

JOINT COMMITTEE ON GOVERNMENT AND FINANCE
WEST VIRGINIA OFFICE OF THE LEGISLATIVE AUDITOR

POST AUDIT DIVISION

LEGISLATIVE AUDIT REPORT

DIVISION OF CORRECTIONS' 25-YEAR LEASE OF FORMER WEST VIRGINIA PENITENTIARY

Legislative Auditor: Aaron Allred
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GENERALLY ACCEPTED GOVERNMENT
AUDITING STANDARDS STATEMENT

We conducted this performance audit in accordance with Generally Accepted Government Auditing Standards (**GAGAS**). Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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DIVISION OF CORRECTIONS' 25- YEAR LEASE OF FORMER WEST VIRGINIA PENITENTIARY

NOVEMBER 11, 2018

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INTRODUCTION: PAGE.....	1
BACKGROUND: PAGE	3
ISSUE 1: PAGE.....	5
<i>Based on the terms of the lease agreements, from February 1997 to July 2013, the DOC erroneously paid for an indeterminable portion of electric utility costs that were the MEDC's responsibility. From July 2013 to April of 2018, the DOC erroneously paid approximately \$204,000 of electric utility costs, which were the responsibility of the MEDC.</i>	
ISSUE 2: PAGE.....	7
<i>Poorly drafted language concerning insurance requirements in the 2004 lease agreement and the 2013 MOU potentially opens the State to increased liability.</i>	
ISSUE 3: PAGE.....	11
<i>The Legislative Auditor has concerns with allowing a State agency to enter into a 25-year lease agreement without requiring a thorough, high-level review of the language, terms, and potential long-term effects of the agreement.</i>	
OBJECTIVE, SCOPE, & METHODOLOGY: PAGE....	14
APPENDIX A: PAGE	16
<i>DMAPS Cabinet Secretary 2017 Memorandum</i>	
APPENDIX B: PAGE	20
<i>Letter of Understanding 1995</i>	
APPENDIX C: PAGE	22
<i>Lease Agreement 1997</i>	
APPENDIX D: PAGE.....	28
<i>Lease Agreement 2004</i>	
APPENDIX E: PAGE	34
<i>Memo of Understanding 2013</i>	
APPENDIX F: PAGE	41
<i>Legislative Services Opinion</i>	

Introduction

In September of 2017, Cabinet Secretary Jeff Sandy of the Department of Military Affairs and Public Safety (DMAPS) wrote a memo (Appendix A) to the Governor's General Counsel, Brian Abraham, expressing concerns over the Division of Corrections' (DOC) lease of the former West Virginia Penitentiary (Penitentiary) to the Moundsville Economic Development Council (MEDC). The following is a summary of the concerns expressed in the memo:

- The DOC paid electric utility bills for the leased space at the Penitentiary that was the contractual obligation of MEDC.
- The MEDC utilizes the Penitentiary for revenue producing ventures with no benefit to DOC (the State).
- The MEDC failed to provide the DOC with proof of an insurance policy meeting the coverage requirements stipulated in the lease. This was especially critical to the DOC as large pieces of stone had recently fallen from the structure, which highlighted the potential for injury due to the deteriorating structural integrity of the building and the need to verify proper insurance coverage.
- Vandalism had occurred to the facility, as well as to state-owned equipment, during non-DOC events supervised by MEDC staff, due in part, to MEDC allowing the public to go unattended during overnight tours.
- The MEDC did not provide copies of the release of liability forms required of individuals attending MEDC sponsored events to the DOC.
- The MEDC used the DOC logo for merchandise sold for the benefit of the MEDC in violation of a limited use license agreement executed between DOC and MEDC.
- Former DOC Commissioner Jim Rubenstein was a co-founder of the "Corrections Training Foundation," a nonprofit corporation with the principal purpose of assisting with the funding of the Mock Prison Riot at the Penitentiary. This raised the concern that a former Commissioner of Corrections may have inappropriately served as Director of a nonprofit while employed by the State of West Virginia.
- The DOC may have provided labor, building materials, and other items of value to a nonprofit in carrying out its revenue producing activities.
- DMAPS cabinet secretaries, for at least the past decade, had no knowledge of the lease agreements that DOC had with the MEDC to utilize the Penitentiary for a 25-year term.

