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**IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
DOCKET NO. 21-0234**



LARRY BRADFORD,

Petitioner,

v.

**WEST VIRGINIA SOLID WASTE
MANAGEMENT BOARD,**

Respondent.

FILE COPY

**Certified Questions
from the Circuit Court of
Kanawha County, West Virginia**

(Civil Action No. 15-C-1543)

PETITIONER'S BRIEF

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I. ASSIGNMENTS OF LEGAL ERROR

In certifying questions to this Court pursuant to Rule 17 of the West Virginia Rules of Appellate Procedure and W. Va. Code § 58-5-2, the Circuit Court of Kanawha County, West Virginia committed the following legal errors:¹

1. The Circuit Court erred as a matter of law in finding a fixed-term contract between the manager/operator of a solid waste facility and a statutorily created county solid waste authority is unenforceable;
2. The Circuit Court erred as a matter of law in finding a fixed-term contract between the manager/operator of a solid waste facility and a statutorily created county solid waste authority containing liquidated damages provisions applicable to both parties is unenforceable;

¹ Even though Certified Question Nos. 1 & 2 appear to be framed to potentially include *any and all* non-civil service employees and *any* government entity, the only parties and issues of interest herein, generally speaking, are a manager/operator of a county solid waste facility; a county solid waste authority; and a contract between these parties for the management/operation of a county solid waste facility. The Order Certifying the Questions to the Supreme Court of Appeals recognizes “[t]his case centers on issues of law regarding the enforceability of various provisions contained in the fixed term contract between Mr. Bradford and the Nicholas County Solid Waste Authority.” (JA001-002) Therefore, the intent of the Certified Questions was to address only those issues and entities, and not the numerous other statutory schemes that apply to other government agencies and which were not before the Circuit Court below.

The Court has the authority to reformulate the certified questions to narrow the issue if it sees fit. *See* Syl. Pt. 4, *SER State Line Sparkler of WV, Ltd. v. Teach*, 187 W. Va. 271, 418 S.E.2d 585 (W. Va. 1992) (holding “[t]his Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance.”). Respectfully, Petitioner suggests the questions may be restated more appropriately as follows:

Certified Question No. 1: Whether a fixed-term contract between the manager/operator of a solid waste facility and a statutorily created county solid waste authority is enforceable?

Certified Question No. 2: Whether a fixed-term contract between the manager/operator of a solid waste facility and a statutorily created county solid waste authority containing liquidated damages provisions applicable to both parties is enforceable?

Petitioner respectfully suggests the answer to re-stated Certified Question Nos. 1 & 2 should be “Yes.” *See* Syl. Pt. 3, *Kincaid v. Mangum* 189 W. Va. 404, 432 S.E.2d 74 (W. Va. 1993) (holding “[w]hen a certified question is not framed so that this Court is able to fully address the law which is involved in the question, then this Court retains the power to reformulate questions certified to it under both the Uniform Certification of Questions of Law Act found in W. Va. Code § 51-1A-1, *et seq.* and W. Va. Code, 58-5-2 (1967)[.]”

3. The Circuit Court erred as a matter of law in ruling an implied contract cannot exist between a non-civil service employee and a government entity; and
4. The Circuit Court erred as a matter of law in failing to apply a contractual severability clause after determining various provisions in a contract were unenforceable as drafted.

II. STATEMENT OF THE CASE

On or about July 1, 2008, Petitioner Larry Bradford entered into a contract ("the Bradford Contract") with the Nicholas County Solid Waste Authority ("NCSWA"). (JA005, 022-037) Incident to the Bradford Contract, Mr. Bradford assumed the position of manager/operator of the NCSWA. (JA005, 025) The following contractual provisions are relevant to the issues before the Court:

