logs to ensure fuel card privileges are not abused.

Spending Unit's Response: See Appendix D

Finding 15: Internal Control Weaknesses over Travel Reimbursements

Condition: During the audit of the former administration’s travel reimbursements, the following internal control weaknesses were noted:

Former Assistant Commissioner of Agriculture³⁰

- Three instances³¹ on three (5%) different documents where the former Assistant Commissioner claimed a travel expense on a day when he was on a full day’s annual leave (eight hours). Travel reimbursement on these days totaled \$155, which consisted of \$95 in lodging expenses and \$60 in meal allowances;
- One instance where the former Assistant Commissioner stayed in Baker, WV for four nights. Travel reimbursements on these days totaled \$279, which consisted of \$180 in lodging expenses and \$99 in meal allowances. Baker, WV is only 16 miles from the former Assistant Commissioner’s headquarters (Moorefield, WV); therefore, the stay should not have qualified for overnight status; and
- Four instances where the former Assistant Commissioner claimed a meal reimbursement in excess of the amount allowable for the day per the WVDA’s Travel Policy. The former Assistant Commissioner was reimbursed \$69 in excess of the allowable amount.

Former Deputy Commissioner of Agriculture³²

- Seven instances where the former Deputy Commissioner claimed a meal reimbursement in excess of the amount allowable for the day per the WVDA’s Travel Policy. The former Deputy Commissioner was reimbursed \$60 in meal allowances in excess of the amount she should have received; and
- One instance where the former Deputy Commissioner claimed a full meal allowance but did not indicate the destination of her trip. Without a destination listed, we were unable to determine if the entire daily allowance of \$30 should have been reimbursed.

Criteria: **W.Va. Code §5A-8-9, as amended, states in part:**

“The head of each agency shall: . . .

³⁰ We tested the entire population of 64 travel expenditure documents from the period July 1, 2009 through June 30, 2013 submitted by the former Assistant Commissioner of Agriculture totaling \$58,306. (Amounts rounded to nearest dollar.)

³¹ One instance was reported in a letter to the management of the WVDA as part of the previous audit. However, it was not significant enough to warrant inclusion in the February 2014 WVDA Report.

³² We tested the entire population of 34 travel expenditure documents from the period July 1, 2009 through June 30, 2013 submitted by the former Deputy Commissioner of Agriculture totaling \$14,537. (Amounts rounded to nearest dollar.)

(b) **Make and maintain records containing adequate and proper documentation** of the organization, functions, policies, decisions, procedures and essential transactions of the agency designed to furnish information to protect the legal and financial rights of the state and of persons directly affected by the agency's activities." (Emphasis Added)

The WVDA Travel Policy states in part:

"20.1 ...An employee traveling on Department/Agency business pursuant to these policies and procedures is expected to exercise the care and judgment of a prudent person traveling for personal reasons. **Travel on business must be conducted at a minimum cost for achieving success of the mission.** All travel expenditures shall be within budgetary allowance for the Division/Agency for which the trip is taken." (Emphasis Added)

"20.6.c ...It is the responsibility of the approving official to review and approve employee's expense accounts..."

"... 20.7.a. In-State Meal Allowance – Reimbursement will be made for meals while absent from official headquarters on overnight status with **a maximum of thirty dollars (\$30) per day for travel within the State of West Virginia** where the distance from the official headquarters is greater than twenty-five miles..." (Emphasis Added)

"20.7.c **Out-of-State Meal Allowance** – Reimbursement will be made for meals while absent from official headquarters on overnight status, **with a maximum of sixty dollars (\$60) per day...**" (Emphasis Added)

U.S. Government Accountability Office's Generally Accepted Government Auditing Standards define abuse as:

"Abuse involves behavior that is deficient or improper when compared with behavior a prudent person would consider reasonable and necessary business practice given the facts and circumstances..."

Cause: Lack of effective management oversight and review caused meal allowances and travel which did not comply with WVDA policy to be reimbursed to employees. Additionally, the appearance of an unethical tone set by the upper level of management led employees to believe they were unable to question the expenses. Employees stated they felt nothing would be done about the expenses if they were questioned and there was fear among employees they would lose their job if upper management's expenses were questioned.

Effect: Since the WVDA did not verify the information reported on the Travel Reimbursement Request forms, the WVDA paid out travel expenses in excess of the amounts actually necessary. All unnecessary purchases cause unnecessary expense to the State that could diminish the financial standing of the WVDA. An unethical tone of upper management could cause a trickle-down effect where other employees may be more prone to perpetrate unallowable expenditures because they do not consider ethical conduct a priority within the agency.

Recommendation: We recommend the WVDA require all employees, including upper management and the Commissioner of Agriculture, to follow its Travel Policy and comply with each section's requirements. Additionally, we recommend the WVDA comply with W.Va. Code §5A-8-9 and properly maintain adequate documentation and comply with sections 20.1, 20.6, and 20.7 of its travel policy and properly review the travel reimbursement form to ensure travel amounts claimed are correct based on the destination of the traveler and the times of the departure and return trips.

In addition, we recommend the WVDA strengthen internal controls by reconciling employees' timesheets to travel expense reimbursement request before reimbursement is issued. Also, in the case of the WVDA travel credit card, we recommend the WVDA reconcile employees' timesheets to the dates stayed and request reimbursement for any expenses paid while employees were on leave, unless there is a reasonable explanation. Furthermore, we recommend the WVDA be cognizant of the amount of monies spent on travel and follow best business practices and not make purchases a prudent person would consider unreasonable and unnecessary. Finally, we recommend the WVDA consult the IRS to determine whether or not they should file amended W-2s for the former Assistant Commissioner or the former Deputy Commissioner to account for the meal amounts received in excess of the normal meal allowance.

**Spending Unit's
Response:** See Appendix D

Finding 16: Inaccurate Reporting of Taxable Fringe Benefit

Condition: During the audit of the former Commissioner of Agriculture’s taxable fringe benefit reported for personal use of his State vehicle, we noted the WVDA did not properly calculate the former Commissioner’s taxable fringe benefit because the WVDA used the incorrect formula.

Monthly Formula Used by the WVDA:

(Monthly Lease Value + Fuel Costs) * Percentage of Personal Miles Driven

Monthly Formula According to the IRS:

(Monthly Lease Value * Percentage of Personal Miles Driven) + Fuel Costs

Tax Year	EPICS Reported Fringe Benefit	Audited Fringe Benefit	Difference
2009	\$ 1,790	\$ 2,203	\$ 413
2010	\$ 1,739	\$ 1,968	\$ 228
2011	\$ 2,178	\$ 2,434	\$ 256
2012	\$ 1,307	\$ 1,662	\$ 356 ³³
2013	\$ -	\$ - ³⁴	\$ -
Totals	\$ 7,014	\$ 8,267	\$ 1,253

(Amounts rounds to nearest dollar.)

In addition to the difference caused by the incorrect formula being used by the WVDA, there were three minor issues³⁵ that caused the total difference in the table above.

Criteria: W.Va. Code §5A-8-9 states in part:

“The head of each agency shall...

...(b) ...Make and maintain records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency designed to furnish information to protect the legal and financial rights of the state and of persons directly affected by the agency's activities.”

“...(e) Comply with the rules, regulations, standards and procedures...”

IRS Publication 15-B Employer’s Tax Guide to Fringe Benefits: states in part:

“Any fringe benefit you provide is taxable and must be included in the recipient’s pay unless the law specifically excludes it.” (Emphasis Added)

³³ The WVDA did not report a taxable fringe benefit in October 2012. Although the WVDA calculated a taxable fringe benefit of \$95.18 for the month, it was not reported on the former Commissioner’s income.

³⁴ The former Commissioner of Agriculture failed to submit a Commuting Log for January 2013 rendering it impossible to determine the number of times the former Commissioner commuted to and from his home before his departure with the WVDA on January 15, 2013.

³⁵ The WVDA did not report a taxable fringe benefit in October 2012. Although the WVDA calculated a taxable fringe benefit of \$95.18 for the month, it was not reported on the former Commissioner’s income. The other two issues caused immaterial differences.

“General Valuation Rule... You must use the general valuation rule to determine the value of most fringe benefits. Under this rule, the value of a fringe benefit is its fair market value.”

“Lease Value Rule ...the employee must account to the employer... This is done by substantiating the usage (mileage, for example), the time and place of the travel, and the business purpose of the travel. Written records made at the time of each business use are the best evidence. Any use of a company-provided vehicle that is not substantiated as business use is included in income.”

“...Multiply the annual lease value by the percentage of personal miles out of total miles driven by the employee...” **(Emphasis Added)**

Cause: The WVDA misinterpreted the formula for the Lease Value Method under IRS Publication 15. Additionally, the initial calculations were never reviewed and the reported amounts were never reconciled to the calculated amounts. The incorrect fuel cost being used and incorrect mileage were due to human error.

Effect: The miscalculation caused the WVDA to underreport the former Commissioner’s taxable fringe benefit by \$1,270 over the five year span. As a result, the former Commissioner paid less in Federal and State Taxes due for each tax year and the State ultimately could have improperly reported Federal, State, FICA and Social Security taxes.

Recommendation: We recommend WVDA comply with W.Va. Code §5A-8-9 and IRS Publication 15-B by calculating taxable fringe benefits in accordance with the Annual Lease Value method as required. Additionally, the WVDA should generate stronger procedures for maintaining the accuracy of the commuting logs in order to better calculate taxable fringe benefits. We also recommend the WVDA consult the IRS to determine whether or not it should file amended W-2s for the former Commissioner.

Spending Unit’s Response: See Appendix D

Finding 17:

Internal Control Weaknesses over Taxable Fringe Benefits

Condition:

During the audit of the former Commissioner of Agriculture's taxable fringe benefit reported for personal use of his State vehicle, we were informed the former Commissioner drove his State vehicle to/from work daily unless it was in the shop for repairs. However, the Monthly Commuting Logs did not indicate daily commuting. Additionally, we noted the following internal control weaknesses over the reporting of the taxable fringe benefit and the commuting logs.

- The WVDA did not require the former Commissioner to maintain mileage and/or trip records;
- There was not a reconciliation performed to ensure the calculated fringe benefit was entered into EPICS and reported;
- There was not a policy and/or procedure on how information is to be entered into the commuting logs; and
- There was not adequate oversight and monitoring of the information being submitted on the commuting logs.

In addition to the internal control weaknesses noted above, we noted the following:

- Thirteen instances where an odometer reading was not recorded on the former Commissioner's monthly commuting log;
- Two instances where personal mileage driven exceeded total mileage driven causing the percentage of personal miles driven to exceed 100%;
- The October 2012 Commuting Log was illegible; therefore, we had to rely on the WVDA's taxable fringe benefit calculation sheet in order to determine the beginning and/or the ending odometer reading for the month;
- One instance where the ending odometer on one month's commuting log did not match the following month's commuting log beginning odometer reading; and
- Two instances where the WVDA was unable to provide a commuting log for the month in question.

Criteria:

W.Va. Code §5A-8-9 states in part:

"(b) ...Make and maintain records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency designed to furnish information to protect the legal and financial rights of the state and of persons directly affected by the agency's activities."

“(e) Comply with the rules, regulations, standards and procedures...”

WVDA’s Response to the Legislative Auditor’s Memorandum concerning the former Commissioner’s travel states in part:

Question #2:

“Did the former Commissioner ever leave his State vehicle at the Guthrie Complex or did he always take it home with him?”

WVDA’s Response:

“Commissioner ... drove his state vehicle to/from work daily unless it was in the shop for repairs...” (Emphasis Added)

Internal Revenue Service Publication 15-B Employer’s Tax Guide to Fringe Benefits: states in part:

“Any fringe benefit you provide is taxable and must be included in the recipient’s pay unless the law specifically excludes it.” (Emphasis Added)

“General Valuation Rule... You must use the general valuation rule to determine the value of most fringe benefits. Under this rule, the value of a fringe benefit is its fair market value.”

“Lease Value Rule ...the employee must account to the employer... This is done by substantiating the usage (mileage, for example), the time and place of the travel, and the business purpose of the travel. Written records made at the time of each business use are the best evidence. Any use of a company-provided vehicle that is not substantiated as business use is included in income.”

Cause: Lack of effective management oversight and review caused inaccurate mileage records to be maintained by the former Commissioner of Agriculture.

Effect: We were unable to verify mileage records and trip information in order to determine if the taxable fringe benefit for personal use of a State vehicle was correct. As a result, the former Commissioner could have paid less in Federal and State Taxes due for each tax year and the State ultimately could improperly report Federal, State, FICA and Social Security taxes.

Recommendation: We recommend the WVDA comply with W.Va. Code 5A-8-9 and IRS Publication 15-B by reporting all taxable fringe benefits in employee income. Additionally, we recommend the WVDA implement policy and procedures over the Commuting Logs and require adequate mileage and/or trip logs to be maintained for all State vehicles. Furthermore, taxable fringe benefit calculations should be checked before they are reported and then reconciled from the reported amount to the calculation once complete.

Spending Unit’s Response: See Appendix D

Finding 18: Internal Control Weaknesses over Fuel Cards

Condition: During the audit of the WVDA's fuel card expenses, the following internal control weaknesses were noted:

Former Commissioner of Agriculture³⁶

- Two hundred fifty-four instances (85%) where the former Commissioner incorrectly input his assigned personal identification number (PIN) into the odometer prompt at the gas pump. Therefore, we were unable to obtain a correct odometer reading and unable to calculate distance traveled and miles per gallon (mpg) for those purchases;
- Three instances (1%) where odometer readings input at the gas pump indicate a reduction in mileage. For instance, an odometer reading was taken at the pump in the amount of 64,943 on April 21, 2008. The next available invoice, on April 29, 2008, indicates an odometer reading of 64,327, reducing the mileage by 616 miles;
- Sixty-three (21%) instances where the former Commissioner purchased fuel near his home but did not claim commuting on the day of purchase. There was no documentation to support, nor could the WVDA verify, he was in the area on official WVDA business. All 63 purchases were made along the normal route to/from his home in Leon, WV to his official headquarters in Guthrie, WV. Based upon the fuel purchase locations, it appears the former Commissioner should have claimed commuting on these days;
- Twenty instances (7%) where the calculated mpg appears to be unreasonable based upon our calculations using the data entered into the gas pump odometer reading prompt. However, it appears these issues were directly related to the user not inputting the correct odometer reading into the gas pump prompt and not the user abusing his fuel card privileges;
- Four instances (1%) where it appears the former Commissioner purchased fuel in unreasonable locations because there was no indication or documentation to support the former Commissioner was in the area of the purchase location on official WVDA business; and
- One instance where fuel was purchased using the fuel card assigned to the former Commissioner's State vehicle when the vehicle was in a local service shop for repairs. The purchase was made on April 12, 2010; however, the vehicle was in the shop during the period of April 8 - 14, 2010. Since fuel cards are assigned to each vehicle, not to employees,

³⁶ We tested the entire population of 300 fuel card transactions on the former Commissioner's fuel cards (Automotive Resources International (ARI), Wright Express Corporation (WEX), & Exxon) for the period of February 1, 2008 through June 30, 2013 totaling \$16,087. (Amounts rounded to nearest dollar.)

the card should not have been used while the vehicle was being repaired.