Secretary Sandy then requested the Legislative Auditor review the lease agreement and the electric utility payments to confirm the results of his office's analysis. The purpose of this review was to understand the terms of the lease agreements and the responsibilities of the parties in order to quantify the extent of the improper electric utility payments made by the DOC. This review of the electric payments and the lease agreements by the Legislative Auditor found the following issues which are explained in further detail later in the report:

- 1. Based on the terms of the lease agreements, from February 1997 to July 2013 the DOC erroneously paid for an indeterminable portion of electric utility costs that were the MEDC's responsibility. From July 2013 to April of 2018, the DOC erroneously paid approximately \$204,000 of electric utility costs, which were the responsibility of the MEDC.**
- 2. Poorly drafted language concerning insurance requirements in the 2004 lease agreement and the 2013 Memorandum of Understanding potentially opens the State to increased liability.**
- 3. The Legislative Auditor has concerns with allowing a State agency to enter into a 25-year lease agreement without requiring a thorough, high-level review of the language, terms, and potential long-term effects of the agreement.**

While the Legislative Auditor was able to determine these issues from the available information, some of the concerns expressed by Secretary Sandy in his September 2017 memo were not reviewed due to lack of available information and other limitations. For those reasons, some issues referenced in that memo are not discussed in this report. The objective of this review was to determine whether electric payments were improperly made by the DOC that were the financial obligation of the MEDC. This review led to the identification of subsequent issues related to the lease agreement which have potential adverse impact on the State. This report makes no determination of the effectiveness of the MEDC to fulfill its mission as a nonprofit in the Moundsville region, nor is it an analysis of the operations of the MEDC.

Background – Division of Corrections’ Lease Agreement with the Moundville Economic Development Council

On March 27, 1995, the West Virginia Penitentiary was closed per court order due to the determination that the cells were too small and the living conditions inhumane. The State remained the owner of the Penitentiary after its closure with the Division of Corrections being the State entity acting as the oversight body. Sometime subsequent to the closure of the Penitentiary, the DOC and MEDC engaged in communications to allow the MEDC to lease the Penitentiary. The exact nature of these communications is unknown due to lack of available information; however, it is assumed these communications were to allow the MEDC to lease the Penitentiary to engage in economic development activities meant to bring business into the region. At the time, the MEDC was just being formed as a nonprofit organization with the goal of benefiting the economy of the Moundville area through activities at the Penitentiary that would attract tourists to the area and other outside business.

In November of 1995, the DOC and MEDC signed a “*Letter of Understanding*”¹ (Appendix B), which the DOC provided to the Legislative Auditor. Based on a review of this document, it appears this was a preliminary agreement to outline the terms of any future agreement for the lease of the Penitentiary. This document was silent as to the specific terms of any future lease agreement between DOC and MEDC.

Then, on February 5, 1997, the DOC agreed to lease the Penitentiary to MEDC for a term of 25 years for the “*...sum of \$10 cash in hand...*” paid to DOC (Appendix C). The lease granted MEDC the right “*...to occupy the old main prison complex...*” for the “*...advancement of tourism, promotion of the general economy of Marshal County and to conduct the general business affairs of the council....*” This is the first signed document the Legislative Auditor was able to obtain that specifically indicated that a lease existed between MEDC and DOC.

On January 29, 2004, the DOC entered into a new lease agreement of the Penitentiary with MEDC and, as a cotenant, the National Corrections and Law Enforcement Training and Technology Center. (Appendix D) This agreement ostensibly remains in effect today². As was the case with the 1997 agreement, the lease was for \$10 for the entirety of the 25-year lease period. Therefore, the lease agreement will not expire until January 2029. On July 23, 2013, a Memorandum of Understanding (MOU) was effectuated between DOC and MEDC (Appendix E). This MOU amended some terms of the 2004 lease agreement; however, the January 29, 2004 lease agreement remains currently in effect.

Although it may have been neither the intention of MEDC nor DOC, there are two provisions in the 2013 MOU that would seem to allow DOC to terminate the lease far in advance of the end of the original 25-year lease term (January 2029), established by the 2004 lease agreement. While there is no language in the 2013 MOU about the term of the lease, Paragraph K in the MOU permits early termination in the event the Legislature does not appropriate sufficient funds for the DOC to carry out its obligations. The occurrence of circumstances in this provision that would allow for early termination of the lease seems improbable. However, Paragraph L allows the DOC to terminate the lease without any reason, so long as the DOC provides written

¹ Although the Letter of Understanding was signed by both representatives of the DOC and MEDC, no date was documented on the letter. However, a scanned envelope in the scan file accompanying and referencing the letter was postmarked November 13, 1995.