1 TERM: . . . The parties agree that Manager shall continue the duties he is now performing. The term of this Agreement shall begin on the 1st day of July 2008 and terminate on the 1st day of July 2013. The parties agree that before the first anniversary date of this Agreement, and thereafter on or before each subsequent anniversary date, they shall meet and determine whether to extend the term of this Agreement for an additional period of one (1) year. If both parties agree, the term of this Agreement shall be extended by such one (1) year period. In the event NCSWA elects not to extend the term of this Agreement for the one (1) additional year referred to above, on or before the first anniversary date of the term of this agreement, NCSWA shall pay unto Manager the sum of Thirty Thousand Dollars (\$30,000.00). In the event the Manager elects not to extend the term of this Agreement for the one (1) additional year, on or before the anniversary date of the term of this Agreement, Manager shall pay NCSWA the sum of Thirty Thousand Dollars (\$30,000.00). If the parties agree to extend the term of this Agreement they shall execute an acknowledge [sic] of such extension. . . Notwithstanding any provision set forth herein, the parties may terminate this Agreement upon the mutual Agreement of the parties. It is the intent of this section that the term of this Agreement shall not be more than five (5) years, in any event.

* * *

3. MANAGER'S DUTIES AND RESPONSIBILITIES: Manager shall perform the duties of a manager of a solid waste facility. Manager's duties shall generally be those duties set forth on the job description which is attached hereto

and made a part hereof as Exhibit 'A.' Additionally, Manager shall be totally responsible for the operation of a first class solid waste disposal facility and landfill.

* * *

5. TERMINATION: . . . (D) Notwithstanding any other provisions of the contract, either party may terminate this agreement, upon ninety (90) days written notice to the other party, with or without cause. In the event Manager elects to terminate this Agreement, pursuant to this subparagraph, before the expiration of the term of this Agreement and such termination occurs during a time when the term of this Agreement is five (5) years he shall pay NCSWA the sum of Twenty Thousand Dollars (\$20,000.00). If such termination occurs at any time when the term of this Agreement is less than five (5) years, Manager shall pay NCSWA the sum of Five Thousand Dollars (\$5,000.00) In the event NCSWA elects to terminate this Agreement, pursuant to this subparagraph, before the expiration of this term of this Agreement and such a termination occurs during a time when the term of this agreement is five (5) years it shall pay Manager the sum of One Hundred Thousand Dollars (\$100,000.00). If such termination occurs at a time when the term of this Agreement is less than five (5) years, NCSWA shall pay Manager the sum of Eighty Thousand Dollars (\$80,000.00). The amount to be paid by and to either party upon his or its election to terminate this Agreement, pursuant to this subparagraph, was a result of negotiations between the parties and represents a liquidated damages payment for the early termination of this Agreement, without cause.

* * *

12. SEVERABILITY: Each paragraph and each portion of each paragraph of this Agreement shall be viewed as separate and divisible, and should any paragraph or portion thereof be held invalid, the remaining paragraphs and portions thereof shall continue to be in full force and effect.

(JA022-023, 025, 027-028, 031. A complete copy of the Bradford Contract appears at Joint Appendix JA022-037)²

² On January 22, 2008, Silas B. Taylor, then Senior Deputy Attorney General for the State of West Virginia, drafted an unsigned ten-page letter addressed to Robert Johnson, Chairman of the NCSWA Board of Directors during Mr. Bradford's tenure ("Taylor Letter"). (JA128-137) In the Taylor Letter, Senior Deputy Attorney General Taylor opined the Bradford Contract was unenforceable due to its fixed-term and the inclusion of liquidated damages. (*Id.*) Despite the Taylor Letter, the NCSWA continued to perform under the Bradford Contract. Chairman Johnson testified he did not recall receiving the letter. (JA083 at 17:10-11)

After July 1, 2013, the parties to the Bradford Contract – Mr. Bradford and the NCSWA – continued to perform the terms of the Bradford Contract. Mr. Bradford continued to perform his responsibilities as outlined in the parties’ written agreement and attachments until his wrongful termination in June 2014. (JA090) NCSWA, in turn, continued to pay Mr. Bradford’s wages per the parties’ written agreement, as well as fringe benefits (incentive pay, vacation days, and personal days, the latter two of which accrued throughout 2014 and were part of a purported buyout by the West Virginia Solid Waste Management Board (“SWMB”) in June 2014). (JA106-114)

In a 2014 Performance Review of the NCSWA, the SWMB acknowledged that the Bradford Contract, including the liquidated damages provision, was legal:

This contract gave extensive power and authority to [Bradford] but it made clear that he was to work in concert with and at the approval of the Board. Also provided in the contract was a generous buy-out clause and the above-mentioned incentive bonus. **While it is not illegal for the NCSWA to enter such a contract**, it is not considered prudent spending of public money.

