

WEST VIRGINIA LEGISLATURE
Joint Committee on Government and Finance

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CHARLESTON, WEST VIRGINIA 25305-0610

MEMORANDUM

Date: October 15, 2002

From: Michael E. Sizemore ^{MES}
Neil McEachron, Jr. ^{NMM}

To: Theodford L. Shanklin, Director

Subject: FOLLOW-UP REVIEW OF THE SPECIAL REPORT OF
WEST VIRGINIA UNIVERSITY BOOKSTORE OPERATIONS
FOR THE PERIOD 07/01/1997 - 06/30/2000

On Tuesday, July 9, 2002, we met with representatives of West Virginia University (WVU) to discuss the actions taken by WVU to comply with the recommendations presented in our Special Report of the WVU Bookstore Operations for the period July 1, 1997 - June 30, 2000. Specifically, we met with: Gary Rogers, Associate Vice President for Finance; Elizabeth Reynolds, Assistant to the Associate VP for Finance; Lisa Mitchell, Director of Research and Tax Accounting; Jeri Ireland, Director of Business Services; Tim Bostonia, Special Projects Assistant - Business Services; and, Doug Maatman, Management Auditor - Internal Audit. The following paragraphs summarize the actions taken by the University regarding specific findings contained within our report.

FINDING #1 - DEPOSIT AND USE OF GUARANTEED PAYMENTS

WVU deposited \$2,889,686.37 in guaranteed payments from Barnes & Noble into the Special Services Account - Account 4159, instead of following the provisions of Chapter 18B, Article 10, Section 14, as amended, and Chapter 18B, Article 5, Section 2a of the West Virginia Code. As a result, the West Virginia Legislature did not get to exercise its authority to control the use of the guaranteed payments. We believe WVU should have deposited the guaranteed payments into the Bookstore Account - Account 4150 instead of the Special Services Account and then transferred the moneys into a special efficiency surplus account or into another account using procedures outlined in § 18B-5-2a.

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We Recommended:

WVU comply with Chapter 18B, Article 10, Section 14, as amended, and Chapter 18B, Article 5, Section 2a of the West Virginia Code.

University Action:

Under the new bookstore contract which took effect May 1, 2001, WVU defined the payments received from Barnes & Noble as "rent payments" rather than as "guaranteed payments" as referred to in the prior contract. The University is continuing to deposit these "rent payments" received from Barnes & Noble into the Special Services Account - Account 4159 rather than the Bookstore Account - Account 4150.

Post Audit Division Comments:

WVU has not complied with the recommendation contained in our report. WVU continues to fail to deposit the moneys received from the WVU Bookstore into the Bookstore Account and then use the procedures set out in Chapter 18B, Article 5, Section 2a of the West Virginia Code to obtain proper approval from the West Virginia Legislature to expend the funds.

FINDING #2 - RECEIPT OF GUARANTEED PAYMENTS

One quarterly guaranteed payment from Barnes & Noble totaled \$222,186.37 rather than the scheduled \$250,000.00 because WVU and Barnes & Noble verbally agreed to share the cost of certain renovations to the Potomac State College Bookstore. Barnes & Noble then withheld WVU's share of the renovation costs from the next guaranteed payment. By authorizing Barnes & Noble to net WVU's share of the renovation costs against one of the scheduled quarterly payments due WVU without amending the current contract through a change order, WVU was in noncompliance with the Price Adjustment Provisions of the Bookstore Contract. Also, we noted three payments from the vendor were received up to 11 days after the scheduled due date.

We Recommended:

WVU comply with both the Price Adjustment and Guaranteed Revenues Provisions of the contract between WVU and Barnes & Noble.

University Action:

WVU is now in compliance with these recommendations contained in the Legislative Post Audit Division's report on the WVU Bookstore.

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Post Audit Division Comments:

We agree that WVU is now in compliance with our recommendations in this area.

FINDING #3 - VENDOR REIMBURSEMENTS OF MONTHLY EXPENSES INITIALLY PAID BY WVU ON BEHALF OF VENDOR

We noted several instances where reimbursements due under the Bookstore Contract were not being remitted timely and in the correct amounts. Specifically, we noted 21 instances of reimbursement payments totaling \$719,862.14 remitted late by Barnes & Noble; ten (10) instances of payroll credits totaling \$7,516.19 not being applied by WVU to the monthly billings submitted for payment to Barnes & Noble; a cumulative underpayment of \$175.29 by Barnes & Noble through November 30, 2000 which occurred because the vendor was not paying the exact amounts billed by WVU from April 1, 2000 through November 30, 2000; one (1) instance where WVU overbilled Barnes & Noble by \$10.00 due to the wrong payroll credit amount being applied against the March 1999 billing; and five (5) instances of reimbursement payments totaling \$275,919.84 which were accounted for as revenues rather than as expenditure reductions. As a result of these errors, WVU overbilled Barnes & Noble by a net amount of \$7,350.90 through November 30, 2000.

We Recommended:

Both WVU and Barnes & Noble comply with all provisions of the contract regarding the monthly billing for and reimbursement of payroll costs, telephone service, postage and other miscellaneous expenses.

University Action:

WVU has made the necessary procedural changes and is now in compliance with these recommendations contained in the Legislative Post Audit Division's report on the WVU Bookstore.

Post Audit Division Comments:

We agree that WVU is now in compliance with our recommendations in this area.

FINDING #4 - CONTRACT MONITORING

WVU did not conduct a Contract Compliance Audit and a Customer Satisfaction Survey during the fourth year of the Barnes & Noble bookstore contract.

