State of West Virginia
Office of the Attorney General

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The Honorable Kent A. Leonhardt
Commissioner
West Virginia Department of Agriculture
1900 Kanawha Blvd. E.
Charleston, WV 25305

Dear Commissioner Leonhardt:

You have asked for an Opinion of the Attorney General concerning whether the Commissioner of Agriculture ("Commissioner") may enter into legally binding contracts on behalf of the Department of Agriculture during the interim period between the date that his or her successor is elected and the date of the successor's inauguration. This Opinion is being issued pursuant to West Virginia Code § 5–3–1, which provides that the Attorney General "shall give written opinions and advice upon questions of law . . . whenever required to do so in writing by . . . the commissioner of agriculture." To the extent this Opinion relies on facts, it is based solely upon the factual assertions set forth in your correspondence with the Office of the Attorney General.

Your correspondence raises the following legal questions, which are addressed in turn below:

(1) Is a Commissioner who has not been reelected required to abstain from signing agreements, leases, memorandums of understanding or other instruments that obligate resources belonging to the Department of Agriculture in the transition period before his successor is sworn in, or is his authority unaffected during such transition period?

(2) Does a Commissioner have authority to unilaterally cancel long term leases for real property entered into by his or her predecessor Commissioner?

Background

Your correspondence concerns actions taken by your predecessor Commissioner, who entered into two long-term leases for real property in the final days of his administration after your election as his successor. The leases at issue both involve institutional farm property under the control of the Department of Agriculture, and were entered into for the stated purpose of economic

development under the authority granted by West Virginia Code § 19–12A–5(d)(1). The first lease, between the Department of Agriculture and the Sweet Springs Resort Park Foundation, Inc. for 650 acres of real property and a term of thirty-five years, was signed by both parties on January 4, 2017. The second lease, between the Department of Agriculture and the Mason County Building Commission for 128.6 acres of real property and a term of thirty years, was signed by both parties on January 13, 2017.

Discussion

Question One: Is a Commissioner of Agriculture who has not been reelected required to abstain from signing agreements, leases, memorandums of understanding or other instruments that obligate resources belonging to the Department of Agriculture in the transition period before his successor is sworn in, or is his authority unaffected during such transition period?

We conclude that the Commissioner possessed the constitutional authority to enter into the leases in question during the period between the election of his successor and the time that his successor took office.

Under the West Virginia Constitution, the standard powers of an elected official remain for the entirety of the elected term. The Constitution provides that "[t]he[] terms of office [of the executive department, including the Commissioner,] shall be four years and shall commence on the first Monday after the second Wednesday of January next after their election." W. Va. Const. art. VII, § 1.[1] With respect to the Commissioner specifically, West Virginia Code § 19–1–2 provides that "[t]he commissioner of agriculture shall be elected by the qualified voters of the State at the same time and in the same manner as other state officers are elected, and shall hold office for a term of four years and until his successor is elected and qualified." W. Va. Code. § 19–1–2. The West Virginia Supreme Court of Appeals has held that the election and qualification requirements allow elected officials to "enter upon the discharge of their duties *at the time fixed for the commencement of their terms*." *State v. Jones*, 81 W. Va. 182, 94 S.E. 120, 121 (1917) (emphasis added); *see also State ex rel. Tomblin v. Bivens*, 150 W. Va. 733, 747, 149 S.E.2d 284, 292 (1966) (power and authority to perform and discharge duties continues until the expiration of the elected term and until a successor has been elected and qualified). Executive officials therefore often exercise their standard powers until their final day of office, such as issuing executive orders or pardons. *See, e.g.*, Recovering addict, non-profit employee receives pardon, WSAZ-TV (Apr. 5, 2017), available at http://www.wsaz.com/content/news/Recovering-addict-non-profit-employee-receives-pardon--418301023.html (discussing outgoing Governor Earl Ray Tomblin's pardon of a felony conviction).