(JA073, 086-087) This is consistent with testimony from Chairman Johnson that the Bradford Contract had received the Attorney General’s blessing. (JA082-082)³

On June 18, 2014, the SWMB voted to supersede the NCSWA pursuant to W. Va. Code § 22C-3-26. (JA004, 057, 058) The following day – June 19, 2014 – Mark Holstine, Executive Director of the SWMB, terminated Mr. Bradford’s employment without cause. (JA005) Incident to his termination, Mr. Bradford received a letter of termination, a check in the amount of \$4,139.39 for four (4) days of work and fifteen (15) accrued vacation days, and a Separation Agreement and Release. The Separation Agreement and Release provided by the SWMB to Mr.

³ “Q. But it’s your understanding that someone at the Attorney General’s office signed off on that Larry Bradford contract, and it was all good to go? / A. That was our understanding.”

Bradford offered to pay Mr. Bradford \$30,000.00 in liquidated damages for his release of various claims incident to his termination. (JA116-117)

During his deposition, Mr. Holstine testified the \$30,000.00 was recommended by counsel, was the exact same amount agreed to by the parties in the Paragraph 1 of “Manager Employment Contract and Agreement,”⁴ and was intended to foreclose a claim by Mr. Bradford for breach of contract. (JA280, 293-296) The Notice of Termination provided by Mr. Holstine to Petitioner Bradford failed to provide Bradford with the ninety (90) day notice-period afforded under Paragraph (D) of the Bradford Contract. (JA006)

On or about August 14, 2015, Mr. Bradford filed this action against the SWMB, alleging claims for violation of the West Virginia Wage and Hour Law (Count I), and breach of contract (Counts II & III). (JA007, JA010-011) On or about July 15, 2016, the SWMB moved for summary judgment on all of Mr. Bradford’s claims. (JA013-JA038) Importantly, the SWMB (then represented by the West Virginia Attorney General) conceded the Bradford Contract was valid and enforceable but had since expired by its own terms. *See* JA020 (stating “as a matter of fact and law, there is no genuine dispute that the ‘Manager Contract and Agreement’ that had previously existed between the [sic] Bradford and the NCSWA was not in effect on the day of termination.”).

Mr. Bradford later amended his Complaint to implead Mark Holstine, Executive Director of the SWMB, for tortious interference with a contract. (JA004-012) Mr. Holstine was later dismissed by order of the Circuit Court of Kanawha County on or about September 26, 2016. (JA145, ln 1-5)

⁴ *See* JA023, “In the event the NCSWA elects not to extend the terms of this Agreement for the one (1) additional year referred to above, on or before the first anniversary date of the term of this agreement, NCSWA shall pay unto Manager the sum of Thirty Thousand Dollars (\$30,000.00).”

On or about August 9, 2017, Petitioner served Mark Holstine, Executive Director of the SWMB, with a subpoena *duces tecum* requesting Mr. Holstine produce copies of any and all documents that Mr. Holstine created and/or received between 2013 and 2017 regarding Mr. Bradford. In response, Mr. Holstine turned over a May 27, 2014 e-mail from outside counsel for the SWMB, attaching a draft letter from Mr. Holstine to Mr. Bradford.⁵ Mr. Holstine also turned over two draft termination letters, both dated May 27, 2014, in which the SWMB expressly recognized the existence of a contract between Mr. Bradford and the NCSWA.

The first draft letter states

[T]his letter is to advise you that pursuant to the July 1, 2008 'Manager Employment Contract and Agreement,' the Board has voted not to extend the term of this Agreement for an additional year, effective immediately. Enclosed please find a check in the amount of \$30,000.00.

(JA280, 288)

The first draft termination letter was for Mr. Holstine's signature only. The second draft termination letter produced by Mr. Holstine states:

[T]his letter is to advise you that pursuant to the July 1, 2008 'Manager Employment Contract and Agreement,' the Board has voted not to extend the term of this Agreement for an additional year. Accordingly, your employment as Executive Director is terminated, effective five days from the date of this notice. Additionally, please find a check in the amount of \$30,000.00.