² DOC has not provided any record of the disposition of the 1997 lease agreement.

notice to the MEDC 30 days prior to DOC's desired date of termination. While, the 30-day provision is standard in state contracts for goods and services, including such a provision in a lease of such a substantial asset of real property is questionable.

Since leasing the Penitentiary, MEDC has developed and implemented various revenue producing activities and events at the facility. MEDC primarily promotes the Penitentiary as a destination for tourists via its website³. The website provides a brief history of the Penitentiary and lists on-going activities and scheduled special events. According to the MEDC Director, over the last 22 years the Penitentiary has welcomed nearly one million visitors. Some of the revenue generating activities the MEDC operates include charging admission to the public for tours of the facility, renting access to certain areas of the prison to private groups and paranormal investigators for "ghost hunting" ventures, and selling mementoes to visitors at MEDC's gift shop. MEDC has also developed other activities that it charges admission such as a "Dungeon of Horrors" haunted house and an "Escape Room" game. On several occasions MEDC has rented access to the prison grounds to entertainment studios for films and television shows when a prison setting is desired.

Businesses and citizens in the local Moundsville community, including the Marshall County Board of Education, often rent rooms in the Alan B. Mollohan Center⁴ for meetings, conferences, fundraisers, wedding receptions, or business expos. The Alan B. Mollohan Center is a newer building located within the Penitentiary property in the north courtyard. These activities are intended to bring business into the area and improve the economy of the region. All revenues collected from these activities are received by the MEDC and used to fund its operations. None of the revenues are remitted to the DOC or the State.

³ www.wvpentours.com

⁴ The Alan B. Mollohan Center was constructed in 1975 and is variously known as the ABM Building, the Industries Building, and the Moundsville Center. Currently, the Center houses the MEDC business offices, as well as offices for the DOC, as various rooms/areas of the building are apportioned between MEDC and DOC. Meetings for the MEDC, DOC, and outside groups are generally held in this building.

Issue 1: Based on the terms of the lease agreements, from February 1997 to July 2013 the DOC erroneously paid for an indeterminable portion of electric utility costs that were the MEDC’s responsibility. From July 2013 to April of 2018, the DOC erroneously paid approximately \$204,000 of electric utility costs, which were the responsibility of the MEDC.

In Secretary Sandy’s September 2017 memo, the concern was raised that the MEDC had not been paying for the electricity it was responsible for, and instead the DOC had erroneously paid for electric utility costs. The Legislative Auditor reviewed the terms of the lease agreements between the DOC and MEDC, as well as the available documentation for electric payments made by DOC from April 2006 to April 2018, to determine whether Secretary Sandy’s concerns were accurate. However, the various lease agreements are at times ambiguous on the matter. For example, the terms of the February 1997 lease agreement and the January 2004 lease agreement, state that lessee(s) ⁵:

*...shall be responsible for all utilities... by its **use and occupancy** of the demised premises.... (Emphasis Added)*

Yet, these lease agreements do not provide for a mechanism or procedure that would allow the MEDC or the DOC to accurately determine what portion of the electric utility costs are applicable to the respective entity. This is due in part to the fact that there are two electric meters for the Penitentiary; yet, particular locations at the facility that are attributable to each meter are unable to be determined. A further complicating factor is that for the period of January 2004 through July 2013, a cotenant, in addition to MEDC, was party to the lease and was responsible for the utilities incurred by “...its use and occupancy of the demised premises....” The MEDC, a cotenant, and the DOC utilized locations at the facility that can potentially be attributed to both electric meters, and for this reason, the portion of the electric utilities specifically attributable to the MEDC, the cotenant, or the DOC cannot be accurately determined. Therefore, **the portion of electric costs paid by the DOC from February 1997 to January 2004 that were the responsibility of the MEDC cannot be determined. For a nine-year period, from January 2004 to July of 2013, the improper payment of electric utilities by DOC that should have been the responsibility of the MEDC and a cotenant are indeterminable.**

The July 2013 MOU between the MEDC and DOC provided clarification for the responsibility of the utility payments. This MOU clearly specifies that the electric utility costs are the sole responsibility of the MEDC. Section D-1-c of the MOU states in part:

MEDC will pay for electric service to the [Alan B. Mollohan] center. (Emphasis Added)

⁵ Beginning January 2004, National Corrections and Law Enforcement Training and Technology Center became a third-party cotenant in the lease of the penitentiary. Although the Legislative Auditor was unable to verify the date, the Center was subsequently succeeded as cotenant by the West Virginia High Technology Consortium Foundation sometime prior to July 23, 2013, the effective date of the Memorandum of Understanding made between DOC and MEDC, at which time MEDC became the sole lessee.