Former Assistant Commissioner of Agriculture³⁷

- Fifteen instances (7%) where the former Assistant Commissioner incorrectly input his assigned PIN number into the odometer prompt at the gas pump. Therefore, we were unable to obtain a correct odometer reading and unable to calculate distance traveled and miles per gallon (mpg) for those purchases;
- Nine instances (4%) where odometer readings input at the gas pump indicate a reduction in mileage. For instance, an odometer reading was taken at the pump in the amount of 56,000 on June 6, 2012. The next available invoice, on June 8, 2012, indicates an odometer reading of 52,914, reducing the mileage on the vehicle by 3,086 miles;
- One instance where the State vehicle was filled up in Lewisburg, WV which was approximately 60 miles away from the most direct route from Moorefield, WV to Charleston, WV. The employee's travel reimbursement form did not indicate a stop in Lewisburg, WV;
- One instance where the State vehicle was filled up in Lewisburg, WV which was approximately 60 miles away from the most direct route from Fort Ashby, WV to Charleston, WV. The employee's travel reimbursement form did not indicate a stop in Lewisburg, WV;
- Two instances where the former Assistant Commissioner purchased fuel when he was on a full day of annual leave (eight hours) and the WVDA was unable to provide a reasonable business explanation for the occurrences. One of the fuel purchases was made in Charleston, WV when, according to the Travel Reimbursement Request forms, the employee had not been traveling in the Charleston area on the day prior to taking annual leave.
- Eighty-six instances (39%) where the calculated mpg appears to be unreasonable based upon our calculations using the data entered into the gas pump odometer reading prompt. However, it appears these issues were directly related to the user not inputting the correct odometer reading into the gas pump prompt and not the user abusing his fuel card privileges.

³⁷ We tested the entire population of 221 fuel card transactions on the former Assistant Commissioner's fuel cards (Automotive Resources International (ARI), Wright Express Corporation (WEX), & Exxon) for the period of July 1, 2009 through June 30, 2013 totaling \$17,444. (Amounts rounded to nearest dollar.)

Former Deputy Commissioner of Agriculture³⁸

- Fourteen instances (10%) where the user incorrectly input her assigned PIN number into the odometer prompt at the gas pump. Therefore, we were unable to obtain a correct odometer reading and unable to calculate distance traveled and miles per gallon (mpg) for those purchases;
- Sixteen instances (12%) where odometer readings input at the gas pump indicate a reduction in mileage. For instance, an odometer reading was taken at the pump in the amount of 53,000 on March 21, 2011. The next available invoice, on April 21, 2011, indicates an odometer reading of 52,246, reducing the mileage by 754 miles;
- One instance where the State vehicle was filled up in Cross Lanes, WV, which was not along the claimed route. The claimed route was indicated as from Guthrie, WV to Charleston, WV and a flight to Salt Lake City, UT. The employee's home was in Sissonville, WV and the employee's travel form did not indicate a stop in Cross Lanes, WV;
- One instance where the State vehicle was filled up in Summersville, WV which was approximately 53 miles away from the most direct route from Beckley, WV to Lewisburg, WV. The employee's travel reimbursement form did not indicate a stop in Summersville, WV;
- One instance where the State vehicle was filled up in Ripley, WV, which was not along the most direct route from Guthrie, WV to Lewisburg, WV. Route information was obtained from the employee's travel reimbursement form; and
- Sixty-three instances (47%) where the calculated mpg appears to be unreasonable based upon our calculations using the data entered into the gas pump odometer reading prompt. However, it appears these issues were directly related to the user not inputting the correct odometer reading into the gas pump prompt and not the user abusing her fuel card privileges.

Criteria:

West Virginia Legislative Rule §148-3-6 Use of State Owned and Leased Vehicles:

"It is the responsibility of the spending unit to monitor vehicle use and to take appropriate action when an employee's use is determined to be inappropriate or is not in accordance with this rule."

³⁸ We tested the entire population of 135 fuel card transactions on the former Deputy Commissioner's fuel cards (ARI, WEX, & Exxon) for the period of July 1, 2009 through June 30, 2013 totaling \$6,638. (Amounts rounded to nearest dollar.)

Best business practices include efficiently monitoring the fuel card usage of employees by determining mpg. A low mpg may be indicative of fuel card abuse. A negative mpg or extremely high mpg may indicate the employee was not entering the odometer miles correctly at the gas pump.

Cause: The WVDA was not effectively reviewing and monitoring fuel card charges due to two fuel cards for each State vehicle (ARI/WEX & Exxon) and the invoices for these cards were received with payment due at different intervals. In addition, the individual fuel card holders were not inputting the correct odometer reading into the gas pump prompt. These factors made it difficult for the WVDA to calculate mpg and determine if the employees' fuel usage seemed reasonable.

Effect: With multiple fuel cards per vehicle on different billing cycles, the potential for abuse exists and could cause the State an unnecessary expense. It is also possible the former Commissioner of Agriculture did not properly claim commuting which would result in the WVDA under-reporting his taxable fringe benefits.

Recommendation: We recommend the WVDA properly monitor the fuel card usage by calculating mpg for employees' fuel card transactions and investigating any abnormalities. Furthermore, because the WEX fuel cards include mpg on its invoices, the WVDA should consider discontinuance of the Exxon fuel cards which would make it easier to effectively monitor employees' fuel card usage. Additionally, we recommend the WVDA reconcile fuel card purchases back to travel reimbursements and commuting logs to ensure fuel card privileges are not abused.

Spending Unit's Response: See Appendix D

Finding 19: Individual Improperly Classified as an Independent Contractor

Condition: Based on a legal opinion³⁹ obtained from the Legislative Auditor’s counsel, we determined the WVDA improperly entered into a contract with an individual to perform services for the WVDA. The individual should have been classified as an employee according to the Internal Revenue Code (IRC), the Internal Revenue Service’s (IRS) 20 Factor Test⁴⁰, the Tax Court and the Fourth Circuit Court of Appeals Seven Factor Test⁴¹ and the Fair Labor Standards Act (FLSA)⁴².

On April 15, 2013, the WVDA entered into a written agreement with the individual to perform the following duties as an independent contractor for the agency from April 14, 2013 through April 19, 2014:

- Work with the WVDA on various farm programs and issues, including but not limited to assisting with the Farm to Table Programs, Farm to School Programs, and acting as liaison with Farmers, Counties, State and Federal Governments;
- Collaborate with West Virginia Land-grant Universities and Extension Services on agricultural issues; and
- Provide technical expertise, review WVDA programs, and perform other duties that may be assigned by the Commissioner of Agriculture.

IRS 20 Factor Test

The individual’s working arrangement met fourteen of the twenty criteria indicating an employment relationship for the purpose of the IRC. Most importantly, the individual reported to the Commissioner, who appears to have had the ability to issue assignments and direct how the individual was to carry out WVDA objectives, and gave regular reports to the WVDA Chief of Staff. The IRS would almost certainly classify the individual as an employee of the WVDA and could assess back taxes and a penalty for failure to withhold employment taxes.

The 4th Circuit and Tax Court Seven Factor Test

Five out of seven factors in the test the courts apply to determine whether a worker is an employee or an independent contractor indicate the individual was

³⁹ See Appendix C –Legal Opinion over Independent Contractor on page 88.

⁴⁰ The crux of an IRS determination of whether a worker should be classified as an employee is whether “the person or persons for whom services are being performed have the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished.” In a seminal revenue ruling issued in 1987, the IRS identified twenty factors that indicate whether the right to control is present.

⁴¹ The Tax Courts and the Fourth Circuit Court of Appeals, apply a seven factor test to determine whether a worker qualifies as an employee or independent contractor.

⁴² The FLSA creates obligations for employers and protections for employees, including national minimum wage requirements and standards for overtime pay. The FLSA requirements for employers apply to state government agencies.

an employee of the WVDA. If a court were to review the individual's working arrangement, he would likely be determined to have been an employee of the WVDA.

FLSA

The FLSA standards are not quite as clear-cut when applied to the individual's working situation as the IRC standards. However, three out of six elements in the courts' test decisively weigh in favor of classifying the individual as an employee. Two factors, the control factor and the permanency factor are not entirely clear, but a court could conclude those factors favor an employment classification. Thus, the individual would most likely be classified as an employee under the FLSA.

Conclusion

The WVDA should have classified the individual as an employee, rather than as an independent contractor, and should avoid creating similar working arrangements in the future. Courts and federal agencies consider many factors in determining whether individual is an employee, and some of those factors do support the individual's classification as an independent contractor. However, the majority of the factors the courts and the IRS consider in making such a determination under the IRC and the FLSA indicate the individual was an employee.

Criteria:

Internal Revenue Code §3121 (d), as amended, states in part:

"...For purposes of this chapter, the term "employee" means—...

...(2) **any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee...**"

Rev. Rul. 87-41, 1987-1 C.B. 296 (The IRS 20 Factor Test⁴³), as amended, states in part:

"...the person or persons for whom services are being performed have the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished..."

29 U.S. Code §203 (FLSA), as amended, states in part:

"...(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization...

...(g) "Employ" includes to suffer or permit to work..."

⁴³ See Appendix A - Supplemental Information for a copy of the IRS 20 Factor Test on page 67.

Cause: The WVDA did not consider the individual an employee because he was going to be providing general advice and training, served in mostly an advisory role, had no control over employees, maintained no set hours, did not have supervisory powers over any department employees and was only given general objectives to complete and report back on findings or progress to the Commissioner. Additionally, the WVDA stated a contract was entered into instead of an employment arrangement due to the individual's semi-retirement status.

Effect: When an employer misclassifies an employee as an independent contractor and fails to withhold federal taxes, the IRS can collect unpaid income tax withholdings, interest, unpaid Social Security and Medicare contributions and monetary fines. Additionally, the Department of Labor has the authority to fine anyone who violates the requirements of the FLSA. Furthermore, an employee that is not paid for overtime or is not paid minimum wage can also file a lawsuit to recover back pay in the amount of those payments.

Recommendation: The WVDA should avoid creating similar working arrangements in the future. The WVDA should classify any future working arrangements similar to the individual's as employment relationships and comply with all IRC and FLSA requirements to avoid liability.

Spending Unit's Response: See Appendix D

Finding 20: Noncompliance with Purchasing Procedures

Condition: We noted the WVDA entered into a purchasing agreement with an independent contractor without complying with the West Virginia's Purchasing Division Procedures Handbook for purchases exceeding \$25,000 in a 12 month period.

Because the contract was for \$48,000, it should have gone through the formal bidding process listed in the Handbook. The WVDA claimed the training exemption for the independent contractor. However, the independent contractor did not perform any formal or specific training during the agreement period which is covered under this exemption.

It should be noted the WVDA did not renew the agreement with the independent contractor after the April 19, 2014 expiration date.

Criteria: **The West Virginia Purchasing Division Procedures Handbook Revision 20, states in part:**

3.3 Formal Acquisitions (Over \$25,000): "...Agencies under the executive branch of state government are **required to process purchases estimated to exceed \$25,000 through the Purchasing Division**, unless statutorily exempt." (Emphasis Added)

7.1 Definition of Authority: "All requisitions for commodities and services over \$25,000 must be submitted to the Purchasing Division using **TEAM** or a **Purchase Requisition, WV-35**, for formal competitive bidding."

West Virginia Legislative Rule §148-1-4, as amended, states in part:

"... The (Purchasing) Director may establish a list of commodities and services that are not possible to submit for competitive bid. The Director shall approve the list before the beginning of each fiscal year and shall make the list available for public review...

...The following items comprise the non-competitive/exempt list of commodities and services that may be purchased directly by spending units without advertisement or bid...

...27. **Training Activities: This exemption includes lecturers, honorariums, copyrighted test and training materials, test monitors/examination proctors, etc., where competition is not available.**" (Emphasis Added)

Cause: It appears the WVDA claimed the training exemption for the independent contractor in order to avoid the formal bidding process. The WVDA considered this person as an expert in the agricultural field and wanted him specifically for the position.

Effect: The WVDA could have overpaid the independent contractor for the services which could have been received at a lower rate had the formal bid process been followed. Additionally, there is no way to ensure fair, equitable processes to

procure commodities and services were provided because the WVDA failed to comply with the specific procedures established by the Purchasing Division.

Recommendation: We recommend the WVDA comply with the Purchasing Division's Procedures Handbook by submitting all requisitions for commodities and services over \$25,000 to the Purchasing Division.

Spending Unit's Response: See Appendix D

APPENDIX A - SUPPLEMENTAL INFORMATION

OVERALL SUFFICIENCY OF EVIDENCE

The auditors determined the overall sufficiency and appropriateness of evidence to provide a reasonable basis to persuade a knowledgeable person that the findings and conclusions, within the context of the audit objectives, are supported by sufficient evidence and resulted in reasonable findings. The team evaluated the evidence obtained by reviewing original source documents, assessing information documented in various information systems used by the WVDA and using auditor judgment. The manager reviewed all audit documentation throughout the audit and concluded the evidence supports our objectives.

All testimonial evidence obtained by the audit team was evaluated for objectivity, credibility, and reliability and was obtained under conditions in which the employee was able to speak freely without intimidation. The employees had direct knowledge of their working area and there was no evidence employees were biased. The sufficiency and appropriateness of computer processed information was assessed as outlined in Section 6.66 of GAGAS, regardless of whether the information was provided to the auditors or was independently extracted. The audit team used an Internal Control Questionnaire and risk assessment spreadsheets, assessed the reliability and integrity of data, performed analytical reconciliations, and tested the supporting documentation.

The auditors performed and documented an overall assessment of the collective evidence used to support findings and conclusions, including the results of any specific assessments conducted to conclude on the validity and reliability of specific evidence, in accordance with Section 6.69 of GAGAS, by documenting internal controls and performing tests with an appropriate sample size.

The overall evidence obtained was relevant to the objectives and findings. All evidence supported the findings, giving validity to having a reasonable basis for measuring what was being evaluated. The overall evidence was reliable when tested and can be verified and supported. In establishing the appropriateness of the evidence as a whole, the auditors tested reliability by obtaining supporting documentation, used statistical and non-statistical testing, used original documents when testing, used various WVDA information systems when testing, verified the credibility of testimonial evidence, evaluated analytical review, assessed risk through Internal Control Questionnaires and risk assessment spreadsheets and used auditor judgment on the overall evidence.

When assessing the sufficiency and appropriateness of evidence, the auditors evaluated the expected significance of evidence to the audit objectives, findings, and conclusions, available corroborating evidence, and the level of audit risk as described in Section 6.71 of GAGAS, by using professional judgment and statistical sampling to determine a sufficient quantity for the testing and to determine the type of evidence needed based on the audit objectives.

We have determined the evidence obtained provides a reasonable basis for the findings and conclusions based on the audit objectives. An audit includes examining, on a test basis, evidence about the WVDA's compliance with those requirements referred to above and performing such other procedures, as we considered necessary in the circumstances. The audit does not provide a legal determination of the WVDA's compliance with those requirements.

Other than the Scope Limitations identified in the scope section of this report⁴⁴, the auditors did not identify any other limitations or uncertainties in evidence that were significant to the audit findings and conclusions. Therefore, we did not need to apply additional procedures as identified in Section 6.72 of GAGAS.

⁴⁴ See the Scope Section of this report on page 3. More details on the cause of the scope limitations can be found in Finding 6 – Lack of Management Oversight over Grant Funds on page 24.

