IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21-0234

LARRY A. BRADFORD,

Plaintiff Below, Petitioner,

v.

WEST VIRGINIA SOLID WASTE MANAGEMENT BOARD,

Defendant Below, Respondent.

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

(Civil Action No.: 15-C-1543)

RESPONDENT'S BRIEF

WEST VIRGINIA SOLID WASTE MANAGEMENT BOARD

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I. RESPONSE TO ASSIGNMENTS OF LEGAL ERROR

This Court should affirm the Circuit Court's decisions regarding the following four certified questions submitted to this Court pursuant to W. Va. Code § 58-5-2 and Rule 17 of the West Virginia Rules of Appellate Procedure:

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

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

3. May the defenses 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?

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

On January 8, 2018, the parties submitted these questions to the Circuit Court in substantively identical form in a joint motion to certify questions.[1] On March 11, 2021, the Circuit Court granted the motion, and correctly answered each question in the negative.[2]

a. Certified Questions Nos. 1 and 2/Assignments of Error Nos. 1 and 2

In his opening brief, the Petitioner requests that the Court rewrite Certified Questions Nos. 1 and 2 as follows:

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?

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

[1] Joint Appendix at 001-003. The Joint Appendix will be referred to throughout this brief using the abbreviation "JA."
[2] JA 001–003.

> damages provisions applicable to both parties is enforceable?[3]

The Court should not grant this request. Although the Court possesses "power to reformulate questions certified to it" so that it may "fully address the law which is involved in the question,"[4] there is no need to do so with these two certified questions. As explained *infra*, the specific statutory language and decisions that are at issue in this case apply not only to solid waste authorities but to many governmental bodies statewide, particularly those tasked with managing and operating utilities. And the Circuit Court correctly decided that a governmental entity (whether a solid waste authority, or otherwise) cannot be bound to a fixed-term employment contract with a non-civil service employee, nor can a liquidated damages provision in any such contract be enforced. Succinctly, the Court should review Certified Questions Nos. 1 and 2 as presented, and affirm the Circuit Court's decision.

b. Certified Question No. 3 (No Assignment of Error)

The Petitioner does not request reformulation of Certified Question No. 3, nor does the Petitioner substantively challenge the Circuit Court's decision of Certified Question No. 3 in his brief. For that reason, the Court should consider Certified Question No. 3 as written, and affirm the Circuit Court's decision.

c. Certified Question No. 4/Assignment of Error No. 3

Although the Petitioner does not request reformulation of Certified Question No. 4, the Respondent respectfully requests that the Court reformulate Certified Question No. 4 as follows:

> 4. May an implied *fixed-term* contract exist between a non-civil service employee and a government entity?

[3] Pet'r's Br. at 1.
[4] Syl. Pt. 3, *Kincaid v. Mangum*, 189 W.Va. 404, 404, 432 S.E.2d 74, 74 (1993).

This reformulation would be consistent with the first three Certified Questions and would address what is actually at issue in this case: whether the Petitioner can seek to enforce his fixed-term contract through the theory of implied contract, if it is found unenforceable as an express contract. Here, where the Circuit Court correctly ruled that West Virginia does not recognize a implied fixed-term contract between a non-civil service employee and a government entity, its decision below should be affirmed.

d. Assignment of Error No. 4

The Petitioner's fourth assignment of error should be denied and stricken from the record, as it presents issues outside of the Certified Questions and improperly seeks to assert as "error" an unresolved issue that is not based on any appealable decision that the Circuit Court has made, and certainly not any issue presented in this appeal on specific certified questions.

II. STATEMENT OF THE CASE

This case arose out of the gross mismanagement of the Nicholas County Solid Waste Authority ("NCSWA"), and is the result of a former NCSWA manager seeking to enforce the provisions of an illegal fixed-term employment contract that he and a "friendly" NCSWA entered into against the direct advice of NCSWA's counsel, Silas B. Taylor, Esquire, of the Attorney General's office. As an outgrowth of the debacle initiated by the NCSWA's decision to enter into a friendly, illegal employment contract, the Certified Questions before this Court ask whether a government entity may exceed the scope of its statutory powers and improperly bind its future successors to unlimited fixed-term employment contracts and related contractual provisions.

At some time before January 22, 2008, the NCSWA was considering entering into an employment contract with Petitioner, and requested the Attorney General's office provide "input

and opinion regarding the legality and propriety" of the proposed employment contract.[5] On January 22, 2008, Senior Deputy Attorney General Silas B. Taylor provided an opinion letter informing the NCSWA that the proposed contract with Petitioner was highly illegal.[6] As Mr. Taylor explained, the proposed contract was an illegal "fixed-term" contract which established an employment term of five years and required the NCSWA to pay "liquidated damages" of $80,000 to $100,000 if the Petitioner were terminated without cause.[7] The proposed contract further required the contract to be extended on a rolling basis every year, unless the NCSWA paid the Petitioner $30,000 per year on each occasion that the contract was not extended.[8] As Mr. Taylor summarized:

> This provision effectively creates a rolling five year term, assuring the Manager that, if he so desires, he will be continuously employed (absent a termination for cause) unless the Authority pays him $30,000 per year in addition to his regular salary.[9]

Mr. Taylor then provided the following legal recommendation on behalf of the Attorney General's Office of the State of West Virginia:

> It is our advice that the above-described features of the contract unduly interfere with the discretion of the Authority, hamper its ability to perform its public duties, and are consequently void and unenforceable.[10]

This legal recommendation was accompanied by a detailed 9-page analysis of why it would be wholly illegal and improper to enter into this employment contract, as doing so was expressly

[5] JA 128.
[6] JA 128–37.
[7] JA 128–29.
[8] JA 128–29.
[9] JA 129.
[10] JA 129.

prohibited by West Virginia law.[11] Mr. Taylor's letter was then sent to the NCSWA, specifically directed to Chairman Robert Johnson and copied Gregory W. Sproles, Esq.[12]