Here, the express authority for the outgoing Commissioner's decision to enter the land leases at issue is found in West Virginia Code § 19–12A–5, entitled "Powers, duties and responsibilities of [the] commission[er]." The relevant provision "authorize[s] and empower[s]" the Commissioner to "[l]ease to public or private parties, for purposes including agricultural

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[1] The "executive department" of the State of West Virginia consists of "a governor, secretary of state, auditor, treasurer, commissioner of agriculture and attorney general." W. Va. Const. art. VII, § 1.

production or experimentation, public necessity, or other purposes permitted by the management plan, any land, easements, equipment, or other property." W. Va. Code § 19–12A–5(d)(1); *see also* W. Va. Code § 19–12A–1A(a) (abolishing the farm management commission, naming the Department of Agriculture as the successor to all real and personal property, and transferring all powers, duties and responsibilities of the farm management commission, "commission" in the statutes, to the Commissioner).

We do not interpret your correspondence as alleging that the former Commissioner, by entering into these leases, acted outside the scope of authority permitted by West Virginia Code § 19–12A–5. *Cf Minor v. City of Stonewood*, No. 13-0758, 2014 WL 1672941, at *1–3 (Apr. 25, 2014) (voiding five-year employment contract appointing a new Chief of Police because the outgoing Mayor did not have statutory authority necessary to expend future levy funds); *State ex rel. Bache & Co. v. Gainer*, 154 W. Va. 499, 509–10, 177 S.E.2d 10, 16–17 (1970) (contract between Governor and financial advisor was valid and binding on the State, because the relevant statutes "expressly authorized [the Governor] to issue and sell bonds," "vested [the Governor] with discretion as to the manner in which he exercises his authority," and "d[id] not prescribe any specific directions, restrictions or limitations" to his discretion to obtain services to assist in managing the State's bonds). Nor does the statute appear to place any limitation on the lease term to which a Commissioner may agree. Indeed, if a Commissioner were to have any authority to enter into long-term leases for real property—here, 30 years and 35 years respectively—it will often be the case that those leases will remain in effect long after the Commissioner who entered into them has left office.

At least one other State has placed a public policy limitation on the ability of certain elected officials to enter into contracts that extend beyond those officials' terms. In *Boggess v. City of Charleston*, the Supreme Court of Appeals of West Virginia noted in dicta a decision from a Wyoming federal court, which discussed that Wyoming's highest court had repeatedly held that "allow[ing] a prior government or official to bind his successors by creating contracts or other commitments which extend beyond his term would be contrary to [a] critical facet of democracy." *Boggess v. City of Charleston*, 234 W. Va. 366, 375, 765 S.E.2d 255, 264 (2014) (quoting *Figuly v. City of Douglas*, 853 F. Supp. 381, 384 (D. Wyo. 1994)). In *Boggess*, however, the Supreme Court of Appeals did not adopt Wyoming's public policy nor was it necessary to the outcome of the case. The *Boggess* Court held that the use of a particular formula by the City of Charleston to calculate overtime did not create an enforceable contract, but was instead a policy choice that future administrations could alter or amend. *Id.* at 377, 765 S.E.2d at 266. The Court did not purport to hold that elected officials, let alone constitutional officers like the Commissioner, were barred from entering into any contracts during their terms that extended beyond the end of their terms.

The Wyoming public policy itself is limited. The Wyoming federal court underscored that "it would be neither practical nor desirable for all government contracts to terminate upon the completion of the term of the officials which made them." *Figuly*, 853 F. Supp. at 384. The precise contours of that limitation are unclear. *Figuly* itself, similar to *Boggess*, concerned the ability of a new administration to make personnel changes put in place by a prior administration. *Id.* at 382–

83.[2] The decisions in both *Boggess* and *Figuly* appear to be motivated at least in part by the need of each administration to make its own employment decisions and set its own personnel policies. It is unclear whether Wyoming would extend its rule to long-term leases for real property. In any event, West Virginia has not adopted the rule in *any* form, let alone in the specific context of land leases.

For all these reasons, we conclude that the outgoing Commissioner was empowered to enter into the real property leases under the authority granted to the Commissioner by West Virginia Code section 19–12A–5(d)(1), because entering into the leases was an appropriate exercise of his standard powers within his elected term.

Question Two: Does a Commissioner of Agriculture have authority to unilaterally cancel long term leases for real property entered into by his or her predecessor Commissioner?

We conclude that the Commissioner does not have any inherent authority to unilaterally cancel existing contracts entered into on behalf of the State by prior administrations. Nevertheless, the contracts themselves provide one possible alternate avenue for cancellation or revocation—through an act of the State Legislature.