WEST VIRGINIA DEPARTMENT OF AGRICULTURE
JULY 1, 2011 – DECEMBER 31, 2012

FUND LISTING

GENERAL REVENUE ACCOUNTS

WVDA maintained the following accounts:

<u>Fund Number</u>	<u>Fund Name</u>
0131	Department of Agriculture Fund ⁴⁵
0135	Meat Inspection Fund ⁴⁵
0136	Agriculture Awards Fund ⁴⁵
0607	WV Agriculture Land Protection Authority ⁴⁵

SPECIAL REVENUE ACCOUNTS

WVDA maintained the following special revenue accounts. These accounts represent specific funds from specific activities as required by law or administrative regulations. These funds were deposited with the State Treasurer in the following special revenue accounts:

<u>Fund Number</u>	<u>Fund Name</u>
1401	Agriculture Fees Fund ⁴⁵
1402	Indirect Cost Fund
1403	Farmer's Market Operating Fund
1404	Sale Lab/Office Building-Moorefield WV Fund
1405	Rural Resources Special Revenue Fund
1407	Gypsy Moth Suppression Fund
1408	West Virginia Rural Rehabilitation Program ⁴⁵
1409	General John McCausland Memorial Fund ⁴⁵
1412	Farm Operating Fund ⁴⁵
1431	Raleigh County Aquaculture Project
1433	Agriculture Projects - Gov. Civil Cont. Fund
1438	Huttonsville - Insurance Claim
1446	Donated Food Fund ⁴⁵
1459	Gifts Grants and Donations
1464	WV Farmland Protection Fund
1465	Integrated Predation Mgmt Fund ⁴⁵
1471	Donated Foods Insurance Account

Agriculture Fees Fund

Fees for inspection of milk, fruit, vegetables, feed, seed, livestock and grading for operating expenses.

Indirect Cost Fund

Interest, gifts, grants, State & Federal funds for indirect costs of meat inspection program.

⁴⁵ Appropriated Fund.

Farmer's Market Operating Fund

Farm sales and rental fees for operating the farmer's market.

Sale Lab/Office Building-Moorefield WV Fund

Land sale & office rentals fees for capital improvements at new Agriculture Center, Hardy County.

Rural Resources Special Revenue Fund

Grants, sales, rental fees & rent transferred from fund 0250 to promote production, quality, & marketing of agriculture products.

Gypsy Moth Suppression Fund

Landowners payments for Gypsy Moth Suppression Program.

West Virginia Rural Rehabilitation Program

State funds from 0131, farm student loan payments & interest to develop enterprises in agriculture commodities.

General John McCausland Memorial Fund

Farm sales, earned interest, and miscellaneous collections for farm operations, repairs, improvements and perpetual care of the memorial.

Farm Operating Fund

Transfers from fund 8615, rental fees, insurance refunds & farm sales to operate farm fund with all over \$1,500,000 to general revenue fund.

Raleigh County Aquaculture Project - Gov Cont Fund

Statutory transfers & miscellaneous collections for the Raleigh County Aquaculture Project.

Agriculture Projects - Gov. Civil Cont. Fund

Operating funds transfers & cost share from landowners to fund gypsy moth suppression & eradication program.

Huttonsville - Insurance Claim

Proceeds from insurance claim.

Donated Food Fund

Other collections, fees, licenses & income to offset operating expenses of the government foods program.

Gifts Grants and Donations

Grants, gifts, and donations for the general expenditures.

WV Farmland Protection Fund

Other collections and fees for the administration of WV Farmland Protection fund.

Integrated Predation Mgmt Fund

Other collections, fees, licenses and income to protect agriculture animals from wild predatory animals.

Donated Foods Insurance Account

Insurance proceeds from July 2007 warehouse claim.

FEDERAL ACCOUNTS

WVDA maintained the following account funded with Federal sources:

<u>Fund Number</u>	<u>Fund Name</u>
8736	Agriculture - Cons Fed Funds General Administration ⁴⁵
8737	Consolidated Fed Funds Meat Inspection Fund ⁴⁵
8896	Land Protection Authority Federal Fund ⁴⁵

Agriculture - Cons Fed Funds General Administration

Federal funds for marketing and development of rural resources.

Consolidated Fed Funds Meat Inspection Fund

Federal funds for animal disease control, pesticide and meat inspection program.

Land Protection Authority Federal Fund

Federal funds to protect land and land resources.

IRS 20 FACTOR TEST

The 20 factors identified by the IRS are as follows:

1. **Instructions:** If the person for whom the services are performed has the right to require compliance with instructions, this indicates employee status.
2. **Training:** Worker training (e.g., by requiring attendance at training sessions) indicates that the person for whom services are performed wants the services performed in a particular manner (which indicates employee status).
3. **Integration:** Integration of the worker's services into the business operations of the person for whom services are performed is an indication of employee status.
4. **Services rendered personally:** If the services are required to be performed personally, this is an indication that the person for whom services are performed is interested in the methods used to accomplish the work (which indicates employee status).
5. **Hiring, supervision, and paying assistants:** If the person for whom services are performed hires, supervises or pays assistants, this generally indicates employee status. However, if the worker hires and supervises others under a contract pursuant to which the worker agrees to provide material and labor and is only responsible for the result, this indicates independent contractor status.
6. **Continuing relationship:** A continuing relationship between the worker and the person for whom the services are performed indicates employee status.
7. **Set hours of work:** The establishment of set hours for the worker indicates employee status.
8. **Full time required:** If the worker must devote substantially full time to the business of the person for whom services are performed, this indicates employee status. An independent contractor is free to work when and for whom he or she chooses.
9. **Doing work on employer's premises:** If the work is performed on the premises of the person for whom the services are performed, this indicates employee status, especially if the work could be done elsewhere.
10. **Order or sequence test:** If a worker must perform services in the order or sequence set by the person for whom services are performed, that shows the worker is not free to follow his or her own pattern of work, and indicates employee status.
11. **Oral or written reports:** A requirement that the worker submit regular reports indicates employee status.
12. **Payment by the hour, week, or month:** Payment by the hour, week, or month generally points to employment status; payment by the job or a commission indicates independent contractor status.

13. **Payment of business and/or traveling expenses:** If the person for whom the services are performed pays expenses, this indicates employee status. An employer, to control expenses, generally retains the right to direct the worker.
14. **Furnishing tools and materials:** The provision of significant tools and materials to the worker indicates employee status.
15. **Significant investment:** Investment in facilities used by the worker indicates independent contractor status.
16. **Realization of profit or loss:** A worker who can realize a profit or suffer a loss as a result of the services (in addition to profit or loss ordinarily realized by employees) is generally an independent contractor.
17. **Working for more than one firm at a time:** If a worker performs more than de-minimis services for multiple firms at the same time, that generally indicates independent contractor status.
18. **Making service available to the general public:** If a worker makes his or her services available to the public on a regular and consistent basis that indicates independent contractor status.
19. **Right to discharge:** The right to discharge a worker is a factor indicating that the worker is an employee.
20. **Right to terminate:** If a worker has the right to terminate the relationship with the person for whom services are performed at any time he or she wishes without incurring liability that indicates employee status.

More recently, the IRS has identified three categories of evidence that may be relevant in determining whether the requisite control exists under the common-law test and has grouped illustrative factors under these three categories: (1) behavioral control; (2) financial control; and (3) relationship of the parties. The IRS emphasizes that factors in addition to the 20 factors identified in 1987 may be relevant, that the weight of the factors may vary based on the circumstances, that relevant factors may change over time, and that all facts must be examined.

Generally, individuals who follow an independent trade, business, or profession in which they offer services to the public are not employees. Courts have recognized that a highly educated or skilled worker does not require close supervision; therefore, the degree of day-to-day control over the worker's performance of services is not particularly helpful in determining the worker's status. Courts have considered other factors in these cases, tending to focus on the individual's ability to realize a profit or suffer a loss as evidenced by business investments and expenses.

METHODOLOGIES

OBJECTIVE 1:

Further investigate several instances of possible fraud and/or abuse items reported to us in our fraud inquiries sent out to various employees during our previous audit and found in our previous audit to determine if they were in fact instances of possible fraud and/or abuse. For several sub-objectives, we expanded the scope of our audit to include dates outside our audit period to determine if those issues existed prior to and/or after our audit period.

METHODOLOGY:

See the individual sub-objectives listed below.

RELEVANT LAWS, POLICIES, AND PROCEDURES:

See the individual sub-objectives listed below.

Sub-Objectives:

- i. Determine if the former Commissioner's travel amounts paid on the WVDA's travel credit card during the period of February 1, 2008 through June 30, 2013 were in compliance with the WVDA Travel Policy and Statewide Contract TCARD06.

METHODOLOGY:

To achieve our objective, we reviewed applicable internal control and compliance with W.Va. Code, W.Va. Statewide Contract TCARD06 Section 3.2.4A, the WVDA Travel Policy and Procedure; reviewed the source documents; made inquiries with various department personnel; and exercised professional judgment as necessary.

In order to account for adequate documentation, we designed and performed a test to determine if the amounts paid on the WVDA's travel credit card for the former Commissioner's travel were in compliance with the WVDA Travel Policy and W.Va. Statewide Contract TCARD06 Section 3.2.4A. The test consisted of all Ghost Account transactions processed between February 1, 2008 and June 30, 2013. The population consisted of 130 Doc IDs totaling \$620,215.87. We then reviewed the supporting documentation for any transactions which were paid on behalf of the former Commissioner of Agriculture for the period of February 1, 2008 through June 30, 2013 totaling \$14,382.09 to ensure these expenditures were in compliance with the WVDA Travel Policy and Statewide Contract TCARD06. Additionally, we compared the travel dates and travel amounts paid to those amounts reimbursed using a Travel Reimbursement Request form to ensure the amounts being paid directly by the agency were not being claimed as a reimbursement by the traveler.

RELATED LAWS, POLICIES, AND PROCEDURES:

- Statewide Contract TCARD06
- W.Va. Code §5A-8-9

- WVDA Travel Policy
 - W.Va. Code §6B-2-5
-

- ii. Determine if the former Commissioner incurred more and/or larger travel expenses during the end of his last term by performing a trend analysis using his travel reimbursements and travel amounts paid on the WVDA's travel credit card for the period of February 1, 2008 through June 30, 2013.

METHODOLOGY:

To achieve our objective we compiled the information obtained during our testing of the former Commissioner's travel reimbursements, the amounts paid for the former Commissioner on the WVDA's travel credit card, fuel purchases made using the former Commissioner's assigned fuel cards, and amounts directly billed to and paid by the WVDA. We compiled the information by date of expenditure and amount and then sorted the dates from oldest to newest. We then used this data to create a graph in order to give a visual illustration of the trends (rises or falls) in the amount spent on travel for the former Commissioner of Agriculture.

During our previous audit of the WVDA released in February 2014, we designed and performed a test to determine if the former Commissioner of Agriculture's travel expenditures were properly documented and maintained by WVDA and funds were spent on allowable items in compliance with WVDA's Travel Policy and Procedure. The test consisted of all Object Code 026 (Travel) expenses reimbursed to the former Commissioner of Agriculture. We tested the entire population consisting of 46 items totaling \$28,667.56. We then recalculated and reviewed the travel expenditures based on the supporting documentation present in accordance with the test designed.

For this audit, in order to obtain the amounts direct billed to the WVDA for travel expenses of the former Commissioner of Agriculture, we obtained a crystal expenditure report and a crystal purchasing card report for all object code 026 "travel" expenditures. We then summarized the data by vendor name and selected any vendor that appeared to be a hotel. Next we summarized the transactions for these vendors by Doc ID. There were 26 I Docs totaling \$198,244.80 and two S Docs totaling \$143.00. All 26 I Docs and both S Docs were reviewed for expenditures made for the former Commissioner for the period of February 1, 2008 through June 30, 2009 totaling \$113.28. Expenditures for the former Deputy Commissioner totaling \$1,406.00 and the former Assistant Commissioner totaling \$2,022.00 for the period of July 1, 2009 through June 30, 2013 were also reviewed.

For the methodology used to obtain the amounts paid on the WVDA's travel credit card for travel expenses of the former Commissioner, see the methodology under Objective 1.i.

For the methodology used to obtain the amounts of all fuel purchases made using the cards assigned to the former Commissioner's vehicle, see the methodology under Objective 1.iv.

- iii. Determine if the former Commissioner's taxable fringe benefit for personal use of his State vehicle was properly calculated using the proper Internal Revenue Service's (IRS) valuation method for the period of February 1, 2008 through June 30, 2013.

METHODOLOGY:

To achieve our objective, we reviewed applicable internal control and compliance with W.Va. Code, IRS Publication 15-B, and the WVDA Travel Policy and Procedure; reviewed the source documents; made inquiries with various department personnel; and exercised professional judgment as necessary.

In order to account for adequate documentation of program results and proper calculation of the former Commissioner of Agriculture's taxable fringe benefit, we designed and performed a test to determine if the WVDA was properly calculating taxable fringe benefits and adequately reporting the amount in the former Commissioner's taxable income.

In order to conduct the review, we obtained copies of the former Commissioner's commuting logs from the WVDA, copies of the e-mails sent to the payroll coordinator from WVDA's Director of Administrative Services informing them of the calculated taxable fringe benefit for the month to be added into the former Commissioner's taxable income for personal use of his State vehicle, bi-monthly pay stubs, and W2's for the period January 1, 2009 to June 30, 2013. We then compared the former Commissioner's pay stubs to the e-mails from the Director of Administrative Services notifying the payroll administrator of the WVDA's calculated taxable fringe benefit for the month to ensure the amount calculated was reported as taxable income. In addition, we compared the total amount on the former Commissioner's year-end (December 31) pay stub and compared that amount with the amount reported on the former Commissioner's West Virginia W2.

Furthermore, in order to determine if the WVDA was properly calculating the former Commissioner's taxable fringe benefit, we recalculated the amounts by using the methods detailed in IRS Publication 15-B (Annual Lease Value Method). In order to determine personal mileage driven for the recalculation, we reviewed the former Commissioner's monthly commuting log and multiplied the number of times he claimed to commute from his home to his headquarters or vice-versa by the calculated mileage between his headquarters and his home. We then compared our recalculated amount to the amounts reported on the former Commissioner's pay stubs to determine the amount the WVDA under reported the former Commissioner's taxable fringe benefit.

RELATED LAWS, POLICIES, AND PROCEDURES:

- IRS Publication 15-b
- W.Va. Code §5A-8-9
- W.Va. Code §6B-2-5

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- iv. Determine if the former Commissioner's fuel card (ARI, WEX & Exxon) purchases were properly accounted for and documented for the period of February 1, 2008 through June 30, 2013.

METHODOLOGY:

To achieve our objective, we reviewed applicable internal control and compliance with the W.Va. Code, Legislative Rules, and the WVDA Travel Policy and Procedure; reviewed source documents; made inquiries with various department personnel; and exercised professional judgment as necessary.

In order to account for adequate documentation of program results and adequate accounting and monitoring of fuel card purchases, we designed and performed a test to determine if the WVDA was adequately monitoring fuel purchases made using the assigned department fuel cards. We obtained copies of the fuel card invoices for ARI, WEX, and Exxon. We then reviewed all fuel purchases made using the cards assigned to the former Commissioner's vehicle. There were 91 fuel purchases made on the ARI fuel card assigned to the former Commissioner's state vehicle totaling \$4,691.08, three fuel purchases made on the WEX fuel card totaling \$108.98, and 206 fuel purchases made on the Exxon fuel card totaling \$11,286.92 resulting in a total of 300 fuel purchases totaling \$16,086.98.