Despite being placed on clear legal notice that the proposed contract with Petitioner was legally unsupportable, the NCSWA utterly ignored the opinion letter, and on July 1, 2008 it entered into the illegal, unenforceable contract with Petitioner that is the subject of the Certified Questions in this appeal.[13] The Petitioner then served as the manager of the NCSWA, being "totally responsible for the operation of a first class solid waste disposal facility and landfill."[14]

Following extreme mismanagement of the NCSWA during Petitioner's tenure that resulted in a "seriously impaired" rating following an extensive performance review, the West Virginia Solid Waste Management Board ("SWMB") voted to supersede the NCSWA on June 18, 2014, pursuant to W. Va. Code § 22C-3-26.[15] The supersedure was the first in the history of the SWMB. The SWMB immediately terminated Petitioner's employment on the next day, June 19, 2014.[16]

On August 14, 2015, the Petitioner filed suit against the SWMB alleging violation of the West Virginia Wage and Hour Law (Count I) and breach of contract (Counts II and III).[17] Over the course of the next several years, this litigation continued, culminating in a joint motion to certify questions which was filed on January 8, 2018. On March 11, 2021, the Circuit Court of Kanawha County granted the motion and issued an Order certifying the questions, as submitted to this Court.

The Petitioner's Statement of the Case contains numerous references to factually disputed parts of this litigation (such as the personal beliefs and opinions of certain individuals at the

[11] JA 129–37.
[12] JA 128–37.
[13] JA 022–037.
[14] JA 025.
[15] JA 004.
[16] JA 005.
[17] *See* JA 004–012, which is the First Amended Complaint currently governing this litigation.

NCSWA as to the legality of the agreement and certain language in draft termination letters that were never finished or mailed).[18] None of that matters. These Certified Questions are presented on *de novo* review, asking simply "Is this type of contract legal, and is it enforceable?"

The Circuit Court correctly answered no, and this Court should affirm that ruling.

III. SUMMARY OF ARGUMENT

Petitioner's case rises and falls on his argument that a governmental entity given general contract powers has plenary authority to enter into any contract with any terms that it wishes. This argument is simply wrong. While W. Va. Code § 22C-4-17 empowered the solid waste authority with the general authority to contract and be contracted with, its "specific authority, however, is only such as the Constitution and Legislature of the state have seen fit to bestow upon it."[19]

In other words, while the NCSWA has general authority to enter into employment contracts, it can only enter into employment contracts that fit within the specific authority granted to it by the Constitution and Legislature.[20] And when the Legislature prohibits municipal entities from entering into fixed-term employment contracts unless those terms are specifically fixed by law, any offending contract entered into by the NCSWA is invalid.[21] For these reasons, the Circuit Court correctly answered the first Certified Question when it determined that a fixed-term employment contract between a non-civil service employee and a government entity was not enforceable as a matter of law.

The Circuit Court correctly answered the second Certified Question when it determined that a liquidated damages provision in a fixed-term employment contract with a governmental

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[18] *See* Pet'r's Br. at 2–6.
[19] *Boggess v. Housing Authority of City of Charleston*, 273 F. Supp. 2d 729, 739 (S.D. W. Va. 2003) (quoting *Barbor v. County Court of Mercer County*, 85 W. Va. 359, 359, 101 S.E. 721, 722 (1920)).
[20] *Id.*
[21] *See id.*; *see also* W. Va. Code § 6-6-8.

entity is unenforceable. A key part of the governmental right to terminate at-will employees is the ability to do so without suffering liability,[22] which means liquidated damages provisions or other liability provisions cannot be enforced. Any other decision would run contrary to established principles of governmental authority by forcing governmental entities to suffer liability and pay damages if they sought to exercise their inherent hiring and firing abilities.

The Circuit Court correctly answered the third Certified Question when it ruled that a governmental entity could not be bound to an unenforceable contract through theories of estoppel and/or waiver. Not even the Petitioner contests this point, nor could he; as West Virginia law has established, a party entering into contracts with a governmental entity does so at his own peril. Estoppel and waiver cannot bind the government to unenforceable contracts, as "[t]he state is not bound by the unauthorized or illegal acts of its officers."[23]

Lastly, the Circuit Court correctly answered the fourth Certified Question, as West Virginia does not recognize any implied right to a continuing public employment contract (i.e. a fixed-term contract).[24] Any other conclusion is untenable, because that would permit local government entities to sidestep the prohibition on fixed-term contracts if they simply took actions sufficient to imply that they would recognize such a contract. This case is particularly egregious, because the Petitioner is not only claiming an implied right to a fixed-term contract, but also an implied right to a *rolling* fixed-term contract with *liquidated damages* if his contract is not renewed. To claim that a governmental entity could be bound to such a ridiculous agreement on a theory of implied contract is simply unprecedented.

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[22] Syl. Pts. 4 & 5, *Barbor*, 85 W. Va. at 359, 101 S.E. at 721.
[23] *See, e.g.*, Syl. Pt. 1, *Samsell v. State Line Development Co.*, 154 W.Va. 48, 48, 174 S.E.2d 318, 320 (1970).
[24] *Williams v. Brown*, 190 W.Va. 202, 207, 437 S.E.2d 775, 780 (1993).

For these reasons, the Circuit Court's decision on the four Certified Questions should be affirmed, and the Petitioner's first three assignments of error should be rejected. The Petitioner's fourth assignment of error should also be rejected, first because it is not properly before this Court in this interlocutory appeal involving Certified Questions only, and second because it is premature and meritless. The Circuit Court has not yet made any decision on severability, and it is inappropriate for that issue to be brought on review at this time.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Court, in its September 24, 2021 Notice, has set this matter for Rule 20 oral argument scheduled for November 1, 2021.