(JA244, 248, 280) The second draft termination letter was for Mr. Holstine's signature, as well as three members of the NCSWA Board of Directors. Importantly, both draft termination letters, dated before the supersedure process was perfected by the SWMB, recognized the continued existence of the Bradford Contract up to the date of Mr. Bradford's termination in 2014.

⁵ The SWMB's outside counsel, the Honorable Judge Tabit, was subsequently appointed to the Circuit Court of Kanawha County by Governor Tomblin in the fall of 2014. When Mr. Bradford filed his Complaint against the SWMB in 2015, it was initially assigned to Judge Tabit, who recused herself having "counseled [the SWMB] re Plaintiff's discharge." (JA286)

Following the close of discovery and prior to trial, the parties served a number of substantive and procedural motions (some of which were fully briefed, the majority of which were not, and the overwhelming majority of which have yet to be ruled on) regarding the substantive issues before the Court on the Certified Questions. On January 8, 2018, the parties jointly moved the Circuit Court to certify questions to this Court. On March 11, 2021, the Circuit Court of Kanawha County certified the following questions:

Is a fixed-term employment contract between a non-civil service employee and a government entity . . . enforceable as a matter of law?

The Court's Answer: Yes No X

Is a fixed-term contract between a non-civil service employee and government entity that contains liquidated damages provisions applicable to both contracting parties . . . enforceable as a matter of law?

The Court's Answer: Yes No X

May the defense of estoppel and/or waiver be asserted against a government entity that enters into an employment contract that is later challenged as void and/or voidable?

The Court's Answer: Yes No X

May an implied contract exist between a non-civil service employee and a government entity?

The Court's Answer: Yes No X

(JA001-003)

The Circuit Court erred as a matter of substantive West Virginia law in answering Certified Question Nos. 1, 2, and 4 in the negative.⁶ It is within this framework of legal error that Petitioner Larry Bradford submits this brief.

⁶ Given the validity of the Bradford Contract, the Circuit Court did not need to rule on Certified Question No. 3.

III. SUMMARY OF THE ARGUMENT

The Circuit Court below erred as a matter of law in answering each of the Certified Questions presently before the Court in the negative. First, the West Virginia Legislature granted county solid waste authorities the power to enter into fixed-term management and operation agreements with solid waste facility managers/operators. Given this statutory grant of authority, the fixed-term contract between Petitioner Larry Bradford and the Nicholas County Solid Waste Authority was valid and enforceable.

Second, county solid waste authorities are empowered to negotiate the terms and conditions of a manager/operator agreement incident to the contract formation process. The West Virginia Legislature has not tempered or otherwise restricted this grant of statutory authority, and a liquidated damages provision, a contractual term that is compensatory in nature, not punitive, falls squarely within the Legislature's grant of authority.

The Circuit Court erred in finding an implied contract cannot exist between a non-civil service public employee and a government entity. This Court addressed this very issue as early as 1920 and as recently as 2017 and has consistently recognized an implied contract can exist between a public employee and a government entity.

Finally, the Circuit Court erred in failing to undertake a severability analysis after ruling the Bradford Contract was unenforceable because of its fixed-term and liquidated damages provisions. A circuit court is charged with undertaking a severability analysis – the Circuit Court below did not. Had it done so, the parties' intent, reflected in an agreed upon Severability Clause, would have required any offending contractual term be excised to save the Bradford Contract as a whole.

The Certified Questions presently before the Court should be answered in the affirmative, and this case remanded for further proceedings.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

By Order dated June 15, 2021, the Court set this matter for Rule 20 oral argument on November 6, 2021.

V. ARGUMENT⁷

A. The Circuit Court erred as a matter of law in finding the fixed-term contract between Mr. Bradford and the NCSWA was unenforceable.

The NCSWA, as a county solid waste authority, possessed the express statutory authority to enter into a fixed-term contract with Larry Bradford for the management and operation of the Nicholas County Solid Waste Authority. The First Certified Question should be answered by this Court in the affirmative.