We reviewed the fuel card transactions against the former Commissioner's travel reimbursements and the WVDA leave system. We reviewed the purchases to determine if the type of fuel purchased was reasonable, if the amount of fuel purchased was reasonable, if the miles per gallon (mpg) was reasonable based on the average mpg for the type of vehicle being driven, if the number of fuel purchases per day was reasonable, and if the location where the fuel was purchased was reasonable.

RELATED LAWS, POLICIES, AND PROCEDURES:

- W.Va. Code §5A-8-9
- WVDA Travel Policy
- W.Va. Code §6B-2-5

-
- v. Determine if one of the former Deputy Commissioners' travel reimbursements and travel amounts paid on the WVDA's travel credit card were in compliance with the WVDA Travel Policy and Statewide Contract TCARD06 for the period of July 1, 2009 through June 30, 2013.

METHODOLOGY:

To achieve our objective, we reviewed applicable internal control and compliance with the W.Va. Code, Expenditure Schedule Instructions, Legislative Rules, IRS Publications, best business practices, and WVDA internal policies and procedures; reviewed the source documents; made inquiries with various department personnel; contacted outside agencies/businesses; and exercised professional judgment as necessary.

In order to account for adequate documentation of program results and adequate accounting of expenditures, we designed and performed a test to determine if travel expenditures were properly being documented and maintained by WVDA and funds were spent on allowable items in compliance with WVDA's Travel Policy and Procedure. The test consisted of all Object Code 026 (Travel) expenses reimbursed to the former Deputy Commissioner of Agriculture. We tested the entire population of 34 Doc IDs totaling \$14,537.12. We then recalculated and reviewed the travel expenditures based on the supporting documentation present in accordance with the test designed.

In addition, to achieve our objective over the WVDA's travel credit card expenditures, we reviewed applicable internal control and compliance with W.Va. Code, W.Va. Statewide Contract TCARD06 Section 3.2.4A, the WVDA Travel Policy and Procedure; reviewed the source documents; made inquiries with various department personnel; and exercised professional judgment as necessary.

In order to account for adequate documentation, we designed and performed a test to determine if the amounts paid on the WVDA's travel credit card for one of the former Deputy Commissioner's travel were in compliance with the WVDA Travel Policy and W.Va. Statewide Contract TCARD06 Section 3.2.4A. The test consisted of all Ghost Account transactions processed between February 1, 2008 and June 30, 2013. The population consists of 130 Doc IDs totaling \$620,215.87. We then reviewed the supporting documentation for any transactions paid on behalf of one of the former Deputy Commissioner for the period of July 1, 2009 through June 30, 2013 totaling \$12,032.73 to ensure these expenditures were in compliance with the WVDA Travel Policy and Statewide Contract TCARD06. Additionally, we compared the travel dates and travel amounts paid to those amounts reimbursed using a Travel Reimbursement Request form to ensure the amounts being paid directly by the agency were not being claimed as a reimbursement by the traveler.

RELATED LAWS, POLICIES, AND PROCEDURES:

- W.Va. Code §5A-8-9
- WVDA Travel Policy
- W.Va. Code §6B-2-5
- W.Va. Statewide Contract TCARD06

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- vi. Determine if one of the former Deputy Commissioners incurred more and/or larger travel expenses during the end of the former Commissioner's last term by performing a trend analysis using her travel reimbursements and travel amounts paid on the WVDA's travel credit card for the period of July 1, 2009 through June 30, 2013.

METHODOLOGY:

To achieve our objective we compiled the information obtained during our testing of the former Deputy Commissioner's travel reimbursements, the amounts paid for the former Deputy Commissioner on the WVDA's travel credit card, fuel purchases made using the former Deputy Commissioner's assigned fuel cards, and amounts directly billed to and paid by the WVDA. We compiled the information by date of expenditure and amount and then sorted the dates from oldest to newest. We then used this data to create a graph in order to give a visual illustration of the trends (rises or falls) in the amount spent on travel for the former Deputy Commissioner of Agriculture.

In order to obtain the amounts direct billed to the WVDA for travel expenses of the former Deputy Commissioner of Agriculture, we obtained a crystal expenditure report and a crystal purchasing card report for all object code 026 "travel" expenditures. We then summarized the data by vendor name and selected any vendor that appeared to be a hotel. We then summarized the transactions for these vendors by Doc ID. There were 26 I Docs totaling \$198,244.80 and two S Docs totaling \$143.00. All 26 I Docs and both S Docs were reviewed for expenditures made for the former Commissioner for the period of February 1, 2008 through June 30, 2009 totaling \$113.28. Expenditures for the former Deputy Commissioner totaling \$1,406.00 and the former Assistant Commissioner totaling \$2,022.00 for the period of July 1, 2009 through June 30, 2013 were also reviewed.

For the methodology used to obtain the amounts reimbursed to the former Deputy Commissioner, see the methodology under Objective 1.v.

For the methodology used to obtain the amounts paid on the WVDA's travel credit card for travel expenses of the former Deputy Commissioner, see the methodology under Objective 1.v.

For the methodology used to obtain the amounts of all fuel purchases made using the cards assigned to the former Deputy Commissioner's vehicle, see the methodology under Objective 1.ix.

- vii. Determine if the former Assistant Commissioner's travel reimbursements and travel amounts paid on the WVDA's travel credit card were in compliance with the WVDA Travel Policy and Statewide Contract TCARD06 for the period of July 1, 2009 through June 30, 2013.

METHODOLOGY:

To achieve our objective, we reviewed applicable internal control and compliance with the W.Va. Code, Expenditure Schedule Instructions, Legislative Rules, IRS Publications, best business practices, and WVDA internal policies and procedures; reviewed the source documents; made inquiries with various department personnel; contacted outside agencies/businesses; and exercised professional judgment as necessary.

In order to account for adequate documentation of program results and adequate accounting of expenditures, we designed and performed a test to determine if travel expenditures were properly being documented and maintained by WVDA and funds were spent on allowable items in compliance with WVDA's Travel Policy and Procedure. The test consisted of all Object Code 026 (Travel) expenses reimbursed to the former Assistant Commissioner of Agriculture. We tested the entire population of 64 Doc IDs totaling \$58,305.67. We then recalculated and reviewed the travel expenditures based on the supporting documentation present in accordance with the test designed.

In addition to achieve our objective over the WVDA's travel credit card expenditures, we reviewed applicable internal control and compliance with W.Va. Code, W.Va. Statewide Contract TCARD06 Section 3.2.4A, the WVDA Travel Policy and Procedure; reviewed the source documents; made inquiries with various department personnel; and exercised professional judgment as necessary.

In order to account for adequate documentation, we designed and performed a test to determine if the amounts paid on the WVDA's travel credit card for one of the former Assistant Commissioner's travel were in compliance with the WVDA Travel Policy and W.Va. Statewide Contract TCARD06 Section 3.2.4A. The test consisted of all Ghost Account transactions occurring between February 1, 2008 and June 30, 2013. The population consists of 130 Doc IDs totaling \$620,215.87.

We reviewed the supporting documentation for any transactions paid on behalf of one of the former Assistant Commissioner for the period of July 1, 2009 through June 30, 2013 totaling \$13,063.55 to ensure these expenditures were in compliance with the WVDA Travel Policy and Statewide Contract TCARD06. Additionally, we compared the travel dates and travel amounts paid to those amounts reimbursed using a Travel Reimbursement Request form to ensure the amounts being paid directly by the agency were not being claimed as a reimbursement by the traveler.

RELATED LAWS, POLICIES, AND PROCEDURES:

- W.Va. Code §5A-8-9
 - WVDA Travel Policy
 - W.Va. Code §6B-2-5
 - W.Va. Statewide Contract TCARD06
-

viii. Determine if the former Assistant Commissioner incurred more and/or larger travel expenses during the end of the former Commissioner's last term by performing a trend analysis using his travel reimbursements and travel amounts paid on the WVDA's travel credit card for the period of July 1, 2009 through June 30, 2013.

METHODOLOGY:

To achieve our objective we compiled the information obtained during our testing of the former Assistant Commissioner's travel reimbursements, the amounts paid for the former Assistant Commissioner on the WVDA's travel credit card, fuel purchases made using the former Assistant Commissioner's assigned fuel cards, and amounts directly billed to and paid by the WVDA. We compiled the information by date of expenditure and amount and then sorted the dates from oldest to newest. We then used this data to create a graph in order to give a visual illustration of the trends (rises or falls) in the amount spent on travel for the former Assistant Commissioner of Agriculture.

In order to obtain the amounts direct billed to the WVDA for travel expenses of the former Assistant Commissioner of Agriculture, we obtained a crystal expenditure report and a crystal purchasing card report for all object code 026 "travel" expenditures. We then summarized the data by vendor name and selected any vendor that appeared to be a hotel. We then summarized the transactions for these vendors by Doc ID. There were 26 I Docs totaling \$198,244.80 and two S Docs totaling \$143.00. All 26 I Docs and both S Docs were reviewed for expenditures made for the former Commissioner for the period of February 1, 2008 through June 30, 2009 totaling \$113.28. Expenditures for the former Deputy Commissioner totaling \$1,406.00 and the former Assistant Commissioner totaling \$2,022.00 for the period of July 1, 2009 through June 30, 2013 were also reviewed.

For the methodology used to obtain the amounts reimbursed to the former Assistant Commissioner, see the methodology under Objective 1.vii.

For the methodology used to obtain the amounts paid on the WVDA's travel credit card for travel expenses of the former Assistant Commissioner, see the methodology under Objective 1.vii.

For the methodology used to obtain the amounts of all fuel purchases made using the cards assigned to the former Assistant Commissioner's vehicle, see the methodology under Objective 1.ix.

ix. Determine if one of the former Deputy Commissioner's and Assistant Commissioner's fuel card (ARI, Exxon, WEX) purchases were properly accounted for and documented for the period of July 1, 2009 through June 30, 2013.

METHODOLOGY:

To achieve our objective, we reviewed applicable internal control and compliance with the W.Va. Code, Legislative Rules, and the WVDA Travel Policy and Procedure; reviewed source documents; made inquiries with various department personnel; and exercised professional judgment as necessary.

In order to account for adequate documentation of program results and adequate accounting and monitoring of fuel card purchases, we designed and performed a test to determine if the WVDA was adequately monitoring fuel purchases made using the assigned department fuel cards, if the type of fuel purchased was reasonable, if the amount of fuel purchased was reasonable, if the miles per gallon (mpg) was reasonable based on the average mpg for the type of vehicle being driven, if the number of fuel purchases per day was reasonable, and if the location where the fuel was purchased was reasonable. We obtained copies of the fuel card invoices for ARI, WEX, and Exxon. We then reviewed all fuel purchases made using the cards assigned to the former Deputy Commissioner's vehicle and the former Assistant Commissioner's vehicle.

There were 117 fuel purchases made on the ARI fuel card assigned to the former Deputy Commissioner's state vehicle totaling \$5,740.14, ten fuel purchases made on the WEX fuel card totaling \$575.35, and eight fuel purchases made on the Exxon fuel card totaling \$322.39 resulting in a total of 135 fuel purchases totaling \$6,637.88. We then reviewed the travel expenditures selected as our sample based on the supporting documentation present in accordance with the test designed.

There were 182 fuel purchases made on the ARI fuel card assigned to the former Assistant Commissioner's state vehicle totaling \$14,279.31, 24 fuel purchases made on the WEX fuel card totaling \$2,074.90, and 15 fuel purchases made on the Exxon fuel card totaling \$1,089.70 resulting in a total of 221 fuel purchases totaling \$17,443.91. We then reviewed the items selected as our sample based on the supporting documentation present in accordance with the test designed.

RELATED LAWS, POLICIES, AND PROCEDURES:

- W.Va. Code §5A-8-9
- WVDA Travel Policy
- W.Va. Code §6B-2-5

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- x. Determine if the Mountaineer Food Bank maintained a separate account for all State funds received from the WVDA for the Food Distribution Program during the period of July 1, 2009 through December 31, 2012.

METHODOLOGY:

To achieve our objectives, we reviewed applicable internal control and compliance with the W.Va. Code, and Legislative Rules, reviewed source documents; made inquiries with various department personnel; contacting the Mountaineer Food Bank (MFB); and exercised professional judgment as necessary.

In order to account for adequate documentation of our objectives, we contacted the Executive Director of the Mountaineer Food Bank (MFB) to determine if the MFB maintained a separate account for all State funds received from the WVDA for the Food

Distribution Program. During this time, we were informed by the Executive Director the MFB did not maintain a separate account; however, they did maintain a general ledger which separately accounted for all State funds received and expended. We requested copies of the MFB's general ledger, bank statements, deposit slips, TEFAP invoices, and receipts/invoices for all accounts and transactions expensed with TEFAP money.

RELATED LAWS, POLICIES, AND PROCEDURES:

- W.Va. Code §5A-8-9
- The Emergency Food Assistance Program (TEFAP) – Sub-Recipient Agency Agreement to Participate – Food Distribution Program Agreement

-
- xi. Determine if the Mountaineer Food Bank is in compliance with The Emergency Food Assistance Program (TEFAP) – Sub-Recipient Agency Agreement to Participate – Food Distribution Program Agreement during the period of July 1, 2011 through December 31, 2012.

METHODOLOGY:

To achieve our objectives, we reviewed applicable internal control and compliance with the W.Va. Code, and Legislative Rules, reviewed source documents; made inquiries with various department personnel; contacting the Mountaineer Food Bank (MFB); and exercised professional judgment as necessary.

In order to achieve our sub-objective and to account for adequate documentation of program results and adequate accounting of expenditures, we contacted the Executive Director of the MFB in order to obtain an understanding of the process in which the MFB invoices the WVDA. During our inquiry, we were informed by the Executive Director the MFB does not maintain records of expenditures made from a certain grant because the WVDA does not require it to do so. Instead, the amount of the grant funds allocated to each expense account (i.e. – Salaries, Repairs, Alterations, Supplies, Equipment, Inventory, etc) is based on a predetermined percentage multiplied by the total amount expensed for each account at the end of each period. The TEFAP reimbursement is based on a percentage of all expenditures made by the MFB. In order to determine compliance, all MFB expenditures would have to be audited. Due to the unrealistic timeframe of auditing all MFB expenditures, it was not feasible for us to perform a test which would give reasonable assurance all expenditures were in compliance with TEFAP – Sub-Recipient Agency Agreement to Participate – Food Distribution Program Agreement. This issue was reported in the scope section of the report.

RELATED LAWS, POLICIES, AND PROCEDURES:

- W.Va. Code §5A-8-9
- The Emergency Food Assistance Program (TEFAP) – Sub-Recipient Agency Agreement to Participate – Food Distribution Program Agreement

-
- xii. Determine if the Mountaineer Food Bank is in compliance with the West Virginia Department of Agriculture – Donated Foods Program – Supplemental Agreement for State Funding during the period of July 1, 2011 through December 31, 2012.