Further, section Q of the MOU states in part:

Payment of all utilities not specified above shall be the responsibility of MEDC which shall include all utilities for the Penitentiary building... (Emphasis Added)

The MEDC's responsibility for payment of the electric utility was not exempted elsewhere in the MOU. Based on the Legislative Auditor's review of the electric utility payments made by the DOC from July 2013 to April of 2018, the DOC erroneously paid approximately \$204,000 for electric service for the Penitentiary that was the responsibility of the MEDC. As of April 2018, the MEDC assumed paying the entirety of electric utility costs after DMAPS representatives brought the matter of DOC's improper payments to MEDC's attention.

Recommendations:

- 1.1 The Legislative Auditor recommends the Division of Corrections comply with the 2013 Memorandum of Understanding and only pay for utilities for which it is legally and justly responsible. The Legislative Auditor further recommends the Division of Corrections ensure employees responsible for the payment of invoices are made aware of any agreements that may impact the Division of Corrections' responsibility for payment of utilities and services for which another entity is contractually or otherwise obligated.
- 1.2 The Legislative Auditor recommends the Division of Corrections attempt to collect \$204,159.24 from the Moundsville Economic Development Council for the electric services that the Division of Corrections erroneously paid for which the Moundsville Economic Development Council was contractually liable.
- 1.3 The Legislative Auditor recommends the Department of Military Affairs and Public Safety and the Division of Corrections ensure that all terms and conditions incorporated in lease documents be enforceable and verifiable, and that such terms clearly define the responsibilities of both parties regarding any costs of operations of such leased property.

Issue 2: Poorly drafted language concerning insurance requirements in the 2004 lease agreement and the 2013 MOU potentially opens the State to increased liability.

Legislative Services' attorneys reviewed historical lease agreements between the MEDC and DOC, as well as the two legal documents that currently govern the terms and conditions of DOC's lease of the Penitentiary to MEDC. These documents are:

- a) A January 29, 2004 *Lease Agreement*; and
- b) A July 23, 2013 *Memorandum of Understanding*.

After its review, Legislative Services issued a legal opinion regarding both the January 2004 lease and the July 2013 MOU. (Appendix F) The opinion notes that the 2004 lease appears to have suffered from bad editing, and the language concerning the insurance requirements appears to have departed from the 1997 lease. Regarding the 2013 MOU, Legislative Services states it is unclear why the 2013 document was titled a "Memorandum of Understanding" when it would have been more appropriate to call it an amended lease and to structure it as such. The MOU appears to have been a shortcut to modify some terms of the 2004 lease without drafting a fully amended lease.

The sections of these agreements that Legislative Services found to have issues were the language concerning the hold harmless and indemnification provisions, and the MEDC's requirement to obtain insurance coverage to protect the State from undue liability. The MEDC has been issued insurance through the State Board of Risk and Insurance Management (BRIM) since the inception of its lease agreement with the DOC. BRIM insures the MEDC as it is a nonprofit and qualifies for coverage under W.Va. Code §29-12-5(b)(1)(B). The language of the 1997 lease agreement describing MEDC's requirements for insurance coverage was amended and replaced by the terms of the 2004 lease agreement, which were then removed by the 2013 MOU. **As a result, the language of the lease agreement potentially increases the State's liability for claims due to an accident during a MEDC sponsored event.**

The requirements for insurance as written in the 2004 lease agreement appear flawed, making them potentially unenforceable.

According to the opinion of Legislative Services the 2004 lease agreement appears to contain flaws in the language of the agreement itself. Several key words are absent from the paragraph concerning insurance. For instance, one sentence begins:

Such policies shall name both the Lessor and, during the term of this Lease through the State Board of Risk, fire and extended coverage insurance in an amount adequate to cover the cost...