We have been unable to locate any authority that would provide the Commissioner with inherent authority to cancel his predecessor's contract unilaterally. That said, the Commissioner might still possess revocation or cancellation authority if the parties had agreed to such authority in the text of the contract itself. The general rule of contract interpretation is that "'[a] valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or interpretation but will be applied and enforced according to such intent.'" Syl. Pt. 4, *Zimmerer v. Romano*, 223 W. Va. 769, 679 S.E.2d 601 (2009) (quoting Syl. Pt. 1, *Cotiga Dev. Co. v. United Fuel Gas Co.*, 147 W.Va. 484, 128 S.E.2d 626 (1963)). The two lease agreements at issue, however, do not purport to provide the Commissioner with any authority to unilaterally revoke the agreements. To the contrary, an identical provision in both leases recognizes that "the lease can be cancelled without further obligation if the legislature fails to appropriate sufficient funds or otherwise acts to impair the lease or cause it to be cancelled."[3] This provision contrasts with provisions in other state contracts that provide the State with an automatic right of cancellation for long term leases. *Cf.* W. Va. Code § 18B–19–12 (mandating any lease

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[2] In *Figuly*, the court permitted the City of Douglas to void an employment contract entered into by the prior city council for a city administrator. 853 F. Supp. at 386–87.

[3] This language appears to be standard in a number of State statutes governing long term leases, and is in other contexts statutorily required to be included in the text of contracts. *See, e.g.*, W. Va. Code § 5B–2–11 ("Contracts entered into pursuant to this section for longer than one fiscal year shall contain, in substance, a provision that the contract shall be considered canceled without further obligation on the part of the state if the Legislature or, where appropriate, the federal government shall fail to appropriate sufficient funds therefor or shall act to impair the contract or cause it to be canceled."); W. Va. Code § 18B–19–12 ("The lease is considered canceled without further obligation on the part of the lessee if the Legislature or the federal government fails to appropriate sufficient funds for the lease or otherwise acts to impair the lease or cause it to be canceled."); W. Va. Code § 5A–10–5 ("[T]he lease shall be considered canceled without further obligation on the part of the lessee if the State Legislature or the federal government should fail to appropriate sufficient funds therefor or should otherwise act to impair the lease or cause it to be canceled.")

executed under this statute to "contain, in substance" a provision granting the State entity, as lessee, "the right to cancel the lease without further obligation . . . upon . . . written notice to the lessor"). Under traditional principles of contract interpretation, the explicit mention of one specific avenue for cancellation appears to foreclose other avenues not specifically mentioned. *See* Syl. Pt. 3, *Bischoff v. Francesca*, 133 W. Va. 474, 56 S.E.2d 865 (1949) (quoting *Harbert v. Cnty. Court of Harrison Cnty.*, 129 W. Va. 54, 64, 39 S.E.2d 177, 186 (1946) ("In the interpretation of written instruments 'the express mention of one thing implies exclusion of another, expressio unius est exclusio alterius.'").

Based on the language in the two leases at issue, the Commissioner does not have authority to cancel the leases unilaterally, but may be able to propose legislative rules that could be adopted by the State Legislature to cancel the existing leases. In the alternative, the Legislature could on its own initiative enact a statute to that effect.[4]

Sincerely,

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[4] If the leases did not contain any such provision, the Legislature might still be able to alter or revoke the leases, but any such actions would then be subject to constitutional limitations on a State's ability to impair contractual rights under the Contracts Clauses of the United States Constitution and the West Virginia Constitution. *See* U.S. Const. art I, § 10, cl. 1; W. Va. Const. art. III, § 4; *see also* Syl. Pt. 1, *Shell v. Metro. Life Ins. Co.*, 181 W. Va. 16, 380 S.E.2d 183 (1989) ("In construing our state constitutional provision prohibiting any 'law impairing the obligation of a contract,' W. Va. Const. art. III, § 4, we have generally accepted the United States Supreme Court's interpretation of the similar provision contained in Article I, Section 10, Clause 1 of the United States Constitution."). Because the leases at issue expressly reserve the right of the Legislature to cancel the contract, no constitutional question appears to be presented here. *See, e.g.*, *First Trust Co., Inc. v. State*, 449 N.W.2d 491, 496 (Minn. Ct. App. 1989) (upholding State's cancellation of a contract where the parties explicitly agreed that continuation of the contract was contingent on legislative appropriation of funds, and the Legislature failed to appropriate funds).