METHODOLOGY:

In order to achieve our sub-objective and to account for adequate documentation of program results and adequate accounting of expenditures, we contacted the Executive Director of the MFB in order to obtain an understanding of the process in which the MFB invoices the WVDA. During our inquiry, we were informed by the Executive Director the MFB does not maintain records of expenditures made from a certain grant because the WVDA does not require it to do so. Instead, the amount of the grant funds allocated to each expense account (i.e. – Salaries, Repairs, Alterations, Supplies, Equipment, Inventory, etc) is based on a predetermined percentage multiplied by the total amount expensed for each account at the end of each period.

Since the TEFAP reimbursement is made for a percentage of all expenditures made by the MFB, we would have had to perform an audit of all MFB expenditures in order to determine compliance. Therefore, it was not feasible for us to perform a test which would give us reasonable assurance all expenditures made were in compliance with The Emergency Food Assistance Program (TEFAP) – Sub-Recipient Agency Agreement to Participate – Food Distribution Program Agreement because auditing all MFB expenditures would result in an untimely audit report. Additionally, the WV Legislature does not provide specific guidance regarding the purpose of the appropriation. Therefore, we were unable to determine the intent of the WV Legislature and if the MFB was spending the funds consistent with the Legislature’s intentions. This issue was reported in the scope section of this report.

RELATED LAWS, POLICIES, AND PROCEDURES:

- W.Va. Code §5A-8-9
- The West Virginia Department of Agriculture – Donated Foods Program – Supplemental Agreement for State Funding

OBJECTIVE 2:

Determine if the remaining 16 Rural Rehabilitation Loans not tested during the previous audit were properly managed during the period of July 1, 2011 through December 31, 2012.

METHODOLOGY:

To achieve the objectives, we took several steps, including obtaining a listing of all Rural Rehabilitation Loans the WVDA issued independently with no recommendation from the United States Department of Agriculture (USDA), reviewing the WVDA’s Procedure over the Rural Rehabilitation Loan Program, policy statement, cover letter, application, reviewing loan holder files and making inquiries with various WVDA employees involved in the loan process.

In order to account for adequate documentation of program results and adequate accounting of revenues and expenditures, we designed and performed a test to determine if the Rural Rehabilitation Loan Program was properly managed, determined if deeds of trust or liens for collateral were received and maintained by WVDA personnel, and determined if loan payments were received by the WVDA according to the loan terms.

The listing of Rural Rehabilitation Loans the WVDA issued independently with no recommendation from the USDA had a total population of 42 loans. The WVDA had 13 'current' loans outstanding, 22 'delinquent' loans outstanding and seven loans that were written off. Because we had already reviewed 19 out of the previous 35 loans as part of our previous audit of the WVDA released in February 2014, it was determined the remaining 16 loans would be tested.

RELEVANT LAWS, POLICIES, AND PROCEDURES:

- W.Va. Code §5A-8-9
 - WVDA Rural Rehabilitation Loan Fund Policy Statement
 - WVDA Rural Rehabilitation Assets Use Agreement
 - WVDA Rural Rehabilitation Loan Fund Procedure
-

Sub-Objectives:

- i. Determine if deeds of trust or liens for collateral were received and maintained by WVDA personnel.

METHODOLOGY:

See the methodology for Objective 2 above.

RELATED LAWS, POLICIES, AND PROCEDURES:

- W.Va. Code §5A-8-9
 - WVDA Rural Rehabilitation Loan Fund Policy Statement
 - WVDA Rural Rehabilitation Assets Use Agreement
 - WVDA Rural Rehabilitation Loan Fund Procedure
-

- ii. Determine if loan payments were being received by the WVDA according to the loan terms.

METHODOLOGY:

See the methodology for Objective 2 above.

RELATED LAWS, POLICIES, AND PROCEDURES:

- W.Va. Code §5A-8-9
 - WVDA Rural Rehabilitation Loan Fund Policy Statement
 - WVDA Rural Rehabilitation Assets Use Agreement
 - WVDA Rural Rehabilitation Loan Fund Procedure
-

OBJECTIVE 3:

Determine if the Rural Rehabilitation Loan Committee should be considered a public body and therefore be subject to the Open Meetings Act?

METHODOLOGY:

To achieve our objectives, we attempted to obtain an advisory opinion from the West Virginia Ethics Commission’s Committee on Open Governmental Meetings; however, in accordance with W.Va. Code §6B-2-3(a), advisory opinions may only be sought by a public servant or a public agency about their own prospective conduct. Therefore, we requested a legal opinion from the Legislative Auditor’s counsel concerning whether or not the West Virginia Department of Agriculture’s (WVDA) Rural Rehabilitation Loan Committee is considered a governing body of a public agency subject to the requirements of the West Virginia Open Governmental Proceedings Act established by W.Va. Code §6-9A.

RELEVANT LAWS, POLICIES, AND PROCEDURES:

- W.Va. Code §5A-8-9
 - W.Va. Code §6-9A-1 (Open Meetings Act)
-

OBJECTIVE 4:

Determine if the WVDA maintained effective internal controls over the processing of special handled checks during the period of July 1, 2011 through December 31, 2012.

METHODOLOGY:

To achieve our objectives, we reviewed applicable internal control and compliance with the W.Va. Code, and Legislative Rules, reviewed the source documents; made inquiries with various department personnel; and exercised professional judgment as necessary.

In order to account for adequate documentation of program results and adequate procedures used to process special handled checks, we designed and performed a test to determine if the WVDA followed procedures in place for safe processing, loans were disbursed to the proper recipients (only applicable to stratum 1), whether or not the funds were disbursed to an active and registered state vendor by locating the vendor in the West Virginia Financial Information Management System (WVFIMS), reviewing the procedure and the policies in place over the processing of special handled checks to ensure internal controls were in place, and the items selected in the third stratum were reviewed to ensure they were processed in accordance with policy and procedures that were in direct relation to the use of the appropriated monies.

The test consisted of all transactions processed using special handling. The population consists of 216 transactions totaling \$3,660,841.39. We then stratified the population into two strata, the first included all transactions processed through Fund 1408 - West Virginia Rural Rehabilitation Program (eight transactions totaling \$744,500) and the second included the remaining transactions (208 transactions totaling \$2,916,341.39).

We selected all eight transactions in the first stratum for testing. We then subtotaled the second stratum by Doc ID which resulted in a population of 200 Doc IDs. Next, we used RATSTAT's Attribute Sample Size Determination program to select how many transactions should be tested. According to RATSTATs, at a confidence level of 99% and a precision level of 10% the sample to be tested was 44 items. We used RATSTATs Single Stage Random Numbers function to generate 44 random numbers for stratum 2 and then used the random numbers generated to identify the items selected for testing in the population. Our sample for stratum 2 consisted of 44 items totaling \$464,635.90. After reviewing all transactions, we used our professional judgment to select an additional two items to be removed from the second stratum and moved in a third stratum. Our sample consisted of 54 Doc IDs totaling \$2,052,395.90. We then reviewed the items selected as our sample based on the supporting documentation present in accordance with the test designed.

RELEVANT LAWS, POLICIES, AND PROCEDURES:

- W.Va. Code §5A-8-9
- Purchasing Division Procedures Handbook

APPENDIX B - LEGAL OPINION OVER LOAN COMMITTEE

I N T E R

LEGISLATIVE
S E R V I C E S

O F F I C E

MEMO

To: Melissa Childress, Legislative Post Audit Division
From: Sarah Rogers, Counsel
Subject: Open Meetings Act Requirements for the Rural Rehabilitation Loan Committee
Date: June, 16 2014

I. Question Presented

Is the West Virginia Department of Agriculture's Rural Rehabilitation Loan Committee a governing body of a public agency subject to the requirements of the West Virginia Open Governmental Proceedings Act, W.Va. § Code 6-9A-1, *et seq.*?

II. Short Answer

Yes. According to the plain language of the Open Governmental Proceedings Act, the West Virginia Department of Agriculture's Rural Rehabilitation Loan Committee is clearly a governing body of a public agency. The Loan Committee must comply with the requirements of the Act, including those procedures necessary for entering into an Executive Session.

III. Facts

The following facts were taken directly from your "Request for Opinion" memorandum and our recent telephone conversation. The West Virginia Department of Agriculture ("WVDA") is an Executive Agency under the supervision of the Commissioner of Agriculture. *See* W.V. Code § 19-1-1. The WVDA created the Rural Rehabilitation Loan Program pursuant to the authority granted by West Virginia Code § 19-1-4a. The purpose of the Loan Program is to promote agriculture in West Virginia by helping individuals to purchase farms and by providing assistance to individuals in commercializing home-based farms. Upon receiving an application for a loan, the WVDA provides the information to the Rural Rehabilitation Loan Committee (the "Loan Committee"), which is comprised solely of members of the Department of Agriculture: the Commissioner of Agriculture, the Executive Division Senior Manager, the Chief of Staff, and the Marketing and Development Division Director. The Loan Committee then reviews the application materials and makes a decision as to whether to grant or deny a loan application. The Commissioner of Agriculture maintains the authority to override a recommendation by the Loan Committee, however he is not a "voting member" of the Committee. The Loan Committee refers to each of its other three members as "voting members," indicating that a quorum is required to officially convene or make a decision regarding an application.

IV. Discussion

- A. The WVDA Loan Committee is a "Governing Body" Subject to the Open Governmental Proceedings Act

West Virginia's Open Governmental Proceedings Act ("the Act") defines a "governing body" as:

the members of any public agency having the authority **to make decisions for or recommendations to a public agency** on policy or administration, the membership of a governing body consists of two or more members; for the purposes of this article, a governing body of the Legislature is any standing, select or special committee, except the commission on special investigations, as determined by the rules of the respective houses of the Legislature.

W. Va. Code § 6-9A-2 (**emphasis added**).

The Loan Committee has more than two members, all of whom are members of a public agency (the WVDA).¹ The Loan Committee's function is to make decisions for or recommendations to the WVDA regarding loan applications. There is no question that the Loan Committee is a governing body under the plain language of the Act.

The Act sets forth certain requirements for the meetings of governing bodies. A covered "meeting" is:

the convening of a governing body of a public agency for which a quorum is required in order to make a decision or to deliberate toward a decision on any matter which results in an official action. Meetings may be held by telephone conference or other electronic means.

W. Va. Code § 6-9A-2(5).

The quorum requirement in the Act's definition of "meeting" need not be explicit in a law or in the rules of the governing body. In *Common Cause v. Tomblin*, 186 W. Va. 537, 543 (W. Va. 1991), the West Virginia Supreme Court held that where a law regarding the Legislature's budget making process "contemplate[d] preparation of the Budget Digest by the entire Conferees Committee on the

¹A "[p]ublic agency" means any administrative or legislative unit of state, county or municipal government, including any department, division, bureau, office, commission, authority, board, public corporation, section, committee, subcommittee or any other agency or subunit of the foregoing, authorized by law to exercise some portion of executive or legislative power." W. Va. Code § 6-9A-2.

Budget (or a quorum thereof)" the open meetings law applied. Whether or not the quorum requirement is explicitly recorded or set forth in a Loan Committee rule, the fact that the Loan Committee designates its members as "voting members" indicates that the Committee acts on a quorum basis and that its meetings are subject to the Act.

B. A Gathering Constitutes a Meeting if Members of a Governing Body Conduct Official Business

The Supreme Court has held that when members of a governing body gather to deliberate over official business, they conduct a "meeting." This is so, even if the gathering is informal and some members are absent. In *McComas v. Board of Education*, 197 W.Va. 188, 195 (W.Va. 1996), the West Virginia Supreme Court explained that a gathering is a "meeting" subject to the Act if the members of a governing body "transacted business -i.e., made a decision or deliberated toward a decision -." In *McComas*, the Court considered whether an informal gathering of 4 out of 5 county board of education members to discuss a school consolidation plan constituted a "meeting" under the Act. In holding that the members conducted a "meeting," the court rejected the board's argument that that no formalities were followed, that no votes were taken, that no resolutions were adopted, and that those attending did not plan on other members being present at the meeting. The court explained that:

[b]y imposing the openness requirement on governing bodies who deliberate toward a decision on any matter, the Legislature clearly intended W. Va. Code § 6-9A-1, *et seq.* to apply to those assemblies where discussions leading up to a decision take place. The statute also encompasses at least some meetings between board members and staff. [. . .] Consultations with staff, deliberation and making a decision are steps in a process. For our purposes they are not separate and distinct occurrences. Consultations, deliberations and making a decision are elements in a continuum. To attempt to separate this continuum into contrived components obstructs rather than facilitates interpretation of the Act.

McComas, 197 W.Va. at 195 (*quoting* *Appalachian Power Company v. Public Service Commission*, 162 W. Va. 839, 843 (1979)(internal citations omitted)).

The 1999 Amendments to the Act changed the definition of the term, "meeting" to exempt certain informal discussions.² However, the Amendments explicitly limit exempted discussions to

² According to the 1999 Amendments, "meetings" do not include:

(D) General discussions among members of a governing body on issues of interest to the public when held in a planned or unplanned social, educational, training, informal, ceremonial or similar setting, without intent to conduct public business even if a quorum is present and public business is discussed **but there is no intention for the discussion to lead to an official action;** or

(E) Discussions by members of a governing body on logistical and procedural methods to schedule and regulate a meeting.

those where "there is no intention for the discussion to lead to an official action [. . .]" W.Va. Code § 6-9A-2(5)(D). The 1999 Amendments did not modify the holding of *McComas* as it applies to gatherings in which members of a governing body deliberate over official business or take official action. The Loan Committee's gatherings involve those deliberations and decisions that lead to the WVDA's official action on loan applications. The fact that some of the most authoritative members of the WVDA gather to make decisions and conduct official business on behalf of the agency puts these gatherings squarely within the purview of the Act, regardless of the designation of the members as a separate "Loan Committee."

C. The Executive Session Exception Does Not Exempt the Loan Committee from the Open Governmental Proceedings Act

The Act allows a governing body to enter into a closed executive session and exclude the public from discussion of certain subjects, but the Act explicitly states that "no decision may be made in executive session." W. Va. Code § 6-9A-4(A). Loan Committee discussions involving personal information about loan applicants, as well as certain property transactions, might fall under the Act's Executive Sessions exceptions enumerated in W. Va. Code §§ 6-9A-4(6) and (6)-9A-4(9).³ That the Act allows for discussion of certain subjects in closed meetings, however, does not exempt the Loan Committee from the Act's other requirements. The Act contains strict procedures for entering into Executive Session in the context of an open meeting conducted in accordance with the requirements of West Virginia Code § 6-9A-3.

W.Va. Code § 6-9A-2(5) (**emphasis added**).

³The Act specifies that "a public agency may hold an executive session and exclude the public only when a closed session is required for any of the following actions: [. . .]

(6) [t]o discuss any material the disclosure of which would constitute an unwarranted invasion of an individual's privacy such as any records, data, reports, recommendations or other personal material of any educational, training, social service, rehabilitation, welfare, housing, relocation, insurance and similar program or institution operated by a public agency pertaining to any specific individual admitted to or served by the institution or program, the individual's personal and family circumstances;[. . .]