V. ARGUMENT

A single overarching issue underlies the four certified questions: does a governmental entity that has been granted general contract powers have plenary authority to enter into fixed-term employment contracts? The answer is no. And for that foundational reason, the Circuit Court correctly answered all four certified questions in the negative.

A. The Circuit Court correctly found that the fixed-term contact between the Petitioner and the NCSWA was unenforceable.

It is well-established in West Virginia that fixed-term employment contracts are strongly disfavored by public policy, as the ability to exercise discretion in hiring and firing employees is a necessity for state and local governments.[25] For this reason, governmental entities are prohibited from contracting away this discretionary ability:

> Where 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 maybe exercised at its discretion, and **cannot be contracted away**

[25] *See, e.g.*, *Town of Davis v. Filler*, 47 W.Va. 413, 413, 35 S.E. 6, 7 (1900).

so as to bind the appointing body to retain him in such position for a definite, fixed period.[26]

This principle was specifically applied to fixed-term employment contracts with local managers—such as this case—in the seminal case *Barbor v. County Court of Mercer County*, where a county court employed a manager for its poor farm using an employment contract with a three year fixed term.[27] Using precedent from *Town of Davis v. Filler* and applying W. Va. Code § 6-6-8, the Court had no difficulty in finding that the fixed-term employment contract with the local manager was void and unenforceable.[28] As *Town of Davis*, *Barbor*, and W. Va. Code § 6-6-8 clearly state, unless a term of employment has been specifically set **by law**, any non-civil service officer or employee can be removed at will.[29] And as explained further in *Barbor* and its progeny,

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[26] Syl. Pt. 4, *Barbor*, 85 W. Va. at 359, 101 S.E. at 721 (emphasis added).
[27] 85 W. Va. at 359, 101 S.E. at 721.
[28] *Id.* at 359, 101 S.E. at 721-23.
[29] *See id.*; *Town of Davis*, 47 W.Va. at 413, 35 S.E. at 7; W. Va. Code § 6-6-8. While the Petitioner's high level of autonomy and sovereignty in his former position at the NCSWA as the public manager "totally responsible" for operations suggest that he should be considered a public officer, not a public employee, for the purposes of this appeal that question is purely academic. This Court has applied the implied at-will removal power doctrine and W. Va. Code § 6-6-8 in a variety of cases involving employment contracts for both public officers and public employees. *See id.*; *see also Williams*, 190 W.Va. at 207, 437 S.E.2d at 780; *State ex rel. Archer v. County Court of Wirt County*, 150 W.Va. 260, 144 S.E.2d 791 (1965); *Boggess*, 273 F.Supp.2d at 738 ("The West Virginia Supreme Court's holdings in the above cases, that the employees or officers were subject to the implied at-will removal power..."). In fact, the first published opinion in West Virginia to discuss this doctrine analyzed and applied it to both officers and employees:

> [As to public employees]: If a street commissioner,—a mere appointee of a municipal corporation; I may say, for this purpose, a mere employé,—is to have a fixed tenure for a fixed term, without power in the council to remove him, it would cramp the powers of the town, defeat the performance of some of its essential functions, and be very hurtful to public interests. Public policy overrules that contention.
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> [As to public officers]: Now, with pointed respect to municipal officers, Dill. Mun. Corp. § 240, says that, "from the reason of the thing, from the nature of corporations, and for the sake of order and government, the power is incidental." *Richards v. Clarksburg*, 30 W. Va. 491, 4 S. E. 774, holds that "power to remove a corporate officer is one of the common–law incidents of all corporations."

this rule applies even if the local entity has signed and performed on a fixed-term employment contract with a local manager or other local officer or employee.[30] Regardless of the ostensible terms of that agreement, the contract cannot be enforced and can be annulled at will.[31]

Accordingly, as a matter of law, unless a statute sets a specific term for appointment/employment, a fixed-term employment agreement between a governmental entity and a non-civil service employee is invalid and unenforceable—as the Circuit Court correctly determined.

i. Contrary to Petitioner's assertions, West Virginia's statutory structure does not permit fixed-term employment contracts between governmental entities and non-civil service employees unless the term is specifically set by statute.

The Petitioner's argument that the NCSWA's general contract powers can sidestep this rule is unsupportable. The Petitioner relies upon two statutes related to solid waste authorities: W. Va. Code § 22C-4-23 ("Powers, duties and responsibilities of authority generally") and W. Va. Code § 22C-4-17 ("Operating contracts"). But neither of these statues provide solid waste authorities with any authorization to enter into fixed-term employment contracts. The first, W. Va. Code § 22C-4-23, is simply an enabling statute authorizing solid waste authorities to "contract for the operation"[32] of solid waste facilities, "enter all contracts . . . necessary"[33] to perform its responsibilities, and to "employ managers"[34] such as the Petitioner. Nothing in this statute sets a

Town of Davis, 47 W. Va. at 413, 35 S.E. at 7 (bracketed comments added).

[30] *See Barbor*, 85 W. Va. at 359, 101 S.E. at 721 (performing on fixed-term contract for five months before termination); *Town of Davis*, 47 W. Va. at 413, 35 S.E. at 6 (performing on fixed-term contract for unspecified amount of time); *Williams*, 190 W.Va. at 204, 437 S.E.2d at 777 (claiming implied right to continued/fixed-term employment after being employed from 1957 to 1985); *Archer*, 150 W.Va. at 261, 144 S.E.2d at 792-93 (claiming right to continued/fixed-term employment after being employed from 1964-1965); *Boggess*, 273 F.Supp.2d at 731-32 (performing on five-year fixed-term contract for three years before termination).

[31] *See id.*

[32] W. Va. Code 22C-4-23(6).

[33] W. Va. Code 22C-4-23(10).