With respect to the Bradford Contract, the following Sections of the West Virginia Code are controlling. First, the West Virginia Legislature has granted county solid waste authorities the following powers:

(6) Acquire, construct, reconstruct, enlarge, improve, furnish, equip, maintain, repair, operate, lease or rent **or contract for the operation by any person, partnership, corporation or governmental agency, any solid waste facility or collection, transportation and processing facilities related thereto.**

* * *

(10) **Make and enter all contracts, leases and agreements and to execute all instruments necessary or incidental to the performance of its duties and powers.**

(11) **Employ managers, engineers, accountants, attorneys, planners and such other professional and support personnel as are necessary in its judgment to carry out the provisions of this article.**

* * *

⁷“The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*.” Syl. Pt. 1, *Hose ex rel. K.M.H. v. Estate of Hose*, 230 W. Va. 61, 736 S.E.2d 61 (W. Va. 2012) (quoting Syl. Pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W. Va. 172, 475 S.E.2d 172 (1996)).

(17) Do all acts necessary and proper to carry out the powers expressly granted to the authority by this article and powers conferred upon the authority by this article.

W. Va. Code § 22C-4-23(6), (10), (11) & (17) (emphasis added).

The Legislature also enacted West Virginia Code § 22C-4-17, which further expounds on a county solid waste authority's power under Sections 22C-4-23(6) and (10):

The board may enter into **contracts or agreements with any persons**, firms or corporations for the operation and management of the solid waste facilities **for such period of time and under such terms and conditions as are agreed upon** between the board and such persons, firms or corporations.

W. Va. Code § 22C-4-17 (emphasis added).⁸

"A cardinal rule of statutory interpretation is that code sections are not to be read in isolation but construed in context." Syl. Pt. 5, *State of West Virginia v. Stone*, 229 W. Va. 271, 728 S.E.2d 155 (W. Va. 2012). For that matter,

[s]tatutes which relate to the same persons or things, or to the same class of persons or things, or statutes which have a common purpose will be regarded in *pari materia* to assure recognition and implementation of the legislative intent. Accordingly, a court should not limit its consideration to any single part, provision, section, sentence, phrase or word, but rather review the act or statute in its entirety to ascertain legislative intent properly.

Syl. Pt. 3, *In re Estate of Lewis*, 217 W. Va. 48, 614 S.E.2d 695 (W. Va. 2005) (quoting Syl. Pt. 5, *Fruehauf Corp. v. Huntington Moving & Storage Co.*, 159 W. Va. 14, 217 S.E.2d 907 (W. Va. 1975)). Perhaps most importantly, though, "[w]hen a statute is clear and unambiguous and the legislative intent is plain the statute should not be interpreted by the courts, and in such a case it is

⁸ The abbreviated "board," as used in Section 22C-4-17 and other sections of Article 4, refers to the board of directors for a county solid waste authority. When the Solid Waste Management Board is referenced in Article 4, the Legislature uses its formal title, "Solid Waste Management Board," in total. See W. Va. Code §§ 22C-4-2(l), 3(a), 4(a), 6, 7(c), 8(a), (c)-(e), 9(a)-(b), 9A(b)-(d),(g), (h), (h)(4), (i)-(j), 10(b), 11, 24(a), (c)-(k), 26, 27, 30(h). Inasmuch as the Legislature omitted "Solid Waste Management Board" from Section 22C-4-17, it is not for this Court to add it after the fact. See *Dailey v. Board of Review*, 214 W. Va. 419, 428, 589 S.E.2d 797, 806 (W. Va. 2003) (concluding "[w]here a statute is unambiguous, the incorporation of additional words, terms, or provisions is not the domain of the courts.").

the duty of the courts not to construe but to apply the statute.” Syl. Pt. 1, *W. Va. Radiologic Technology Bd. of Examiners v. Darby*, 189 W.Va. 52, 427 S.E.2d 486 (1993).

Here, the statutory scheme enacted by the West Virginia Legislature could not be clearer. County solid waste authorities, including the NCSWA, are empowered to contract, including to contract for the operation and management of a solid waste facility by any person. W. Va. Code §§ 22C-4-17, 22C-4-23(6), (10).⁹ Expressly included in the power to contract is the power to negotiate “for such period of time and under such terms and conditions as are agreed upon between the board and such persons.” W. Va. Code § 22-4-17.

In light of these legislative enactments, which expressly permit a county solid waste authority to enter into a fixed-term contract for the operation and management of a solid waste facility, the fixed-term Bradford Contract for the operation and management of the Nicholas County Solid waste facility was proper and enforceable as a matter of law.