(9) To consider matters involving or affecting the purchase, sale or lease of property, advance construction planning, the investment of public funds or other matters involving commercial competition, which if made public, might adversely affect the financial or other interest of the state or any political subdivision: Provided, That information relied on during the course of deliberations on matters involving commercial competition are exempt from disclosure under the open meetings requirements of this article only until the commercial competition has been finalized and completed: Provided, However, that information not subject to release pursuant to the West Virginia Freedom of Information Act does not become subject to disclosure as a result of executive session;

W. Va. Code § 6-9A-4

An executive session, closed to the public, may be held to discuss certain exempted topics "only upon a majority affirmance vote of the members present of the governing body of a public agency." W. Va. Code § 6-9A-4(a). In order to commence an Executive Session to discuss exempted topics:

"[d]uring the open portion of the meeting, prior to convening an executive session, the presiding officer of the governing body shall identify the authorization under this section for holding the executive session and present it to the governing body and to the general public, **but no decision may be made in the executive session.**"

W.V. Code § 6-9A-4(a)(**emphasis added**). While it is true that the Loan Committee could enter into a closed Executive Session for certain discussions, the Committee must still comply with the Act's other requirements and follow the Act's very specific procedures for entering into Executive Session. Furthermore, final decisions regarding loan applications must be made during the open portion of Loan Committee meetings.

D. Summary of Open Governmental Proceeding Requirements for the WV Rural Rehabilitation Loan Committee

The Loan Committee is a governing body and must carefully adhere to the Act's requirements. The Loan Committee must make all meetings open to the public. W. Va. Code § 6-9A-3. The Committee must create procedures and rules to make the date, time, location and purpose of all meetings available to the public and to the media in advance. W. Va. Code § 6-9A-3(d). As a governing body of the Executive Branch, the Loan Committee must submit the date, time location and purpose of all regular meetings to the Secretary of State in time to allow the information to appear on the Secretary's website five days in advance of such meeting. W. Va. Code § 6-9A-3(e).

The Loan Committee must also arrange to record the minutes of its meetings. W. Va. Code § 6-9A-5. The minutes of all Loan Committee meetings, except minutes of executive sessions, must be made available to public within a reasonable time after the meeting and shall include:

- (1) The date, time and place of the meeting;
- (2) The name of each member of the governing body present and absent;
- (3) All motions, proposals, resolutions, orders, ordinances and measures proposed, the name of the person proposing the same and their disposition; and
- (4) The results of all votes and, upon the request of a member, pursuant to the rules, policies or procedures of the governing board for recording roll call votes, the vote of each member, by name.

Id.

Melissa Childress, CPA, Audit Manager
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Should the Loan Committee wish to go into Executive Session to discuss topics exempted from the Act by W. Va. Code § 6-9A-4, the Committee must comply with the procedures prescribed therein.

V. Conclusion

A review of the statutory language and applicable case law makes it clear that the Loan Committee, by virtue of its purpose, membership, and structure is a "governing body" subject to the West Virginia Open Governmental Proceedings Act. The West Virginia Supreme Court cautioned in *McComas*: "We leave government officials with this guide: When in doubt, the members of any board, agency, authority or commission should follow the open-meeting policy of the State." *McComas*, 197 W. Va. at 201 (*quoting* *Town of Palm Beach v. Gradison*, 296 So. 2d at 477)(internal quotations omitted). The Loan Committee should adhere to requirements of the Open Meetings Act to avoid liability, which would likely result if a citizen were to challenge its current practices.

**APPENDIX C - LEGAL OPINION OVER
INDEPENDENT CONTRACTOR**

INTER

LEGISLATIVE
SERVICES

MEMO

OFFICE

**To: Kristina Taylor, CPA, Senior Auditor, Legislative Post Audit Division
Melissa Childress, CPA, Audit Manager, Legislative Post Audit Division**
From: Sarah Rogers, Counsel, Legislative Services
Subject: Legal Opinion – Employee vs. Independent Contractor
Date: July 29, 2014

On July 7, 2014, you requested a legal opinion regarding a working arrangement between [REDACTED] and the West Virginia Conservation Agency (WVCA). Below is a legal analysis in response to your question, based upon the facts that you provided.

I. QUESTION PRESENTED

Should [REDACTED] have been classified as an employee or an independent contractor?

II. BRIEF ANSWER

To avoid potential liability for violations of federal tax and labor laws, the West Virginia Department of Agriculture (WVDA) should have classified [REDACTED] as an employee rather than as an independent contractor. Whether an individual is an employee is a factual question and courts consider many factors in determining whether an employment relationship exists. For tax purposes, courts have repeatedly held that they will err on the side of considering an individual an employee in questionable circumstances, and the majority of factors indicate that [REDACTED] was an employee. The WVDA may also have violated the Fair Labor Standards Act (FLSA) by misclassifying [REDACTED] as a contractor and failing to fulfill the FLSA's requirements for employment relationships.

III. FACTS

On April 15, 2013, [REDACTED] entered into a written agreement with the West Virginia Department of Agriculture (WVDA) to perform certain functions for the agency from April 14, 2013 through June 30, 2014. According to the agreement (the Contract), [REDACTED] would perform the following duties as an independent contractor:

- Work with the WVDA on various farm programs and issues, including but not limited to assisting with the Farm to Table Programs, Farm to School Programs, and acting as liaison with Farmers, Counties, State and Federal Governments.

- Collaborate with West Virginia Land-grant Universities and Extension Services on agricultural issues.
- Provide technical expertise, review WVDA programs, and perform other duties that may be assigned by the Commissioner of Agriculture.

Contract at 1 (emphasis added). As compensation for these tasks, ██████████ would be paid \$4,000 per month, to be paid bi-monthly. The written agreement specified that ██████████ would be reimbursed for travel expenses in accordance with WVDA Travel Regulations, and that he would be provided with a laptop and cell phone for carrying out his agreed upon duties.

According to the document you provided titled “Possible Subsequent Event Issues v2” (PAD Memo), the audit team discovered through verbal inquiry that ██████████ had been assigned an office and phone extension at the WVDA facility. PAD Memo at 1. ██████████ also had access to state vehicles for carrying out his duties. In addition, ██████████ had “reported directly to the Commissioner of Agriculture, Walt Helmick.” Id.

IV. LEGAL ANALYSIS

Two federal statutory schemes could present serious legal consequences to the WVDA for misclassifying ██████████ as an independent contractor. As discussed in detail below, ██████████ would most likely be classified as an employee under both the Internal Revenue Code (IRC) and the Fair Labor Standards Act (FLSA).

a. Internal Revenue Code § 3121

Employers have tax incentives to classify workers as non-employees. When workers are treated as non-employees, employers are relieved of liability for the employer's share of Social Security taxes and federal unemployment tax¹ and have no obligation to withhold income tax from the worker's paychecks.² However, when an employer misclassifies an employee as an independent contractor and fails to withhold federal taxes, the Internal Revenue Service (IRS) can collect unpaid income tax withholdings, interest, unpaid Social Security and Medicare contributions and monetary fines. *See* 26 U.S.C.A. § 6601(a); 26 U.S.C.A. § 6672.

The IRC defines "employee" broadly, as "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." 26 U.S.C.A. § 3121(d)(2). In determining whether a worker should be classified as an employee according to these standards, the IRS applies a twenty factor test. *See* Rev. Rule. 87-41 (I.R.S. 1987). The courts apply a seven factor test which largely encompasses the more detailed factors in the IRS test and generally reaches the same conclusion. *See Case v. Comm'r*, 2011 Tax Ct. Memo LEXIS 72, 21-22 (T.C. 2011) (“This Court and the Internal Revenue Service use similar tests”). As discussed below, both the IRS twenty factor test and the 4th Circuit’s seven factor test indicate that ██████████ was an employee of the WVDA.

¹ See generally 26 U.S.C.A. §§ 310.1.

² As required by 26 U.S.C.A. § 3402.

1. *IRS Twenty Factor Test*

The crux of an IRS determination of whether a worker should be classified as an employee is whether “the person or persons for whom services are being performed have the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished.” Rev. Rul. 87-41, 1987-1 C.B. 296. In a seminal revenue ruling issued in 1987, the IRS identified the following twenty factors that indicate whether the right to control is present.

i. *Factors Indicating that ██████████ was an Employee--*

(1) Instructions

“A worker who is required to comply with another persons' instructions about when, where, and how he or she is to work is ordinarily an employee.” Rev. Rul. 87-41, 1987-1 C.B. 296.

Although ██████████ set his own working hours, he “reported to” Commissioner Helmick and was required to “perform other duties that may be assigned by the Commissioner.” PAD Memo at 1; Contract at 1. In addition, ██████████ was required to attend certain meetings at specific times and locations. PAD Memo at 2. Based on these facts, regardless of how much control the WVDA actually exercised over ██████████, the IRS would most likely determine that the Commissioner had the right to control the manner in which ██████████ performed his duties. This factor would weigh in favor of classifying ██████████ as an employee of the WVDA.

(2) Integration

“Integration of the worker’s services into business operations generally shows that the worker is subject to directions and control.” Rev. Rul. 87-41, 1987-1 C.B. 296. Integration of services generally means that a worker’s services are part of the putative employer’s regular business operations. *See Kumpel v. Comm’r*, 86 T.C.M. (CCH) 358, 372 (2003).

There is no question that ██████████’s services were integrated into the WVDA’s regular business operations. ██████████ advised senior officials regarding essential functions of the WVDA and even participated in policy decisions that could influence the mission and direction of the agency. According to Chris Ferro, Chief of Staff for the WVDA, ██████████ produced project ideas, provided budgetary and legislative advice, and helped train members of the Commissioner’s senior staff. See Ferro Email at 1. The integration of ██████████’s services into the most central operations of the WVDA weighs in favor of classifying ██████████ as an employee.

(3) Services Rendered Personally

If the services at issue must be rendered personally, or by a specific individual, “presumably the person or persons for whom the services are performed are interested in the

methods used to accomplish the work as well as in the results.” Rev. Rul. 87-41, 1987-1 C.B. 296.

The WVDA most certainly expected ██████ himself to perform the services described in his contract. In his email to the audit team, Chris Ferro stated that ██████ was chosen based on his “experience and wide variety of agricultural endeavors [. . .] as a teacher and principal, a member of the WV Senate and House of Delegates, former deputy commissioner with the WV Dept. of Agriculture, private owner of a cattle operations, and as a West Virginia University’s associate provost and director of public service and extension as well as liaison to the WV Legislature.” Ferro Email at 1. The qualifications for ██████’s role were extensive, specialized and highly unique to ██████ indicating that he was an employee.

(4) Doing Work on Employer’s Premises

“If the work is performed on the premises for the person or persons for whom services are being performed, that factor suggests control over the worker, especially if that work could be done elsewhere.” Rev. Rul. 87-41, 1987-1 C.B. 296; *see also* Rev. Rul. 56-560, 1956-2 C.B. 693. In addition, “[c]ontrol over the place of work is indicated when the person or persons for whom the services are performed have the right to compel the worker to travel to a designated place [. . .] or work at specific places as required.” Rev. Rul. 87-41, 1987-1 C.B. 296.

██████ performed work in an office at the WVDA Guthrie location and was also required to attend meetings at specific times and places. Thus, this factor weighs in favor of classifying ██████ as an employee.

(5) Oral or Written Reports

“A requirement that the worker submit regular or written reports to the person or persons for whom the services are performed indicates a degree of control.” Rev. Rul. 87-41, 1987-1 C.B. 296; *See also* Rev. Rul. 70-309, 1970-1 C.B. 199.

██████ had regular meetings with Chris Ferro to update Mr. Ferro on his work. PAD Memo at 2. The fact that ██████ met regularly to give oral reports on his work to the Chief of Staff of the WVDA is a factor weighing in favor of classifying him as an employee of the WVDA.

(6) Payment by Hour, Week, Month

Regular payment, by the hour, week or month, generally indicates an employer-employee relationship. Rev. Rul. 87-41, 1987-1 C.B. 296. ██████ was regularly paid on a bi-monthly basis, indicating that he was an employee of the WVDA. Contract at 2.

(7) Payment of Business or Travel Expenses

“If the person or persons for whom the services are performed ordinarily pays the worker’s business and/or traveling expenses, the worker is ordinarily an employee.” Rev. Rul.

87-41, 1987-1 C.B. 296. The WVDA reimbursed ██████ for all travel and business expenses, including lodging and meals, indicating that he was an employee of the WVDA. Contract at 2.

(8) Furnishing of Tools and Materials

If the person for whom services are being performed furnishes the tools and materials for those services, this factor indicates an employment relationship. Rev. Rul. 87-41, 1987-1 C.B. 296. The WVDA furnished ██████ with a laptop, offered ██████ a mobile phone and made state vehicles available to him. Contract at 2. This factor weighs in favor of classifying ██████ as an employee.

(9) Significant Investment

If the worker invests in facilities in which to perform duties, this indicates that he is an independent contractor. Rev. Rul. 87-41, 1987-1 C.B. 296. ██████ did not invest in facilities for the specific functions of his work. This indicates that he was an employee.

(10) Realization of Profit or Loss

An individual is more likely to be classified as an independent contractor if he can realize a profit or suffer a loss as a result of his services. Rev. Rul. 87-41, 1987-1 C.B. 296. ██████ was paid a set salary and did not put himself in a position to realize a profit or suffer a loss based on the quality of his services. This factor indicates that ██████ was an employee of the WVDA.

(11) Working for More than One Firm at a Time

If a worker provides more than de minimis services for more than one firm or entity at a time, this factor indicates that the worker is an independent contractor. Rev. Rul. 87-41, 1987-1 C.B. 296. We are unaware of ██████ providing the services described in his contract to another entity while he worked for the WVDA. Thus, this factor weighs in favor of classifying ██████ as an employee.

(12) Making Services Available to General Public

If a worker makes his services available to the general public, he is more likely to be an independent contractor. Rev. Rul. 87-41, 1987-1 C.B. 296. We are unaware of ██████ making his services available to the general public. Thus, this factor weigh in favor of classifying ██████ as an employee.

(13) Right to Discharge

If the person for whom services are being performed has the right to discharge the worker of his duties, it is more likely that the worker is an employee. Rev. Rul. 87-41, 1987-1 C.B. 296.

Although the contract between ██████████ and the WVDA states that the contract can only be cancelled by written agreement signed by both parties, an addendum to the contract states that the agency can unilaterally terminate the agreement “upon thirty (30) days written notice to [the] Vendor.” Contract at 3. This addendum clause effectively allowed the WVDA the opportunity to terminate ██████████ on one month’s notice without incurring contract damages. This factor weighs in favor of classifying ██████████ as an employee.

(14) Training

Training a worker “by requiring a worker to attend meetings, or by using other methods” indicates that the person or persons for whom the services are performed wants the services performed in a particular manner.” Rev. Rul. 87-41, 1987-1 C.B. 296.

Although we are unaware of whether ██████████ received formal training, ██████████ was required to attend certain meetings. PAD Memo at 2. This factor weighs in favor of classifying ██████████ as an employee.

ii. *Factors Indicating ██████████ was not and Employee--*

(1) Hiring, Supervision, and Paying Assistants

If a worker trains, hires or supervises assistants, this factor indicates employee status. Rev. Rul. 87-41, 1987-1 C.B. 296. Because ██████████ is not known to have done any of these things, this factor weighs against classifying ██████████ as an employee.

(2) Continuing Relationship

A continuing relationship between a worker and putative employer indicates an employment relationship. Rev. Rul. 87-41, 1987-1 C.B. 296. ██████████ s work for the agency lasted only one year and the parties did not renew the arrangement. This factor weighs against classifying ██████████ as an employee.