[34] W. Va. Code 22C-4-23(11).

specific term of employment for any manager, employee, or officer, as *Barbor* and W. Va. Code § 6-6-8 require.[35] And this type of general contract authority is hardly unique to solid waste authorities: the enabling statutes of many other West Virginia governmental entities contain similar language authorizing them to enter into contracts, hire employees, and to do whatever is necessary to carry out their responsibilities.[36] Any argument that the general authority contained in these statutes to "employ managers" or "enter contracts" authorizes fixed-term contracts is simply beyond the pale, and runs contrary to W. Va. Code § 6-6-8 and decades of case law.[37]

The second statute that the Petitioner relies upon, W. Va. Code § 22C-4-17, which permits solid waste authorities to enter into contracts necessary for the operation of their facilities, does not help the Petitioner either. This operational statute permits the authorities to:

> [E]nter 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.[38]

Based on this, the Petitioner argues, the NCSWA had unique, explicit statutory authority to enter into any fixed-term employment contract with any terms and conditions that it wished.[39]

Not so.

Contrary to the Petitioner's assertions that the principles involved in this case are unique to solid waste authorities, the language in this operational statute is identical to the language in the

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[35] *Barbor*, 85 W. Va. at 359, 101 S.E. at 721-23; W. Va. Code § 6-6-8.
[36] *See, e.g.*, W. Va. Code § 15-5-4C (authorizing the Division of Emergency Management with these abilities); W. Va. Code § 31-19-6 (authorizing the Community Infrastructure Authority with these abilities); W. Va. Code § 22C-1-6 (authorizing the Water Development Authority with these abilities); W. Va. Code § 29-18-6 (authorizing the State Rail Authority with these abilities); and W. Va. Code § 5D-1-5 (authorizing the Public Energy Authority with these abilities), to name a few.
[37] *See, e.g.*, *Town of Davis*, 47 W. Va. at 413, 35 S.E. at 7; *Barbor*, 85 W. Va. at 359, 101 S.E. at 721-23; *Boggess*, 273 F.Supp.2d at 738, W. Va. Code § 6-6-8.
[38] W. Va. Code § 22C-4-17.
[39] Pet'r's Br. at 11-12.

operational statutes of other West Virginia governmental entities. For example, W. Va. Code § 16-13-22e ("Operating contract") gives municipalities the same authority for operating sewerage systems:

> Any such municipality may enter into contracts or agreements with any persons, firms or corporations for the operation and management of the facilities and properties of said sewerage system, or any part thereof, **for such period of time and under such terms and conditions as shall be agreed upon between such municipality and such persons, firms or corporations.**[40]

W. Va. Code § 16-13A-18 gives the same authority for operating and managing public service properties:

> The board may enter into contracts or agreements with any persons, firms or corporations for the operation and management of the public service properties within the district, or any part thereof, **for such period of time and under such terms and conditions as shall be agreed upon between the board and such persons, firms or corporations.**[41]

And W. Va. Code § 8-19-10 gives the same authority for municipal and county waterworks and electric power systems:

> Any such municipality or county commission may enter into contracts or agreements with any persons for (1) the repair, maintenance and operation and management of the facilities and properties of said waterworks or electric power system, or any part thereof, or (2) the collection and disbursement of the income and revenues therefor, or for both (1) and (2), **for such period of time and under such terms and conditions as shall be agreed upon between such municipality or county commission and such persons.**[42]

Rather than being a unique power given to solid waste authorities, the language relied upon by Petitioner is simply the same broad contracting authority given to many utility boards for

[40] W. Va. Code § 16-13-22e.
[41] W. Va. Code § 16-13A-18.
[42] W. Va. Code § 8-19-10.

operating their facilities.[43] By arguing that the solid waste authority's operating statute permits it to enter into unlimited fixed-term employment contracts with open-ended terms and conditions, the Petitioner is also arguing that the West Virginia Legislature intended to give the municipal authorities governing utilities statewide (including solid waste, sewage, gas, power, electricity, water, and stormwater) unlimited authority to bind their successors with unchangeable fixed-term employment contracts.

This is absurd. And it does not survive even casual scrutiny. First, W. Va. Code § 6-6-8 only recognizes fixed-term employment contracts when the terms are specifically "fixed by law."[44] Similarly, the *Barbor* line of cases require the "statute conferring the power" to fix the specific term.[45] These operating statutes only reference contracts with persons, firms, or corporations based on agreed periods, terms, and conditions—they do not fix any specific term of employment for any employee, and neither does any related law. If the phrase "agreed period of time" in these statutes were held to be synonymous with "term fixed by law"—as Petitioner argues—then W. Va. Code § 6-8-8 and *Barbor* would be nullified. But this tortured interpretation is not necessary: by requiring the fixed-terms had to be set "by law" or "by statute," West Virginia law clearly demands that any fixed-terms must be determined *by the Legislature*, not by the parties to the contract. Reworking the definition of "by law" to be "by agreement," as Petitioner seeks to do, is a perversion of what these statutes and cases actually say.

Petitioner's argument is further belied by the fact that the Legislature has often set specific fixed-terms for the employment of officers and employees by certain governmental entities when it wished to do so. One of the earliest cases to address the issue, *Helmick v. Tucker County Court*,[46]

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[43] *See* W. Va. Code §§ 16-13-22e, 16-13A-18, 8-19-10.
[44] W. Va. Code § 6-6-8.
[45] *Barbor*, 85 W. Va. at 359, 101 S.E. at 722.
[46] 65 W. Va. 23, 23, 164 S.E. 17, 17 (1909).