Words appear to be missing after the first "and" in this sentence. Based upon a similar provision in the February 1997 lease between the DOC and the MEDC, it appears that the missing words should have been "and Lessee as the named insured." This would make the full sentence read as, "Such policies shall name both the Lessor and the Lessee as named insured." Then a new

sentence should have started with a description of a separate policy for fire and other hazards. The missing wording would have made it clear that the MEDC was obligated to obtain insurance to protect the DOC. As a result of this omission in the insurance paragraph, the intention of the parties was not clearly stated and, at the very least, this could have resulted in unnecessary litigation if the DOC had need to enforce the insurance requirement. In the worst-case scenario, the insurance provision may have been completely unenforceable.

The language in the 2013 MOU potentially voided those requirements for insurance.

In the 2013 MOU, there is no language that specifically mentions the requirements for the MEDC to have insurance. Presumably, the original requirements from the 2004 lease carry forward into this agreement; however, it is the opinion of Legislative Services that the language in Paragraph J of the 2013 MOU strongly implies that insurance policies are no longer required. This paragraph reads:

J. All parties shall be responsible for their own liability arising from any claim regarding injury to person, property, or otherwise. Neither part [sic] agrees to defend, indemnify, or hold the other harmless.

With this language, the 2013 MOU indicates that the DOC will expect the MEDC to cover its own liabilities without any assurance that the MEDC will have the financial resources to do so, or that the DOC will have any other recourse. This language merely declares that each party will “be responsible” for its own liability, without any express mechanism, such as an insurance policy, to make this happen. It is unclear to Legislative Services if this was either parties’ intention. However, without having this clearly defined it appears this language gives up some protections for the State and subjects it to risks without any corresponding benefit.

In reviewing the historical lease agreements and other legal documents pertaining to the lease of the Penitentiary to the MEDC, Legislative Services also noted that the current lease agreement has greatly modified the original intent of the lease. A review of two letters concerning the Penitentiary lease, both dated in 1996, strongly indicates that DOC’s intent at that time was to ensure MEDC would be entirely accountable for upkeep at the facility and would assume all responsibility in the event of a liability claim. In a March 11, 1996 letter to the Public Land Corporation, George Freeman⁶, who at the time was employed as an attorney with the Attorney General’s Office, requested the assistance of the Public Land Corporation⁷ in preparing a lease agreement with the MEDC. In his letter Mr. Freeman stated:

...MEDC submitted a proposed lease agreement to us which we found unacceptable because it placed most of the burden of maintaining the facility on the DOC, and because the term of the lease was for five years....

A draft of a letter dated October 2, 1996 from General Joseph Skaff, former Cabinet Secretary for the Department of Public Safety, to Phil Remke, former MEDC Executive Director

⁶ George Freeman was employed with Legislative Services from July 15, 1996 to May 30, 2014 as a full-time attorney.

⁷ The Public Land Corporation was initially established as a unit of the Division of Natural Resources. In 2007, the Corporation was continued as a unit of the Department of Administration’s Real Estate Division. In general, the functions of the Real Estate Division and its Public Land Corporation unit include providing support and guidance to state agencies regarding transaction of real property.

was also reviewed. The draft was unsigned by General Skaff and it remains unclear if this letter, or a similar letter, was ever sent to MEDC. However, this letter may exemplify the intent of the original lease agreement as it was drafted in response to MEDC's "...request for consideration of a twenty-five year lease of the old West Virginia Penitentiary property in Moundsville...." This draft letter states in part:

*...If and when this extended lease is developed, it will be similar in form and substance to the current signed understanding with the Division of Corrections. That is, the Economic Development group in Moundsville will accept responsibility and control of the property, to include any operating and maintenance expenses. **The Division of Corrections and the State of West Virginia will be held free of liability or financial obligation....** (Emphasis Added)*

Given the effect of the 2013 MOU which, in the opinion of Legislative Services, seems to entirely remove the requirements for insurance and greatly shifts liability back to the State, it appears that the current lease agreement is a complete departure from the original intent of the agreement. Based on documents reviewed, the original intent was to allow the MEDC to lease the Penitentiary and assume all financial responsibilities and liability; however, the current agreement seems to have departed from that intent entirely.

The IRS revocation of the MEDC's 501(c)(3) tax-exempt status leaves unanswered questions regarding the ability for BRIM to serve as an insurer.