(3) Set Hours of Work

If a worker is required to work specific hours, this factor indicates control. ██████████ er was allowed to set his own hours. Rev. Rul. 87-41, 1987-1 C.B. 296. This factor weighs against classifying ██████████ as an employee.

(4) Full Time Required

If a worker is required to work full-time, this factor indicates control. ██████████ was allowed to set his own hours and work only as much as necessary to carry out his tasks. Rev. Rul. 87-41, 1987-1 C.B. 296. This factor weighs against classifying ██████████ as an employee.

(5) Order of Sequence Set

If a worker must perform services in a specific order or sequence, this factor indicates an employment relationship. Rev. Rul. 87-41, 1987-1 C.B. 296. We are not aware of any such requirement for ██████ thus, this factor weighs against classifying ██████ as an employee.

(6) Right to Terminate

If the worker has the right to terminate the working relationship with the person for whom services are being performed, he is more likely an employee. Rev. Rul. 87-41, 1987-1 C.B. 296. According to ██████'s contract, he could only terminate the contract with a signed agreement by *both* parties. Thus, ██████ did not have the ability to terminate the contract without permission of the WVDA. This factor weighs against classifying ██████ as an employee.

iii. *Conclusion: IRS Twenty Factor Test*

██████'s working arrangement meets fourteen of the twenty criteria in Rev. Rul. 87-41 that indicate an employment relationship for the purpose of the IRC. Most importantly, ██████ reported to Commissioner Walt Helmick, who appears to have had the ability to issue assignments and direct how ██████ was to carry out WVDA objectives, and gave regular reports to Chris Ferro. The IRS would almost certainly classify ██████ as an employee of the WVDA and could assess back taxes and a penalty for failure to withhold employment taxes.

2. *The Courts – Seven Factor Test*

The Tax Courts and the Fourth Circuit Court of Appeals, apply a seven factor test to determine whether a worker qualifies as an employee or independent contractor. The courts consider:

(1) The degree of control exercised by the principal over the worker, (2) which party invests in work facilities used by the worker, (3) the worker's opportunity for profit or loss, (4) whether the principal has the right to discharge the worker, (5) whether the work is part of the principal's regular business, (6) the permanency of the relationship, and (7) the relationship the parties believed they were creating.

Cave v. Comm'r, 101 T.C.M. (CCH) 1224, 1243-47 (T.C. 2011) (Citing *Ewens & Miller, Inc. v. Commissioner*, 117 T.C. 263, 270 (2001); *Weber v. Commissioner*, 103 T.C. 378, 387 (1994), affd. 60 F.3d 1104 (4th Cir. 1995). The courts use this test to make a “realistic interpretation” and consistently hold that “doubtful questions should be resolved in favor of employment.” *Kumpel* T.C. Memo 265 at 273; see also *Ewens*, 117 T.C. 263 at 269. Once the IRS has classified a taxpayer as an employee, the burden of proof is on the taxpayer-employer to prove by a preponderance of the evidence that its workers are not employees. *Weber* at 17, *Boles Trucking Inc., v. United States*, 77 F.3d 236, 240 (8th Cir. 1996).

In the event of an IRS finding against the WVDA regarding ██████'s employment classification and a subsequent legal challenge, the courts would apply this test. The seven

factor test largely encompasses the IRS test, however, the application of the seven factors to ██████ is discussed in detail below.

i. *Factors Indicating that ██████ was an Employee--*

(1) Degree of Control

The most crucial factor, though not exclusive, in determining whether an employment relationship exists, is whether the person or entity for whom services are performed has the right to control the manner in which services are performed. *See Weber*, 60 F.3d at 1110. To retain the requisite control to establish an employment relationship, an employer need not stand over the employee and direct every move made by that employee, nor must an employer “set an employee’s hours or supervise every detail of the work.” *Id.* at 1110-1111. Courts have consistently held that workers who set their own hours are not necessarily independent contractors. *See e.g. Kumpel*, T.C. Memo 265 at 275.

The courts have also explained that the threshold level of control necessary for an employment relationship is generally lower when applied to professional services than when applied to nonprofessional services.” *Weber*, 60 F.3d at 1111. This is because professional employees necessarily require more individual discretion to perform their duties. *Id.* Despite flexibility in working schedule, where a worker reports to the person or entity for whom services are being performed, courts have found that an employment relationship exists.

In *Weber v. Commissioner*, 60 F.3d 1104 (4th Cir. 1995), the court held that a Minister was an employee of the Methodist church, despite the minister’s ability to schedule his own activities from day to day and take vacation without prior approval. The court explained that the minister’s “ability to schedule his activities according to his own desire merely demonstrate[d] that less supervision is necessary in connection with a professional.” *Id.*

In *West Virginia Personnel Servs. v. United States*, U.S. Dist. LEXIS 14450 (SDWV 1996), the district court found that homemakers provided to West Virginia citizens with certain health requirements through a state program were employees of a homemaker referral company, despite the fact that the state, not the employer, dictated many of the terms and standards involved in the homemakers’ day-to-day work. The referral company did not formulate the treatment plans or supervise details of the jobs at issue and homemakers could turn down assignments from the referring agency, but the referral agency paid the homemakers an hourly wage. The court explained that “it was plaintiff to whom the homemakers reported [. . .] and plaintiff to whom the homemakers were ultimately responsible for carrying out the dictates of the plan.” *Id.* at *20.

A court would likely find that the WVDA exercised the requisite control over ██████ to indicate that he is an employee of the agency. Most importantly, ██████ reported directly to the Commissioner of Agriculture, Walt Helmick. PAD Memo at 1. ██████’s agreement specifically stated that Mr. Helmick could assign ██████ duties during his tenure with the WVDA. Contract at 1. Although ██████ set his own hours, the WVDA could require ██████ to attend certain meetings at specific times/locations. PAD Memo at 2. Further, ██████

█████ regularly met with Chris Ferro, Chief of Staff of the WVDA, to report on █████'s work progress. As described above, courts have found the requisite control for an employment relationship in situations involving much less supervision than what the WVDA could have exercised over █████. In a challenge, the courts would most likely find that the WVDA had the right to control █████'s work.

(2) Investment in Facilities

When an entity provides the facilities where an individual works or the equipment the individual uses to complete that work, the individual is more likely to be an employee. *See Weber*, 60 F.3d at 1112; *Kumpel*, T.C. Memo 265 at 277-78. The WVDA provided █████ with an office, as well as a phone extension. The WVDA provided █████ with a laptop computer and offered to provide him with a cellular phone and access to state vehicles. This factor indicates that █████ was an employee of the WVDA.

(3) Opportunity for Profit or Loss

A worker is more likely to be classified as an employee if he receives set wages or a guaranteed salary and is not in a position to increase his profit or risk for loss in performing his services. *See e.g. Weber*, 60 F.3d at 1112. █████ received a guaranteed salary of \$4,000 per month, paid bi-monthly, according to his contract. █████ could not, by his own actions or performance of duties, increase his profit or suffer a financial loss. This factor weighs in favor of classifying █████ as an employee.

(4) Right to Discharge

An employment relationship is more likely to be found if an entity has the right to discharge a worker from his or her duties. *See e.g. Weber*, 60 F.3d at 1112-13. Although the contract between █████ and the WVDA states that the contract can only be cancelled by written agreement signed by both parties, an addendum to the contract states that the agency can unilaterally terminate the agreement "upon thirty (30) days written notice to [the] Vendor." Contract at 3. This clause in the addendum effectively allowed the WVDA to terminate █████ on one month's notice without future contract damages and thus, weighs in favor of classifying █████ as an employee.

(5) Integral Part of Business

Courts also look to whether a worker's duties are part of the putative employer's regular business operations and whether those duties are integral to the business. *See Weber*, 60 F.3d at 1110, 1112. There is no question █████ performed an integral part of the WVDA's business. █████ was charged with essential agency tasks, such as serving as a liaison to farmers and government units on behalf of WVDA programs, conducting technical training programs and advising the most senior staff of the agency. *See Contract at 1.* █████'s work even included assistance with agency policy. *See Contract at 1; PAD Memo at 2.* This factor weighs heavily in favor of classifying █████ as an employee of the WVDA.

ii. *Factors Indicating ██████████ was not an Employee--*

(1) Permanency of Relationship

A transitory working relationship is less likely to be considered an employment relationship than a permanent one. *See Weber*, 60 F.3d at 1110, 1113. ██████████'s work for the WVDA did not lead to a permanent relationship. The duration of the contract for services was effective April 15, 2013 through June 30, 2014 and the parties did not renew their contract at the end of that period, according to our recent phone conversation. This factor weighs against classifying ██████████ as an employee.

(2) Relationship the Parties Thought They Created

Courts consider the relationship that parties believe they have created in determining whether a worker is an employee or a contractor. *See Weber*, 60 F.3d at 1110, 1113. Clearly, ██████████ and the WVDA intended to create an independent contractor relationship by the language of their agreement. However, "if the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial." Rev. Rul. 87-41, 1987-1 C.B. 296, 1987 IRB LEXIS 254, 10, 1987-23 I.R.B. 7 (I.R.S. 1987); *see also Weber*, 60 F.3d at 1113 ("We give this factor little weight").

3. *Conclusion – 4th Circuit and Tax Court Test*

Five out of seven factors in the test that the courts apply to determine whether a worker is an employee or an independent contractor indicate that ██████████ was an employee of the WVDA. If a court were to review ██████████'s working arrangement, he would likely be determined to have been an employee of the WVDA.

b. Fair Labor Standards Act

The FLSA creates obligations for employers and protections for employees, including national minimum wage requirements and standards for overtime pay. The FLSA requirements for employers apply to state government agencies. 29 U.S.C. § 203(d). The FLSA defines "to employ" broadly, as "to suffer or permit to work." 29 U.S.C. § 203(g). The Supreme Court has long recognized that this definition does little to identify the realistic limits to the employee-employer relationship under the FLSA, and has promulgated a six factor "economic realities" test to determine whether a worker qualifies as an employee. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727-28 (1947). The following six factors comprise the "economic realities" test:

1. The degree of control which the putative "employer" has over the manner in which the work is performed;
2. The opportunities for profit or loss dependent on the managerial skill of the worker;
3. The worker's investment in equipment or material, or his employment of other workers;

4. The degree of skill required for the work;
5. The permanence of the working relationship; and
6. Whether the service rendered is an integral part of the "employer's" business.

Scruggs v. Skylink Ltd., 2011 U.S. Dist. LEXIS 138759, *5-6 (SDWV, 2011); citing *Herman v. Mid-Atlantic Installation Servs., Inc.*, 164 F. Supp. 2d 667, 671 (D. Md. 2000) (discussing *Heath v. Perdue Farms, Inc.*, 87 F. Supp. 2d 452, 457 (D. Md. 2000)).

While these factors are similar to those considered in tax-related cases, the FLSA serves a fundamentally different purpose than the IRC. As the Fourth Circuit once explained, “[t]he focal point [of the Act] is whether the worker “is economically dependent on the business to which he renders service or is, as a matter of economic reality, in business for himself.” *Schultz v. Capital Int’l Sec., Inc.*, 466 F.3d 298, 304 (4th Cir. Va. 2006). With this purpose in mind, each of these factors, as applied to ██████’s arrangement, are discussed below.

1. *Factors that are Inconclusive as to Whether ██████ was an Employee or a Contractor--*

- a. *Degree of Control*

While the economic realities test includes many of the same factors as the tax-related tests discussed above, the courts apply the factors somewhat differently in cases involving the FLSA. Some courts appear to focus on how much control was *actually* exercised over a worker, rather than the degree of control the employer *could* exercise, the latter being the focus of the tax courts. In *Scruggs v. Skylink*, the federal court for the Southern District of West Virginia considered whether cable installers were employers or independent contractors. In designating the workers as independent contractors, the court explained that such workers had control over “how much and when to work. . . whether they [had to] wear uniforms, and how closely their work [was] monitored and controlled by the purported employer.” *Scruggs*, 2011 U.S. Dist. LEXIS 138759 at *8; quoting *Berrocal v. Moody Petroleum, Inc.*, 2009 U.S. Dist. LEXIS 17138, at *17(S.D. Fla. Feb 22, 2009) (internal citations omitted).

The fact that ██████ set his own schedule weighs in favor of classifying him as an independent contractor under the FLSA. On the other hand, ██████ did agree to accept “assignments” on an as needed basis from the WVDA and met with Chris Ferro regularly to report on his work. As explained above, ██████ ultimately “reported to” Walt Helmick. These factors weigh in favor of classifying ██████ as an employee. How a court would answer the question of the degree of control the WVDA exercised over ██████ under the FLSA is not entirely clear, since aspects of his arrangement point to opposing results.

- b. *Permanence of Working Relationship*

“The more permanent the [working] relationship, the more likely the worker is to be an employee.” *Schultz*, 466 F.3d at 306. In addition, “greater exclusivity may imply an employment relationship.” *Scruggs*, 2011 U.S. Dist. LEXIS 138759 at *21-22.

While ██████'s work for the agency lasted only one year and the parties did not renew the contract, it appears that ██████ worked exclusively for the WVDA and did not perform services for another entity during that time. It is not clear how a court would decide this factor, as these considerations produce conflicting results.

2. *Factors Indicating that ██████ was an Employee--*

a. *Opportunities for Profit or Loss*

Similar to the IRC analysis, the FLSA test considers whether a worker can control his own opportunity for profit or loss within a job. "The extent to which an individual is able to generate more money based on skill and hard work may tend to establish independent contractor status." *Scruggs*, 2011 U.S. Dist. LEXIS 138759 at *18. ██████ had a set salary and could not influence his profit or sustain a loss in performing his duties. This factor weighs in favor of classifying ██████ as an employee under the FLSA.

b. *Worker's Investment in Equipment or Material*

A worker's investment in facilities or work materials indicates that the worker is an independent contractor. *Schultz*, 466 F.3d at 308; *Scruggs*, 2011 U.S. Dist. LEXIS 138759 at *19-20. Since the WVDA provided ██████ with an office, computer, phone extension, and travel costs and offered to provide ██████ with a car and cell phone, this factor weighs against classifying ██████ as an independent contractor.

c. *Whether Service is Integral to the Business*

The final factor the courts consider is "the extent to which the service rendered by the worker is an integral part of the putative employer's business." *Schultz*, 466 F.3d at 308. For example, in *Scruggs*, the court pointed out that cable installers were the "lifeblood" of a cable company and their work was integral to the company's business.

Again, ██████'s work was integral to the WVDA's business. ██████ was expected to advise the most senior members of the agency on crucial policy decisions. This factor weighs in favor of classifying ██████ as an employee.

3. *Factors Indicating that ██████ was not an Employee--*

a. *Degree of Skill Required*

Courts are more likely to classify a worker as an employee if the work at issue does not involve a specialized skill or trade. *Scruggs*, 2011 U.S. Dist. LEXIS 138759 at *21-22. ██████'s work involved a high degree of specialization and experience in agricultural affairs and policymaking. See Ferro Email at 1. This factor weighs in favor of classifying ██████ as an independent contractor.