involved the Legislature setting two-year terms for the employment of road surveyors.[47] In fact, *Barbor* used *Helmick* as an example of when fixed-terms were permitted in employment contracts, being an instance where the term was set by statute.[48] In a similar case, *Craig v. Nicholas County Court*,[49] the Court noted that until the Legislature revised the Code in 1931, "county road engineers were employed for a fixed-term of two years" per statute.[50] When dealing specifically with municipal authorities and similar entities, the Legislature has had no difficulty in choosing when it wishes to specify terms: for example, when it comes to housing authorities, the Legislature chose to have officers and employees serve "from time to time"[51] (a judicially recognized phrase for "at-will").[52] When it comes to the public service commission, the Legislature chose to specify two-year, four-year, and six-year terms for board members,[53] and gave the board **explicit** authority to "fix the term of employment" for employees.[54] And when it comes to solid waste authorities, the Legislature set one-year, two-year, three-year, and four-year terms for specific members on the board of directors, and chose not to set any terms for any other officers or employees, or to give the solid waste authorities the power to set terms of other officers or employees.[55]

If the Legislature wanted to set specific terms for the employment of NCSWA officers and employees, it could have done so. And if the Legislature wanted to give the NCSWA the power to fix terms of employment for officers and employees (a power it gave the public service commission), it also could have done so. Because the Legislature chose not do so, however, the

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[47] *Id.* (citing section 1392, Code 1906).
[48] *Barbor*, 85 W. Va. at 359, 101 S.E. at 723.
[49] 117 W. Va. 198, 185 S.E. 1 (1936).
[50] *Id.* (citing Code 1923, c. 43, § 112).
[51] W. Va. Code § 16-5-5.
[52] *Boggess*, 273 F.Supp.2d at 734–37 (analyzing this language in W. Va. Code § 16-5-5).
[53] W. Va. Code § 16-13A-3.
[54] W. Va. Code § 16-13A-6.
[55] W. Va. Code 22C-4-3.

NCSWA was explicitly **barred** from entering into any fixed-term employment contract, as its own counsel warned it.

Lastly, these operating statutes and their language regarding "agreed periods of time" for contracts do not even apply to employment contracts, as they were designed for agreements with independent contractors, not employees. As Mr. Taylor explained in his opinion letter on the proposed contract,

> Again, it appears that this provision was not intended to expand upon the power to employ a manager, but rather contemplated independent contractors. "[F]irms or corporations" cannot be "employees." Further, the contract must be for operation *and* management," not "operation *or* management." (Emphasis supplied.) Several such contracts exist in West Virginia. For instance, the City of Charleston contracts with Waste Management of West Virginia, Inc. to operate and manage its municipal landfill, and the Jefferson County Solid Waste Authority does the same with respect to its county-owned transfer station.[56]

This is a much more sensible interpretation. West Virginia law does not prohibit government entities from entering into fixed-term contracts *in general*, only from entering into fixed-term *employment* contracts (absent statutory authority).[57] The NCSWA's enabling statute, which expressly permits the employment of managers, does not provide the ability to incorporate fixed-terms—logical, because such are prohibited.[58] On the other hand, the NCSWA's operating statute does reference the idea of entering into term contracts with outside parties/independent contractors—also logical, because such are allowed.[59]

In sum, the Court is faced with two possible interpretations of these two statutes:

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[56] JA 132.
[57] *See, e.g., Town of Davis*, 47 W. Va. at 413, 35 S.E. at 7; *Barbor*, 85 W. Va. at 359, 101 S.E. at 721-23; *Boggess*, 273 F.Supp.2d at 738, W. Va. Code § 6-6-8.
[58] W. Va. Code § 22C-4-23.
[59] W. Va. Code § 22C-4-17.

1. (Petitioner): Both the enabling statute and operating statute apply to employees, and permit governmental entities to enter into unlimited fixed-term employment contracts based on agreement of the parties, regardless of whether any statute sets a specific fixed term.

2. (Respondent): The enabling statute references employees, applies to employees, and does not provide for fixed-term employment contracts. The operating statute references outside/independent contractors, applies to outside/independent contractors, and permits fixed-term contracts only for outside/independent contractors, not employees.

The first interpretation would create an unsupportable metric wherein utility authorities statewide suddenly have power possessed by no other state entity, and establish precedent that the phrase "fixed by law" is synonymous with "whatever is agreed upon by the parties."[60]

The second interpretation avoids this disastrous result and comports with West Virginia's established public policy goals, statutes, and case law.[61]

Only one interpretation can survive the day, and for the reasons set forth above, the second interpretation can be the only correct one. The Petitioner's arguments to the contrary must fail.

ii. Contrary to Petitioner's assertions, *Barbor* and its progeny are controlling.

The Petitioner's sole argument against the application of *Barbor* and its progeny is that those cases "were predicated on the absence of statutory authority to enter into the fixed-term contracts at issue."[62] Having established above that the NCSWA also lacked statutory authority to enter into the fixed-term contract with Petitioner, the application of *Barbor* becomes a simple matter. As set forth in *Barbor*, even if a contract between a governmental entity and an employee contains a fixed term of employment, the governmental entity can terminate that employee at any time "without liability" because such employment contracts must be at will unless a statute

[60] Pet'r's Br. at 9–11.
[61] *See, e.g., Town of Davis*, 47 W. Va. at 413, 35 S.E. at 7; *Barbor*, 85 W. Va. at 359, 101 S.E. at 721-23; *Boggess*, 273 F.Supp.2d at 738, W. Va. Code § 6-6-8.
[62] Pet'r's Br. at 11.

provides otherwise.[63] The *Barbor* court also foreclosed on the Petitioner's current argument that general contracting powers are sufficient to permit fixed-term employment contracts:

> To adopt plaintiff's contention that the county court, by entering into a contract of employment for a term of three years, has exercised its pleasure in the premises is to bestow upon such governmental bodies power to extend through contracts the period of their control long beyond the terms for which they were elected, and thus to deprive their regularly elected successors of the important right to exercise some of the functions normally incident to the office. **Such was not the legislative intent as we construe the statute.**
>
> Nor does section 1, c. 39, Code (Code 1913, § 1525) operate to validate a contract such as this. It merely makes the county court of every county a corporation, and **in general terms empowers it to contract and be contracted with. Its specific authority, however, is only such as the Constitution and Legislature of the state have seen fit to bestow upon it.**[64]