Any reliance by the Circuit Court on *Barbor v. County Court of Mercer County*, 85 W. Va. 359, 101 S.E. 721 (1920) and its progeny was in error.¹⁰ *Barbor*, and the line of cases that came after it, were predicated on the absence of statutory authority to enter into the fixed-term contracts at issue:

[w]here a statute conferring the power to appoint fixes no definite term of office but provides that the tenure shall be at the pleasure of the appointing body, the implied power to remove such appointee may be exercised at its discretion, and cannot be contracted away so as to bind the appointing body to retain him in such position for a definite, fixed period.

⁹ And that is exactly how the contract between Mr. Bradford and the NCSWA is framed: “Manager shall perform the duties of a manager of a solid waste facility. . . . Manager shall be totally responsible for the operation of a first class solid waste disposal facility and landfill.” (JA025)

¹⁰ See, e.g., *Yunker v. E. Assoc. Coal Corp.*, 214 W. Va. 696, 591 S.E.2d 254, 258 (2003); Syl. Pts. 2-4, *Williams v. Brown*, 190 W. Va. 202, 437 S.E.2d 775 (1993); *SER Archer v. County Court of Wirt Count*, 150 W. Va. 260, 144 S.E.2d 791 (1965); *Bogges v. Housing Authority of the City of Charleston*, 273 F. Supp. 2d 729 (S.D. W. Va. 2003) (Stanley, M.J.).

Syl. Pt. 4, *Barbor*.

Here, the Legislature has expressly afforded the county solid waste authorities, themselves a product of statute enacted in 1989, the authority to “enter into contracts or agreements with any person . . . for the operation and management of the solid waste facilities for such period of time and under such terms and conditions as are agreed upon between the board and such person[.]” W. Va. Code § 22C-4-17. *Barbor* and its progeny, then, have no bearing on this case.

Because the actions of the NCSWA were expressly authorized by statute, the Circuit Court should have answered the First Certified Question in the affirmative.

B. The Circuit Court erred as a matter of law in ruling the liquidated damages provision in the Bradford Contract was unenforceable as a matter of law.

The Circuit Court erred as a matter of law in ruling a “fixed-term contract between a non-civil service employee and government entity that contains liquidated damages provisions applicable to both contracting parties . . . [is] [un]enforceable as a matter of law.” (JA001-003) As an initial matter, the breadth and scope of the Second Certified Question is far too broad, as suggested in Footnote 1. The only parties before the Circuit Court were a manager/operator for a solid waste facility and a county solid waste authority – no one else – which puts W. Va. Code § 22C-4-1, *et seq.*, directly at issue.

As it did with a county solid waste authority’s ability to enter into a fixed-term contract, Section 22C-4-17 controls:

The board may enter into contracts or agreements with any persons, firms or corporations for the operation and management of the solid waste facilities **for such period of time and under such terms and conditions as are agreed upon between the board and such persons, firms or corporations.**

W. Va. Code § 22C-4-17 (emphasis added).

If the Legislature in any way wanted to temper the terms or conditions to which a county solid waste authority could agree after good faith negotiations, it would have done so. It did not.

If the Legislature wanted to enact a general statutory provision providing immunity for political subdivisions from liquidated damages the same way it did for punitive damages or noneconomic damages in the tort context, it would have done so.¹¹ Again, it did not.

Liquidated damages are compensatory, not punitive, in nature, and are the very type of contractual term negotiated during the contract formation process when damages for a prospective breach are uncertain.¹² See, generally, Syl. Pt. 3, *Huntington Eye Associates, Inc. v. LoCasio*, 210 W. Va. 76, 553 S.E.2d 773 (2001) (articulating two-part test for analyzing validity of liquidated damages clause). Negotiation and inclusion of such a term fall squarely within the authority granted by the West Virginia Legislature to county solid waste authorities under Section 22C-4-17,

Now, if it is ultimately determined the liquidated damages provision contained in the Bradford Contract is punitive rather than compensatory, such provision will naturally fail as a matter of West Virginia law. Syl. Pt. 4, *Wheeling Clinic v. Van Pelt*, 192 W.Va. 620, 453 S.E.2d 603 (W. Va. 1994). But that question is not presently before the Court;¹³ only whether a contract between a county solid waste facility and a manager/operator may contain such a liquidated damages term in the first place. As a matter of West Virginia law, it can.