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We Recommended:

WVU comply with the Monitoring Contract Performance provision of the contract to ensure Barnes & Noble is fully complying with the terms and conditions of the contract.

University Action:

WVU entered into a new five-year agreement with Barnes & Noble for the period May 1, 2001 - June 30, 2006 which makes the previously mandatory internal audits optional on the part of WVU and the required customer satisfaction surveys are now to be provided by the vendor (Barnes & Noble).

FINDING #5 - SALES TO THE GENERAL PUBLIC

Barnes & Noble was making sales to the general public (with the exception of educational software) from the WVU Bookstore although State law prohibits such sales.

We recommended:

WVU comply with Chapter 18B, Article 10, Section 14 of the West Virginia Code until such time as the statute is amended to allow sales to the general public.

University Action:

The Vendor (Barnes & Noble) continues to make sales to the general public, with the exception of educational software.

Post Audit Division Comments:

WVU should instruct Barnes & Noble that sales to the general public from any bookstore facility operating the name of WVU are in noncompliance with Chapter 18B, Article 10, Section 14 of the West Virginia Code.

I N T E R

**LEGISLATIVE
SERVICES**

O F F I C E

MEMO

To: Thedford Shanklin, Director, Post Audit Division
From: Randall Eldris, Counsel
Subject: WVU Bookstores
Date: October 9, 2002

I am writing to respond to your question concerning the disposition of funds that West Virginia University receives from the operation of its bookstores. According to the information you have supplied, WVU has entered into an "Agreement and Lease" with Barnes & Noble for the operation of bookstores on WVU's campuses. You have specifically asked into what account is WVU to deposit funds it receives from the operation of the bookstores.

The Legislature has provided a mechanism for the establishment and operation of bookstores by institutions of higher education in W.Va. Code §18B-10-14. This section requires, in part, that:

All moneys derived from the operation of the store shall be paid into a special revenue fund as provided in section two, article two, chapter twelve of this code. Each governing board shall, subject to the approval of the governor, fix, and from time to time, change the amount of the revolving fund necessary for the proper and efficient operation of each bookstore.

Based on the information supplied, WVU claims that it is not operating the bookstores, but instead providing a special service to its students by allowing the operation of private bookstores on its campuses. Consequently, it is depositing the funds it receives from the operation of the bookstores into a special services account under the provisions of W.Va. Code §18B-10-15.

After reviewing the Agreement and Lease, its associated documents, the Court's order you provided in *W. Va. University Association of Concerned Employees, et al. v. The University of West Virginia Board of Trustees* (C.A. No. 91-C-882) and the applicable statutes, it is my opinion that WVU has established the bookstores and is operating the bookstores through its Agreement and Lease with Barnes & Noble. Consequently, it is required to comply with the provisions concerning the operation of the bookstores and the disposition of funds it receives from the operation of the bookstores contained in W.Va. Code §18B-10-14.

The documents supplied clearly demonstrate that the relationship between WVU and Barnes & Noble is not simply a landlord/tenant relationship or that WVU is merely

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receiving "rental income" from Barnes & Noble. A review of the documents establish that Barnes & Noble is, in fact, operating the WVU bookstores on behalf of WVU. The Agreement gives WVU ample control over the operations of the bookstores.

Some of the more obvious provisions of the Agreement that demonstrate Barnes & Nobles is operating the WVU bookstores on behalf of WVU are:

- ◆ Paragraph 1.2 contains a noncompetition clause in case of termination or expiration of the Agreement.
- ◆ Paragraph 2.1 provides that "Vendor will operate as the official West Virginia University Bookstores."
- ◆ Paragraph 2.7 contains provisions allowing WVU full access to Barnes & Noble's records relating to the bookstores.
- ◆ Paragraph 2.9 provides that "VENDOR may not display or sell any item, as requested by West Virginia University, that does not meet university standards. Vendor is required to sell certain niche-type items or merchandise as needed or required by university custom."
- ◆ Some of the employees working at the bookstores are employees of WVU.

The Legislature has authorized the establishment and operation of university bookstores in W.Va. Code §18B-10-14. This section also contains specific requirements relating to the operation of the bookstores, including the requirement that all moneys derived from the operation of the store are to be paid into a special revenue fund, as required in W.Va. Code §12-2-2. Although this section does not require state universities to establish or operate bookstores, if a university chooses to establish and /or operate a bookstore, either by itself or through a vendor as WVU has chosen, the university must comply with the section's requirements.

The West Virginia Supreme Court of Appeals commonly uses a rule of statutory construction which applies in this case.

A statute which provides for a thing to be done in a particular manner or by a prescribed person or tribunal implies that it shall not be done otherwise or by a different person or tribunal; and the maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies to such statute.

148 W.Va. 97, 133 S.E.2d 86, State ex rel. Battle v. Hereford, (W.Va. 1963)
Syllabus point 1.

In this case, the Legislature has provided a specific manner in which a university

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may establish and operate a bookstore. WVU seems to have ignored the statute and structured its own manner, which is in apparent conflict with the law.

WVU's argument that it is providing a special service by letting Barnes & Noble operate a private bookstore on campus does not seem reasonable. Of all of the special services that are authorized in W.Va. Code §18B-10-15, none are remotely similar to providing a private bookstore. This, when viewed with the fact that it is the previous section that addresses university bookstores, leads me to the conclusion that providing a bookstore is not the type of special service the Legislature authorized in enacting W.Va. Code §18B-10-15. Consequently, it is my opinion that WVU should comply with the provisions of W.Va. Code §18B-10-14 with regard to the operation of its bookstores.

If you need anything further in this matter, do not hesitate to contact me.