4. Conclusion – FLSA Standards

The FLSA standards are not quite as clear-cut when applied to ██████'s working situation as the IRC standards. However, three out of six elements in the courts' test decisively weigh in favor of classifying ██████ as an employee. Two factors, the control factor and the permanency factor are not entirely clear, but a court could conclude that those factors favor an employment classification. Thus, ██████ would most likely be classified as an employee under the FLSA. The Department of Labor has the authority to fine anyone who violates the requirements of the FLSA. 29 USCS § 216(a). An employee that is not paid for overtime or is not paid minimum wage can also file a lawsuit to recover backpay in the amount of those payments. 29 USCS § 216(b). The WVDA should classify any future working arrangements similar to ██████'s as employment relationships and comply with all FLSA requirements to avoid liability.

V. CONCLUSION

The West Virginia Department of Agriculture (WVDA) should have classified ██████ as an employee, rather than as an independent contractor, and should avoid creating similar working arrangements in the future. Courts and federal agencies consider many factors in determining whether individual is an employee, and some of those factors do support ██████'s classification as an independent contractor. However, the majority of the factors that the courts and the IRS consider in making such a determination under the IRC and the FLSA indicate that ██████ was an employee.

APPENDIX D - WVDA'S RESPONSE TO AUDIT FINDINGS



**Administrative Services Division
West Virginia Department of Agriculture**

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304-558-2221

Walt Helmick
Commissioner

Sandra Gillispie, CPA
Director

August 18, 2014

Mr. Denny Rhodes, Director
Legislative Post Audit Division
Building 1, Rm. W-329
1900 Kanawha Blvd., East
Charleston, WV 25305

Dear Mr. Rhodes:

RE: Response to Legislative Audit Memorandum – July 2014 Follow-up Findings

The July 24, 2014, memorandum from Kristina Taylor identifies items noted during follow-up testing conducted after the conclusion of WV Department of Agriculture's (WVDA) initial audit for the period ending December 31, 2012. For each of the areas of concern noted as follow-up findings, WVDA Administrative Services Division (ASD) staff have reviewed the items and offer the following explanatory notes:

Finding 1. Noncompliance with Open Meetings Act

WVDA agrees with this finding. Agency personnel currently participating in the administration of the Rural Rehabilitation Loan Program began complying with the Open Meetings Act as of January 31, 2014, as noted in the finding memorandum.

Finding 2. Internal Control Deficiency over Loan Program

WVDA agrees with this finding. In June, 2014, competitive bids were solicited from CPA firms for a specialized engagement to review all active loan files and payment history, and recalculate the outstanding balance of each loan as of June 30, 2014.

Dixon Hughes Goodman, LLP, was the successful vendor for this project. As of the date of this response, the field review of fifty-four (54) active loan files (the entire population of active loans, with the exception of a loan with only a single remaining payment due, which WVDA reasonably expects to receive in the near future) has been completed, and a report is forthcoming with any necessary updates to balances

and amortization schedules for each active loan. The Legislative Post Audit Division will be provided a final copy of the report when it is available.

In accordance with the language in 2014 Regular Legislative Session SB350, bids for loan servicing arrangements will be solicited from financial institutions. An agreement will be established with the successful vendor who will assume all loan collection and reporting duties. It will be the responsibility of this vendor to properly track loan activity (including repayment, late payments, and loan refinancing) and report outstanding loan balances to WVDA on a periodic basis (most likely monthly).

Finding 3. Lack of Documentation over Loan Program

WVDA agrees with this finding. In accordance with the language in 2014 Regular Legislative Session SB350, WVDA has filed an Emergency Rule with the WV Secretary of State (61 CSR 33). This rule establishes updated operating procedures for the Rural Rehabilitation Loan Program, including requirements for future loan applicants to document unsuccessful attempts to obtain loans from other sources, and to show adequate collateral at the time of application. The Commissioner of Agriculture has appointed a new Loan Committee comprised of independent, respected members of the business community that bring years of relevant experience to the loan program. It will be the responsibility of the newly appointed Loan Committee to ensure applicant and loan holder compliance with the established standards.

For currently active loans, WVDA agrees with the Legislative Auditors' assessment that collateral previously secured by UCC filings would no longer be of sufficient value. WVDA is still working with the WV Attorney General to review delinquent loan accounts to determine which should be turned over to a collection agency or written off. However, WVDA is experiencing difficulty in getting a ruling from the AG's office and in one instance, we have already incurred charges from the AG's office for an amount equal to the outstanding amount of the loan. We do not believe this to be a fiscally prudent use of the loan program funds.

Informational Finding 4. \$661,790 of Federal Funds Spent on Unprofitable Farmer's Market

WVDA disagrees with this finding. The usage of federal Stimulus (ARRA) funding to upgrade cooling equipment at the Inwood Farmer's Market was determined to be a legitimate and viable project by both the previous agency administration, as well as the WV Division of Energy (DOE), who served as the State oversight agency for the funding. It was the decision of the previous administration to continue retail operations at the Inwood Farmer's Market location in support of area agricultural activities, despite a history of financial difficulties. Profit from the cold storage rental operation at the same location generated positive cash flow into WVFIMS Fund 1403, which in turn helped to support all agency farmer's market operations. It was anticipated that the increased energy efficiency would further improve profitability of the cold storage operation and thereby support the continuation of the farmers' market function.

Because the WVDA successfully completed the first approved energy-efficient upgrades under the strict requirements of the State Energy Program (SEP) ARRA funding, the department was given the opportunity by the WV Division of Energy to receive additional funding for "shovel-ready" projects (those

projects which could be quickly planned, implemented, and completed by state agencies). When considering possible uses for the additional funding, the previous administration identified the aging cold storage infrastructure as a viable project. The aging cooling equipment in the market and cold storage buildings was not energy efficient and required continually increasing maintenance costs to operate.

Thus, the decision was made to accept the offer of the SEP ARRA funding to upgrade the cooling equipment in order to realize savings via reduced energy consumption and maintenance costs. This, in turn, would allow the cold storage rental income to be maximized and continue to support market operations. At the time this project was completed, it was anticipated that the market operations at the Inwood location would continue “as is” under WVDA indefinitely.

Under the new administration, the operation was considered with a more realistic assessment of whether it was reasonable to continue “as is” with the history of losses. Commissioner Helmick did not believe that it was the best use of taxpayer dollars to continue absorbing losses from the operation. His desire was to explore alternatives to save tax dollars by cutting our losses and still provide the service to the agriculture community. We believe that this has been accomplished with the current leasing arrangement. Although WVDA may not directly realize the energy cost savings, the newer equipment made the property more attractive to potential lessees when competitive bids were obtained from private parties interested in taking over those operations. Further, the energy-efficient equipment will allow the current lessee to realize the environmental benefit of reduced energy consumption (and subsequent cost effectiveness) from operating the market and cold storage facilities while providing a source of income for the WVDA to support the remaining farmers’ markets or pursue new opportunities that are more beneficial for taxpayers.

Finding 5. Underinsured Property of Inwood Farmer’s Market

WVDA agrees with this finding. The property values for the Inwood Farmer’s Market and adjacent cold storage facilities will be reevaluated, and appropriate changes will be made on the upcoming annual BRIM Renewal Questionnaire in order to provide a sufficient level of coverage against losses.

Finding 6. Lack of Management Oversight over Grant Funds

WVDA agrees with this finding. For federal funding, it is the intent of WVDA to perform an on-site review of each food bank every other federal fiscal year. WVDA has performed on-site reviews at both the Mountaineer Food Bank and the Feeding Hunger Food Bank (formerly the Huntington Area Food Bank) in previous years. The most recent reviews were conducted in 2012 on the food banks’ 2011 calendar year expenditures. Procedures performed in past reviews included examining expense documentation, established organization policies and procedures, minutes of Board of Director’s meetings, timesheet and payroll documentation, and bank statement reconciliations. Each food bank then received a review report and was required to respond with corrective actions plans for any problems that were noted.

Unfortunately, additional workload and staff shortages in WVDA ASD have made it impossible to conduct the on-site reviews since 2012. However, as of the date of this response, this section is fully staffed and the agency is planning to schedule on-site reviews in the coming months. Past review programs utilized

for the on-site reviews will be updated to test a sampling of expenses, along with backup documentation, to ensure proper handling of federal funding in compliance with 7 CFR 11, as noted in the agreement between WVDA and each food bank.

As discussed in the finding memorandum, state funding appropriated to support the food banks is less restrictive. The WV Legislature does not restrict the funding to a particular group of expenditures or specific purpose for either food bank. Additionally, the Legislature does not give WVDA authority to impose restrictions on the usage of the funding by the food banks. Therefore, we cannot review the usage of these funds for compliance against an established budget or specific purpose.

Finding 7. Noncompliance with TEFAP Agreement to Participate

WVDA agrees with this finding. WVDA has subsequently obtained the 2012 Independent Auditor's Report for this funding recipient. Additionally, the recipient has been notified on multiple occasions of the requirement to submit its fiscal year 2013 Independent Auditor's Report. Current funding disbursements to this recipient are being placed on hold until the report is received and reviewed by WVDA.

Finding 8. Inappropriate Reimbursements to Former Deputy Commissioner

WVDA agrees with this finding. The former Deputy Commissioner is no longer employed by the agency, and this individual's calendar, meeting notes, and other documentation are not available for research or review to determine the purpose of travel or trip details of the occurrences noted in this finding.

Staff assignment changes have been made in WVDA ASD to more closely align the audit of employee travel reimbursements and the reconciliation of United Bankcard travel ghost account statement in order to prevent any lodging which may have been paid via one of the agency's travel ghost account from also being included in an individual employee's travel reimbursement request. Additionally, agency travel policies and procedures are being revised as well and language will be added to reinforce the filing of timely and accurate travel reimbursement requests with proper documentation attached.

Further, it is anticipated that the implementation of the wvOASIS travel module (expected in January, 2015), will automate the travel reimbursement process and have safeguards in place to minimize the potential for duplicate travel reimbursements to an employee.

Finding 9. Inappropriate Reimbursements to Former Assistant Commissioner

WVDA agrees with this finding. The former Assistant Commissioner is no longer employed with the agency, and this individual's calendar, meeting notes, and other documentation are not available for research or review to determine the purpose of travel or trip details of the occurrences noted in this finding.

Further, it is anticipated that the implementation of the wvOASIS travel module (expected in January, 2015), will automate the travel reimbursement process and have safeguards in place to minimize the potential for improper travel reimbursements to an employee.

Finding 10. Hotel Paid for Former Commissioner's Retirement Party

WVDA agrees with this finding. The location and agenda for this event were planned by the previous agency administration. It was the decision of the previous administration to stay overnight at the location where the event was held.

Finding 11. Excessive Travel Reimbursements to Former Administration

WVDA agrees with this finding. The former Commissioner and other administrative support staff noted in this finding are no longer employed with the agency, and individual calendars, meeting notes, and other documentation are not available for research or review to determine the purpose of travel or trip details of the occurrences noted in this finding.

Finding 12. Conference Registrations Paid for Former Administration's Spouses

WVDA agrees with this finding. WVDA ASD staff assigned to audit individual travel reimbursements and United Bankcard travel ghost account statements will set up a receivable from an employee when spousal registration and related travel expenses are initially paid by WVDA. This will allow instances where reimbursement is due to WVDA to be appropriately tracked, and payment requested from the employee in a timely manner.

Finding 13. Improper Calculation of Taxable Income

WVDA agrees with this finding. It was the decision of the previous administration to stay overnight at locations where events were held, regardless of proximity to the employees' homes or official headquarters. The former Commissioner and other administrative support staff noted in this finding are no longer employed with the agency, and individual calendars, meeting notes, and other documentation are not available for research or review to determine the purpose of travel or trip details of the occurrences noted in this finding.

Finding 14. Lack of Documentation over Travel

WVDA agrees with this finding. The former Commissioner and other administrative staff noted in this finding are no longer employed with the agency, and individual calendars, meeting notes, and other documentation are not available for research or review to determine the purpose of travel or trip details of the occurrences noted in this finding.

Finding 15. Internal Control Weaknesses over Travel Reimbursements

WVDA agrees with this finding. The former Commissioner and other administrative support staff noted in this finding are no longer employed with the agency, and individual calendars, meeting notes, and other documentation are not available for research or review to determine the purpose of travel or trip details of the occurrences noted in this finding.

Finding 16. Inaccurate Reporting of Taxable Fringe Benefit

WVDA agrees with this finding. Process changes have been implemented in order to capture more accurate state-owned vehicle mileage and usage information, and apply the proper calculation for the

valuation of the taxable fringe benefit that arises from commuting. The incorrect valuation formula had previously been corrected and has been in use for the current agency head, Commissioner Walt Helmick, since his term began in January 2013. Further, internal forms have been implemented to reflect the proper valuation of fuel cost based on current IRS standards.

A payroll process will be implemented where reports will be generated from the current EPICS payroll system of monthly or quarterly taxable fringe benefit entries. The payroll entries will then be reconciled with source commuting logs used to initiate the entries in order to ensure that all months' commuting has been properly captured and reported.

Finding 17. Internal Control Weaknesses over Taxable Fringe Benefits

WVDA agrees with this finding. As noted in the previous response, both updated forms and audit procedures have been implemented to initially capture and subsequently verify the reported taxable fringe benefit information.

A redesigned commuting log has been put in place to capture both beginning and ending mileage for each month. Instructions on completing the log form and expectations for timeliness of submission for each month's form have been clearly communicated to agency personnel who are assigned state-owned vehicles.

Upon receipt of the monthly commuting logs, all information is audited. Also, as noted above, a process will be implemented where EPICS payroll entries are periodically reviewed with source documentation to ensure that all months' commuting has been properly captured and reported.

Finding 18. Internal Control Weaknesses over Fuel Cards

WVDA agrees with this finding. Staff assignment changes have been made in WVDA ASD to allow for a more thorough audit of monthly fuel card statements.

Further, the agency is developing a set of fleet-related policies and procedures, with formalized instruction to employees on proper fuel card usage and appropriate audit and monitoring procedures to minimize the potential for misuse or abuse of fuel cards.

Finding 19. Individual Improperly Classified as an Independent Contractor

WVDA disagrees with this finding. WVDA hired the contractor with the agreement that he would function independently to explore the concept of developing a Farm to School program for the State to support and promote healthy eating habits through our children's school lunch programs. The contractor was charged with identifying and exploring opportunities/possibilities, any obstacles anticipated, evaluating the potential for success under different scenarios and periodically bring results of these activities to the Commissioner and Chief of Staff for their consideration and decision making process. Although the contractor attended meetings as liaison for WVDA, it was pursuant to achieving the goals of the contract to develop a Farm to School program. The contractor provided his own work space and equipment at his place of residence. WVDA permitted the contractor to use vacant space and equipment that was not in use

for minimal amounts of time that he was on the premises. He was not required to report to work at set times nor conduct the work on the premises. The contractor's opportunity for increasing profit or losses was entirely dependent upon his efficiency in producing the deliverables. WVDA does not believe that the activities performed under this agreement can be considered integral to our business because the program did not and does not currently exist. The intent was to explore opportunities and obstacles and provide information on such to management for their evaluation.

Finding 20. Noncompliance with Purchasing Procedures

WVDA disagrees with this finding. WVDA hired the contractor under the exemption for training with the expectation that the program would develop more quickly than it did. The training would be conducted once the program was fully defined and developed. Due to a variety of obstacles encountered and the resulting delays in getting the program fully developed, the contract expired before the training component could be developed and delivered.