Barbor was derived in large part from *Town of Davis*, which explained the basic principle that unauthorized fixed-term contracts for public employees and officers "cramp the powers of the town, defeat the performance of some of its essential functions, and [would] be very hurtful to public interests."[65] *State ex rel. Archer v. County Court* then expanded upon *Barbor* by explaining that, unless limited otherwise by constitutional or statutory provisions, governmental entities retained the power to remove employees at-will "where no definite term is fixed by law."[66] *Williams v. Brown* clarified that the rule applied even if the employment contract contained fixed-terms and did not state that the employment was at-will.[67] And as noted by the United States District Court for the Southern District of West Virginia in *Boggess v. Housing Authority of City of Charleston*, while this removal power is codified in W. Va. Code 6-6-8, it would still exist even

[63] *Barbor*, 85 W. Va. at 359, 101 S.E. at 721-23.
[64] *Id.* at 359, 101 S.E. at 722.
[65] *Town of Davis*, 47 W. Va. at 413, 35 S.E. at 7.
[66] *Archer*, 150 W. Va. at 264, 144 S.E.2d at 794.
[67] *Williams*, 190 W. Va. at 206, 437 S.E.2d at 779.

if was not legislatively codified because it was a rule recognized by the United States Supreme Court itself:

> In *Town of Davis*, the West Virginia Supreme Court explained that
>
> > If the power of removal were not given by the Code, it would exist, because the power to appoint carries with it as an incident the power to remove, in the absence of constitution or statutory restraint of such power. It is called by the United States [S]upreme [C]ourt, as it is, "a sound and necessary rule." Hennen's Cases, 13 Pet. 230, 10 L.Ed. 138. Much authority sustains it. Mechem, Pub. Off. § 445. "Where the power of appointment is conferred in general terms, without restriction, the power of removal in the discretion and at the will of the appointing power is implied, and always exists unless restrained and limited by some provision of law." Trainor v. Board (Mich.) 15 L.R.A. 95, note (s. c. 89 Mich. 162, 50 N.W. 809).[68]

After completing a thorough examination of West Virginia precedent on these issues, *Boggess* concluded that this Court's statements about implied removal power and the invalidity of fixed term contracts were not dicta, but were rather key holdings:

> The statements by the West Virginia Supreme Court in *Town of Davis* originally, but also later in *Archer* and *Williams* were integral parts of the decisions in those cases. They were not statements made in passing or with little consideration. The West Virginia Supreme Court's holdings in the above cases, that the employees or officers were subject to the implied at-will removal power, were based not only on the substance of the statutes at issue, but also the principle that even in the absence of statutory language suggesting an at-will employment relationship, the power to appoint carries with it the implied power to remove in the absence of any limiting constitutional or statutory provision. The latter principle is not dicta, it is one of the two grounds upon which the West Virginia Supreme Court based its holdings in the above cases.
>
> To be clear, the court is not suggesting that the West Virginia Supreme Court in *Town of Davis*, *Archer* and *Williams* articulated some sort of two-part test, the first part of which requires the presence of the "at the pleasure of" or similar language in a statute. To the contrary, by the explicit language of *Town of Davis*, *Archer*

[68] *Boggess*, 273 F.Supp.2d at 737.

> and *Williams*, the absence of the "at the pleasure of" language in a statute is not determinative of the issue of whether the implied at-will removal power exists. Instead, as is the case with respect to West Virginia Code § 16–15–5, where there is a power to appoint and no fixed term of employment in the statute, even in the absence of "at the pleasure of" statutory language, the at-will power to remove is implied.[69]

It bears repeating that while these cases involved the rejection of fixed-term contracts, none of them involved facts as outrageous as in this case, where the Petitioner asserts that he is entitled to a rolling fixed-term contract with liquidated damages if his contract is not renewed. Yet even if the contract at issue were far more reasonable than it is, this wealth of authority provides a definitive conclusion: absent a statute setting a specific fixed-term for Petitioner's employment (i.e., the two-year terms for road surveyors and engineers,[70] or the multiple-year terms for board members,[71] or the express authority given to the public service commission to "fix the term of employment" for employees[72]), the fixed-term provisions in his contract are invalid, and he was always an at-will employee capable of being terminated at any time. It matters not whether the NCSWA performed for a period of time under the contract,[73] or whether certain individuals at the SWMB thought the contract was inadvisable but technically legal,[74] or whether Chairman Johnson inexplicably thought the Attorney General's office had approved the contract when the Attorney General's office had told him otherwise.[75] These same facts were present in *Town of Davis*, *Barbor*, and *Boggess*, for example, where the parties also thought that the contracts were enforceable and performed under the contracts for some time before litigation occurred and the

[69] *Id.* at 738.
[70] *See Helmick*, 65 W. Va. at 23, 164 S.E. at 17; *Craig*, 117 W. Va. at 198, 185 S.E. at 1.
[71] W. Va. Code § 16-13A-3; W. Va. Code § 22C-4-3.
[72] W. Va. Code § 16-13A-6.
[73] Pet'r's Br. at 4.
[74] Pet'r's Br. at 4.
[75] Pet'r's Br. at 4.

contracts were deemed unenforceable.[76] The question before the Court today is simply whether this sort of a fixed-term employment contract is enforceable as a matter of law. The answer to that question is no.

For these reasons, the Circuit Court correctly answered the first certified question, and should be affirmed.

B. The Circuit Court correctly found that the liquidated damages provision in the Petitioner's contract was unenforceable as a matter of law.

The second certified question is derivative of the first: if a governmental entity terminates a fixed-term employment contract as discussed above, can the terminated individual seek to invoke a liquidated damages clause within the contract?