¹¹ The Governmental Tort Claims and Insurance Reform Act, W. Va. Code § 29-12A-1, *et seq.*, is a prime example of the West Virginia Legislature using its power to insulate the state and its political subdivisions from various measures of damages. See W. Va. Code § 29-12A-7(a) (prohibiting award of punitive damages against a political subdivision) and 7(b) (limiting award of noneconomic damages against a political subdivision). This Act, however, does not apply to actions sounding in contract. W. Va. Code § 29-12A-18(a). To date, the Legislature has not enacted any type of sister legislation that would shield a political subdivision from contractual liquidated damages as a matter of public policy.

¹² See *Plumbers & Pipefitters Local 625 v. Nitro Constr. Servs.*, Civil Action No. 2:18-cv-01097, at *11 (S.D. W.Va. Sept. 24, 2020) (Copenhaver, J.) (concluding “the parties to a contract are not free to provide a penalty for its breach. The central objective behind the system of contract remedies is compensatory, not punitive.”).

¹³ Syl. Pt. 4, *State Line Sparkler* (holding “[t]his Court will not pass on a nonjurisdictional question which has not been decided by the trial court in the first instance.”).

This Court should answer the Second Certified Question in the affirmative and remand this case to the Circuit Court for further proceedings.

C. The Circuit Court erred as a matter of law in finding an implied contract cannot exist between a governmental employee and a governmental entity.

The Circuit Court further erred in finding, as a matter of law, an implied contract cannot exist between a governmental employee and a governmental entity. By their very nature, absent an express contract, *all* contracts are implied in fact or law, the only questions being the terms. That said, the Fourth Certified Question before the Court is easily dispatched. This Court recognized more than 100 years ago, and as recently as 2017, an implied contract can exist between a government entity and a public employee:

[b]ut one who merely performs the duties required of him by persons employing him **under an express or implied contract**, though such persons themselves be public officers, and **though the employment be in or about public work or business, is a mere employee.**

SER Key v. Bond, 94 W. Va. 255, 260, 118 S.E. 276, 279 (W. Va. 1923) (emphasis added).¹⁴

The West Virginia Legislature, while favorably recognizing the existence of implied contracts on at least one occasion, *see* W. Va. Code § 16-4C-11 (permitting claim for implied contract to recover costs incurred from emergency medical care), has taken no legislative action to temper the type of public employee implied contract recognized in *Bond*. *See Retired Employees Ass'n of Orange County Inc. v. County of Orange*, 52 Cal. 4th 1171, 1176 (Ca. 2011) (holding “a

¹⁴ *See Grace v. Sparks*, Case No. 2:15-01505, at *16 (S.D. W. Va. May 4, 2016) (Copenhaver, J.) (same); *Boggess v. Housing Auth. of City of Charleston*, 273 F. Supp. 2d 729 (S.D. W. Va. 2003) (Stanley, M.J.) (same); *Cales v. Town of Meadow Bridge*, 239 W. Va. 288, 800 S.E.2d 874, 882 (W. Va. 2017) (same); *SER W. Va. Citizens Action Group v. W. Va. Economic Development Grant Committee*, 213 W. Va. 255, 268, 580 S.E.2d 869, 882 (W. Va. 2003) (same).

county may be bound by an implied contract under California law if there is no legislative prohibition against such arrangements . . .”).¹⁵

Given the only issue before this Court in Certified Question No. 4 is whether, as a matter of law, an implied contract can exist between a non-civil service employee and a governmental entity, the Court need not address the terms of such a contract (a question of fact in the truest sense). The Fourth Certified Question should be answered in the affirmative, and this case remanded to the Circuit Court for further development.

D. The Circuit Court erred as a matter of law in failing to undertake a severability analysis to determine the validity of the remainder of the Bradford Contract.¹⁶

To the extent the fixed-term (or even liquidated damages) provision of the Bradford Contract is unenforceable, the Circuit Court erred as a matter of law by failing to analyze whether the Bradford Contract was severable. In other words, “is the unenforceable contract provision severable, leaving for consideration the remainder of the alleged contract[?]” *Quinn v. Beverages of W. Va., Inc.*, 159 W. Va. 571, 580, 224 S.E.2d 894, 900 (1976).