A review of the insurance requirements in the lease agreements as well as MEDC's BRIM policy also brought to light another potential issue. The IRS appears to have revoked the MEDC's 501(c)(3) tax-exempt status for failure to file the required IRS *Form 990 – Return of Organization Exempt from Income Tax* for several years. This led to inquiries of the West Virginia Secretary of State and BRIM regarding the effect of such revocation, and the procedures and requirements for which an entity is granted nonprofit status in the State.⁸ Further, the nonprofit status of the MEDC is a qualifying factor for the issuance of a BRIM insurance policy, which may be granted to qualifying nonprofits per W.Va. Code §29-12-5(b)(1)(B). Once aware of the revocation, BRIM initially issued MEDC with a notice of cancellation of insurance effective 30 days from notification on October 9, 2018. According to BRIM,

...(h)istorically...it has been BRIM's interpretation of W.Va. Code Section 29-12-5(b)(1)(B) that in order for a non-profit organization to be eligible for coverage...it must produce evidence that it has been designated tax exempt by the IRS

However, after further analysis BRIM questioned whether a loss of tax-exempt status by the IRS would render MEDC ineligible for coverage since MEDC remains currently registered as a "domestic non-profit corporation" by the West Virginia Secretary of State. Consequently, BRIM extended MEDC's coverage for an additional 30 days to November 8, 2018 to allow BRIM to

⁸ Although often used interchangeably, "nonprofit" and "tax-exempt" are not synonymous. Many organizations are both nonprofit and tax-exempt, but there's an important distinction. Nonprofit is a State designation related to how the organization uses the money it generates. In West Virginia, the organization applies for and receives a nonprofit designation from the West Virginia Secretary of State. Tax-exempt status is conferred by the Internal Revenue Service that affects a group's federal tax liability.

undertake "...further research and legal analysis..." to arrive at a conclusion regarding MEDC's insurance eligibility.

On November 9, 2018, BRIM provided the Legislative Auditor a copy of an outside legal opinion regarding its ability to cover MEDC considering the loss of MEDC's IRS tax-exempt status. This opinion states that the terms "tax-exempt" and "non-profit" are given equal consideration in determining an entities eligibility for BRIM coverage and are not mutually exclusive. The loss of an entity's IRS 501(c)(3) status may not be grounds for exclusion; and it is ultimately within BRIM's authority to enact policies in its discretion as it deems necessary for the benefit of the program. Therefore, based on this opinion BRIM may continue to insure the MEDC. The Legislative Auditor does not dispute this opinion; however, the Legislative Auditor would suggest that the Legislature review the relevant statute to determine if any revisions are necessary to ensure the intent of the statute is clear.

Recommendation:

- 2.1 The Legislative Auditor recommends the Division of Corrections establish a new lease agreement with the Moundsville Economic Development Council that clearly and fully defines the terms and responsibilities of all parties. This agreement should be drafted by the Division of Corrections in conjunction with the Department of Military Affairs and Public Safety. The agreement should also be reviewed by attorneys of those offices and approved by both the Commissioner of the Division of Corrections and the Cabinet Secretary of the Department of Military Affairs and Public Safety.
- 2.2 The Legislative Auditor recommends the Legislature review applicable sections of W.Va. Code §29-12-5 regarding the State Board of Risk and Insurance Management insuring nonprofit entities to determine if the nonprofit is required to be an IRS 501(c)(3) designated entity or a federal tax-exempt entity; and to clarify the eligibility requirements to ensure the State is insuring only qualifying entities.

Issue 3: The Legislative Auditor has concerns with allowing a State agency to enter into a 25-year lease agreement without requiring a thorough, high-level review of the language, terms, and potential long-term effects of the agreement.

In February 1997, the Commissioner of the DOC entered into a 25-year lease agreement with the MEDC. Two years later in February 1999, the Legislature passed House Bill 2339, which amended W.Va. Code §25-1-6 and, in doing so, granted the Commissioner of the DOC the authority to lease the Penitentiary for a term of not more than 25 years. Hence, the amended statute granting the DOC Commissioner the authority to lease the Penitentiary for 25 years was passed a full two years after the initial 25-year lease began. On January 29, 2004, the DOC entered into a new 25-year lease agreement of the Penitentiary with MEDC and, in doing so, effectively extended the termination date of the original 1997 lease agreement from 2022 to 2029.

It was noted by the Legislative Auditor as well as Legislative Services, that the lease term of 25 years between DOC and the MEDC seemed unusually long. It was also noted by DMAPS Cabinet Secretary Sandy in his September 2017 memo that to his knowledge no other DMAPS Cabinet Secretary for the past decade was aware of this lease agreement. Given the flaws noted by Legislative Services in the language of those agreements, and the possibility that those flaws open the State to an unnecessarily increased liability, the Legislative Auditor questions why an agreement of this nature was not more thoroughly reviewed and why knowledge of the agreement was not known by DMAPS Cabinet Secretaries for the past decade.