Again, the answer is no. Predictably, the Petitioner cites the operating statute (which does not apply to employment contracts, as discussed *supra*) and claims that a governmental entity can put any liquidated damages provision in any contract that it likes.[77] But the Petitioner misses the mark.

As explained in *Barbor*, a key part of the government being able to terminate at-will employees (including those with unenforceable fixed-term contracts) is that it can do so without liability: "Though a county court employs a manager of the county poor farm for a definite term, **it may without liability annul the contract** and dismiss him at any time before the expiration of such term . . . ."[78] As Petitioner himself admits, the point behind enforcing a non-punitive liquidated damages provision is making the governmental entity face liability for compensatory

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[76] *Town of Davis*, 47 W. Va. at 413, 35 S.E. at 6 (performing on fixed-term contract for unspecified amount of time); *Barbor*, 85 W. Va. at 359, 101 S.E. at 721 (performing on fixed-term contract for five months before termination); *Boggess*, 273 F.Supp.2d at 731-32 (performing on five-year fixed-term contract for three years before termination).

[77] Pet'r's Br. at 12–13. The Petitioner does correctly note that, under ordinary circumstances, the liquidated damages provision will then only be enforceable if it is deemed to be compensatory, rather than punitive.

[78] Syl. Pt. 5, *Barbor*, 85 W. Va. at 359, 101 S.E. at 721.

damages.[79] Not only would this result contradict *Barbor*, it would also go against the longstanding rule for nonliability of employers on discharge of at-will employees (absent contravention of public policy or other recognized liability triggers).[80] More importantly, it would infringe on the constitutionally-recognized ability for local governments to exercise discretion in hiring and firing employees by forcing them to pay for the privilege of doing so if their predecessors had entered into illegal contracts.[81]

None of this should be countenanced. *Barbor* and its progeny make clear that improper fixed-term employment contracts can be terminated without liability, whether such liability is sought to be imposed by liquidated damages or otherwise.[82] Petitioner's attempt to overthrow over 120 years of precedent through an improper reading of an inapplicable operating statute should be rejected.

For these reasons, the Circuit Court correctly answered the second certified question, and should be affirmed.

C. The Circuit Court correctly found that the doctrine of estoppel and/or waiver may not be asserted against a government entity that enters into an employment contract that is later challenged as void.

The Petitioner waived his right to challenge the third certified question because he did not include it in his assignments of error, and did not assert any argument against the Circuit Court's decision in his brief, other than claiming that the Circuit Court did not need to rule on the third certified question (which he himself agreed to submit in the parties' joint motion to certify).[83] However, even if the Petitioner had raised an assignment of error against the Circuit Court's

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[79] Pet'r's Br. at 12–13.
[80] *See, e.g.*, Syl. Pt. 2, *Frohnapfel v. ArcelorMittal USA LLC*, 235 W. Va. 165, 772 S.E.2d 350 (2015).
[81] *Town of Davis*, 47 W.Va. at 413, 35 S.E. at 7 ("[Such a result] would cramp the powers of the town, defeat the performance of some of its essential functions, and be very hurtful to public interests. Public policy overrules that contention.").
[82] *See* Syl. Pt. 5, *Barbor*, 85 W. Va. at 359, 101 S.E. at 721; *Boggess*, 273 F.Supp.2d at 738.
[83] Pet'r's Br. at 7; JA 001–003.

decision on the third certified question, such argument would have failed, because the Circuit Court was demonstrably correct.

This Court has ruled numerous times that estoppel and/or waiver cannot be used to bind the government to an invalid contract:

> "An unauthorized or illegal contract executed by a public corporation, is incapable of enforcement. It is absolutely void, and neither the doctrine of estoppel nor ratification can be invoked to maintain it." *Herald v. Board of Education*, 65 W. Va. 765, 65 S.E. 102, 31 L.R.A. (N.S.) 588. *See Capehart v. Rankin*, 3 W. Va. 571, 100 Am. Dec. 779; *Brown v. Wylie*, 2 W. V. 502, 98 Am. Dec. 781; *Poling v. Board of Educational Philippi Independent District*, 56 W. Va. 251, 49 S.E. 148; *Raleigh County Bank v. Bank of Wyoming*, 100 W. Va. 342, 130 S.E. 476; *Colbert v. Ashland Construction Company,* 176 Va. 500, 11 S.E. 2d 612; *American LaFranee and Foamite Industries v. Arlington County*, 164 Va. 1, 178 S.E. 783.[84]

This Court has further held that:

> One dealing with a public officer must know that such officer has authority to do the thing he undertakes to do at the time he does it. One dealing with a public officer without full knowledge of the extent of his authority does so at his peril. The public will be bound only to the extent that such officer has the authority, no matter what his assumed or apparent authority may be.[85]

This doctrine has been reiterated multiple times, such as in *Samsell v. State Line Development Company*, where this Court ruled that a director who lacked actual authority to enter into a contract could not bind the state to the contract through estoppel.[86] As stated by the Court: "[t]he state is not bound by the unauthorized or illegal acts of its officers...and all persons who deal with such officers do so at their peril, in all matters wherein such officers exceed their legitimate powers."[87]

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[84] *State ex rel. City of South Charleston v. Partlow*, 133 W. Va. 139, 170, 55 S.E.2d 401, 416-17 (1949) (Haymond, J., concurring).
[85] *Capehart v. Board of Educ.*, 82 W.Va. 217, 223, 95 S.E. 838, 840 (1918).
[86] Syl. Pt. 1, *Samsell* at 48, 174 S.E.2d at 320.
[87] *Id.* (emphasis added) (citing Syl. Pt. 3, *Totten v. Nighbert*, 41 W. Va. 800, 800, 24 S.E. 627, 627 (1896)). *See also* Syl. Pt. 2, *W. Va. Public Emp. Ins. Bd. v. Blue Cross Hosp. Serv., Inc.*, 174 W. Va. 605, 605, 328

For these reasons, the Circuit Court correctly answered the third certified question, and should be affirmed. Any argument that the Petitioner may have to the contrary has been waived.