This Court has consistently recognized the difference between a contract that is “entire” from that which is “severable,” *see* Syl. Pt. 2, *Quinn*, holding:

[w]hether a contract is entire or severable is a determination to be made by the court according to the intention of the parties and such intention shall be ascertained from a consideration of the subject matter of the contract, a reasonable construction of the terms thereof and the conduct of the parties during their negotiations, all of which should be viewed in the light of the surrounding circumstances.

¹⁵ If the Court is inclined to look further into whether the NCSWA, specifically, is permitted to enter into implied contract, the answer is “Yes.” W. Va. Code § 22C-4-23(10) empowers a county solid waste authority to “[m]ake and enter all contracts.” The statute does not require such contracts be in writing, or even limit the type of contract a county waste authority may “make” or “enter” (for instance, a bilateral contract, a unilateral contract, a contract implied in fact, or a contract implied in law).

¹⁶ While this issue was presented to the Circuit Court below, *see* JA073-074, the Circuit Court declined to undertake a severability analysis as required by West Virginia law.

See *K & D Holdings, LLC v. Equitrans, L.P.*, 812 F.3d 333 (4th Cir. 2015) (quoting 15 WILLISTON ON CONTRACTS § 45:4 (4th ed. 2000) (finding “[t]here is a presumption against finding a contract divisible **unless** divisibility is expressly stated in the contract itself, or the intent of the parties to treat the contract as divisible is otherwise clearly manifested.”) (emphasis added).

Hampden Coal, LLC v. Varney, 810 S.E.2d 286 (W. Va. 2018), is instructive. In *Hampden*, this Court recognized that

[e]ven if we were to find that [the defendant] had demonstrated that the one-year limitations period was unreasonable, which we do not, the Agreement contains a severability clause. This clause provides that ‘[i]f any specific provision of this Agreement is invalid or enforceable, the remainder of this Agreement shall remain binding and enforceable.’ Consequently, the limitation provision could simply be severed from the Agreement, leaving the remainder of the Agreement enforceable.

Hampden Coal, 810 S.E.2d 286 at n. 17.¹⁷

Analysis of the parties’ intent begins and ends with the severability provision appearing in the Bradford Contract:

12. SEVERABILITY: Each paragraph and each portion of each paragraph of this Agreement shall be viewed as separate and divisible, and should any paragraph or portion thereof be held invalid, the remaining paragraphs and portions thereof shall continue to be in full force and effect.

(JA031 at ¶ 12) The parties’ intent that the terms of the Bradford Contract be severable is clearly manifested within the four corners of the Contract. The Circuit Court erred as a matter of law in failing to not only to undertake a severability analysis, but also failing to conclude the remainder of the Bradford Contract was severable and enforceable.¹⁸

¹⁷ See *id.* (citing Syl. Pt. 8 (in part) *Brown v. Genesis Healthcare Corp.*, 229 W.Va. 382, 386, 729 S.E.2d 217, 221 (W. Va. 2012)).

¹⁸ To the extent the SWMB challenges the ability of this Court or the Circuit Court, below, to effectuate the parties’ intent that a contract be severable, such argument has already been addressed and rejected. See *Quinn*, 159 W. Va. at 583, 224 S.E.2d at 901 (concluding “[w]e disagree, however, that our holding

VI. CONCLUSION

For the reasons stated herein, and for such other and further reasons appearing to the Court, the Certified Questions should be answered by this Court in the affirmative; the Circuit Court of Kanawha County's Orders to the contrary should be reversed; and this case remanded for trial.

By counsel,

A handwritten signature in black ink, appearing to be 'Kathy A. Brown', written over a horizontal line.

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constitutes a fatally defective rewriting of the contract as asserted by the defendants. To apply the defendants' assertion in every case would be to deny the existence of severable or divisible contracts.").

CERTIFICATE OF SERVICE

I, Timothy D Houston, Esq., hereby certify on the 13th day of August, 2021, I caused to be served a true and correct copy of "**Petitioner's Brief**" and "**Joint Appendix**" on the following counsel of record by United States mail, postage pre-paid, addressed as follows:

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A handwritten signature in black ink, appearing to read 'T. Houston', written over a horizontal line.

Timothy D. Houston (WV Bar No. 10858)