While there is no law prohibiting such a long-term agreement, contracts of this type are not commonly authorized in State government. Legislative Services stated that during such a length of time physical, economic, and political circumstances may change; any of which could require the State to seek release from the long-term obligation to another party. Further, basic prudence dictates that an agency give careful consideration to likely circumstances that would justify the termination of the lease and to account for those circumstances in the lease conditions. These considerations do not appear to be given in the terms of the lease agreements between DOC and MEDC, and the obvious flaws that are contained in the language of these agreements is evidence that agreements of this type should be thoroughly reviewed, with consideration for such review to be made by the Cabinet Secretary to which the agency is under.

For leases exceeding one year in length for nominal consideration, the State should require lessees to submit specific criteria to the appropriate Cabinet Secretary that demonstrate the societal and community benefits the lessee(s) will provide through the leases, as well as any proposed enhancements the lessee(s) may make to the leased properties. In this way, high-level state officials will be afforded the opportunity to evaluate the benefits of the leases against the costs that may be incurred by the State in executing the leases. In doing so, State officials can be in a more informed position to determine whether it is practical and astute for the State to effectuate such an agreement.

Additionally, it is the opinion of the Legislative Auditor that leases of all State properties to non-State entities be reviewed and approved by the West Virginia Department of Administration's Real Estate Division. W.Va. Code §5A-10-3 states in part:

The Real Estate Division has the following powers and duties:

(1) To provide leasing, appraisal and other real estate services to state spending units...

Therefore, it would seem both logical and prudent to gain the advice and approval of the Real Estate Division when leasing State properties to further mitigate the risk of flawed leases and substandard lease agreements.

With the passage of House Bill 4338, the old statute, W.Va. Code §25-1-6, was replaced as part of the general reorganization of several divisions within DMAPS to form a consolidated *Division of Corrections and Rehabilitation*. The new statute, which became effective July 1, 2018, appears as W.Va. Code §15A-3-13 and the relevant portion now reads as follows:

...The commissioner is authorized, as lessor, to lease the West Virginia penitentiary in Moundsville, title to which is vested in the state by prior act of the Legislature, for a term of not more than five years: Provided, That this section does not affect any lease in effect as of the effective date of this section. Any agreement entered into under this section shall be with the consent and approval of the Secretary of the Department of Military Affairs and Public Safety, and shall include a provision within each agreement allowing for the immediate termination by the secretary or commissioner at any time.
(Emphasis Added)

The newly created statute significantly reduces the length of time the DOC Commissioner is authorized to lease the Penitentiary from 25 years to 5 years. The statute also requires such future leases have the consent and approval of the DMAPS Cabinet Secretary and permits either the Cabinet Secretary or DOC Commissioner to terminate the lease “at any time.” Even though the statute does not alter the current lease arrangement with the MEDC, it does address the Legislative Auditor’s concerns regarding the length of future lease arrangements and it conforms to the Legislative Auditor’s recommendations that such future lease arrangements receive the prior approval of the DMAPS Cabinet Secretary.

Recommendations:

- 3.1 The Legislative Auditor recommends that future lease agreements between the Division of Corrections and the Moundsville Economic Development Council be reviewed by individuals qualified to ensure the language and terms of the agreement are adequate in clearly defining the responsibilities of the lessee and lessor in all matters related to their respective uses of the former West Virginia Penitentiary, and that the agreement be reviewed and approved by the Cabinet Secretary of the Department of Military Affairs and Public Safety prior to entering into such an agreement.
- 3.2 The Legislative Auditor also recommends the Legislature consider drafting legislation requiring any leasing of State property by a State agency for a period exceeding 10 years be reviewed for content and form to ensure all duties and responsibilities are clearly defined in the terms of such agreements. Further, such agreements should be required to be reviewed and approved by a high-level official, such as the Cabinet Secretary, prior to execution to ensure the State’s interests are protected during the term of the agreement.

- 3.3 The Legislative Auditor recommends the Legislature consider drafting legislation to amend relevant statutes pertaining to the lease of State properties, whereby the agency head, in conjunction with the West Virginia Real Estate Commission, would have the final authority for approval of State property lease agreements.