D. The Circuit Court correctly found that an implied fixed-term contract may not exist between a non-civil service employee and a government entity.

As explained in Section I, *supra*, the fourth certified question should be reformulated to clarify that the issue is whether an implied *fixed-term* contract may exist between a non-civil service employee and a government entity. As the Petitioner points out, prior opinions from this Court support the concept that an implied contract between a governmental entity and an employee or independent contractor can exist in certain situations.[88] However, the issue that was presented to the Circuit Court was whether an implied *fixed-term* contract could exist—i.e., whether the Petitioner was entitled to sue for breach of implied contract based on his termination before his fixed-term ended. And as *Williams* makes clear, West Virginia does not recognize the concept of an implied fixed-term contract:

> Neither *Barbor* nor its progeny recognize an implied contract of continued employment in the public employment sector.[89]

Williams was quite correct, as any other conclusion would permit invalid fixed-term contracts to be enforceable so long the local government entity had taken action to imply that it would recognize the contract. Accordingly, this Court has never recognized that an invalid fixed-term contract could be enforced on implied contract grounds.[90] Instead, when this Court has ruled that a fixed-term contract was invalid, that was the end of the analysis, even when the governmental entity had performed under the contract terms for some time.[91]

S.E.2d 356, 357 (1985) ("A state or one of its political subdivisions is not bound by the legally unauthorized acts of its officers and all persons must take note of the legal limitations upon their power and authority.")

[88] Pet'r's Br. at 14–15.

[89] *Williams*, 190 W.Va. at 207, 437 S.E.2d at 780.

[90] *See Town of Davis*, 47 W. Va. at 413, 35 S.E. at 7; *Barbor*, 85 W. Va. at 359, 101 S.E. at 721-23; *see also Boggess*, 273 F.Supp.2d at 738 (explaining this Court's historical application of the doctrine).

[91] *See id.*

For these reasons, the fourth certified question should be revised as requested above, and the Circuit Court's decision should be affirmed.

E. The Petitioner's fourth assignment of error should be stricken.

This appeal was taken on a motion to certify four specific questions of law that had been answered by the Circuit Court pursuant to W. Va. Code § 58-5-2 and Rule 17 of the West Virginia Rules of Civil Procedure. The Petitioner's Brief only addresses three of the four certified questions, and seeks to raise a fourth assignment of error based on a severability analysis that has not been decided by the Circuit Court, is not part of the four certified questions, and is wholly outside the scope of this appeal. It appears, from the portions of the Joint Appendix cited by the Petitioner and footnoted in his brief, that this purported fourth assignment of error is simply an attempt to air the Petitioner's personal grievance that the Circuit Court did not rule on an argument presented by the Petitioner before certifying the questions for appeal (which, again, was done pursuant to a joint motion between the parties). As such, the Petitioner's fourth assignment of error should be stricken as an impermissible violation of the Rules of Appellate Procedure and as a legal argument that lies outside the scope of this appeal.

To the extent a response is required to this impermissible assignment of error, Respondent states that the severability of contract provisions is a question that may be examined by the Circuit Court *after* this Court rules on the four certified questions of law. As the Court is aware, this is an interlocutory appeal based on certified questions and no final judgment order has been issued by the Circuit Court on any part of this case. Respondent respectfully submits that if this Court were to conduct a severability analysis before the Circuit Court has had the opportunity to do so after applying this Court's ultimate decision on the four certified questions, such action would constitute

an advisory opinion in violation of established West Virginia law.[92]

For these reasons, this Court should reject the Petitioner's arguments presented in the fourth assignment of error and strike the fourth assignment of error from the record.

VI. CONCLUSION

This case began when the NCSWA and Petitioner executed a fixed-term employment contract that the NCSWA knew was illegal, and which the Petitioner entered into at his own peril. The Petitioner has sought to enforce the contract regardless, but West Virginia law is clear:[93]

1. A fixed-term employment contract between a non-civil service employee and a government entity is not enforceable.

2. A liquidated damages provisions in a fixed-term employment contract between a non-civil service employee and a government entity is not enforceable.

3. Estoppel and/or waiver cannot bind the government to a void/voidable employment contract.

4. An implied fixed-term contract cannot exist between a non-civil service employee and a government entity.

The Circuit Court answered all of these questions correctly. The Circuit Court's decision should be affirmed, and the Petitioner's assignments of error rejected.

Signatures appear on next page.

[92] *See, e.g., Estate of Gomez by and through Gomez v. Smith*, 243 W.Va. 491, 503, 845 S.E.2d 266, 278 (2020) (listing "certified questions" as one of a narrow category of orders subject to permissible interlocutory appeal.") Other issues within a given case are generally not subject to interlocutory appeal and must satisfy the rule of finality because "[c]ourts are not constituted for the purpose of making advisory decrees or resolving academic disputes." *Mainella v. Bd. of Trustees*, 126 W. Va. 183, 183, 27 S.E.2d 486, 487-88 (1943).

[93] The exception to conclusions 1 and 2 being when the fixed-term is set by law, which is not the situation in this case, as discussed *supra*.

Dated: September 27, 2021

WEST VIRGINIA SOLID WASTE MANAGEMENT BOARD

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21-0234

LARRY A. BRADFORD,

Plaintiff Below, Petitioner,

v.

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

(Civil Action No.: 15-C-1543)

WEST VIRGINIA SOLID WASTE MANAGEMENT BOARD,

Defendant Below, Respondent.

CERTIFICATE OF SERVICE

I, Kevin L. Carr , hereby certify that on this the 27th day of September, 2021, I served the foregoing **Respondent's Brief** via U.S. Mail, postage pre-paid, addressed as follows:

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