- 3.4 The Legislative Auditor recommends the Legislature consider drafting legislation to amend W.Va. Code §5A-10 by requiring State entities to seek the advice and approval of the West Virginia Real Estate Commission when leasing State properties to non-government entities. The Legislature may consider exempting the Department of Transportation's Division of Highways from this requirement since the Division has a Right of Way Section specializing in transactions of real estate properties.

Objective, Scope and Methodology

The Post Audit Division within the Office of the Legislative Auditor conducted this review as authorized by W.Va. Code §4-2-5, as amended.

Objective

The objectives of this review were to examine the concerns expressed by the Cabinet Secretary of the Department of Military Affairs and Public Safety (DMAPS) regarding the Division of Corrections' (DOC) lease with the Moundsville Economic Development Council (MEDC) of the West Virginia Penitentiary, to determine if DOC and MEDC were in compliance with the terms of the lease, and to evaluate DOC's oversight of State-owned assets in the capacity of Lessor of the penitentiary.

Scope

The scope of this review consists of a review of various documentation related to the DOC lease of the West Virginia Penitentiary to MEDC, including lease agreements, memorandums, and other documents from 1995 to present. In addition, the scope consists of review of available operating and financial documentation of the MEDC including IRS Form-990s, repairs and remodeling details, utility payments, and Corporate Annual Reports.

The total Penitentiary electric bills paid by DOC since fiscal year 2006 were calculated based on payment reports obtained from the wvOasis Business Intelligence Module and, for the period prior to the implementation of wvOasis, the *Vista* State agency payment module accessed via the West Virginia State Auditor's *My Apps* internet webpage. The reports were converted to Microsoft Excel spreadsheets. Meter numbers were verified to ensure only those payments for the Penitentiary were included in our worksheet. Payment amounts were sorted and totaled in order to obtain total DOC electric payments both prior to and subsequent to the effective date of the 2013 *Memorandum of Understanding* made between DOC and MEDC.

Our review did **not** include assessments, judgements, or any recommendations, regarding whether it was in the best interest of the State for DOC to have leased the West Virginia Penitentiary. However, we have included recommendations in this report concerning the procedures of executing a lease that obligates State properties of such consequence and value as the penitentiary and grounds, especially—as it is in this case—when properties are leased for extended periods at below-market nominal rates.

Methodology

Post Audit staff gathered and analyzed several sources of information and assessed the sufficiency and appropriateness of the information used as evidence. Testimonial evidence was gathered through interviews with various agencies that oversee, collect, or maintain information. The purpose for testimonial evidence was to gain a better understanding or clarification of certain issues, to confirm the existence or non-existence of a condition, or to understand the respective

agency's position on an issue. Such testimonial evidence was confirmed by either written statements or the receipt of corroborating or physical evidence.

Audit staff analyzed various source documents that were either provided to us by DMAPS, MEDC, or were publicly available on the internet. Sources include:

1. The IRS
2. Guidestar.org – an informational website for nonprofit organizations.
3. The West Virginia Secretary of State
4. The West Virginia Board of Risk & Insurance Management
5. Wvpentours.com – an informational and promotional website for the MEDC

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.



State of West Virginia
OFFICE OF THE SECRETARY
DEPARTMENT OF MILITARY AFFAIRS AND PUBLIC SAFETY
Building I, Suite W-400
1900 Kanawha Blvd., East
Charleston, West Virginia 25305
Telephone: (304) 558-2930
Facsimile: (304) 558-6221

JIM JUSTICE
GOVERNOR

JEFF S. SANDY CFE, CAMS
CABINET SECRETARY

THOMAS L. KIRK
DEPUTY SECRETARY

Attorney Client Privilege

Date: Tuesday, September 26, 2017

To: Brian Abraham, General Counsel for the Governor
Thom Kirk, General Counsel for Military Affairs, and Public Safety

From: Jeff S. Sandy, Cabinet Secretary, CFE, CAMS *Jeff S. Sandy*

Re: Moundsville Economic Development Council

Purpose

This memorandum is intended to advise the Governor's office of the use of Division of Corrections budgeted funds to the benefit of a non-profit organization. The situation was uncovered in September 2017 during conversations concerning "Netflix" wanting to rent the Moundsville Penitentiary and paint the Moundsville Penitentiary for a film they were producing.

Facts

The Moundsville Prison closed in 1995. Starting in approximately 1997/1998 the Division of Corrections entered into a Memorandum of Understanding with the Moundsville Economic Development Council (MEDC). In quick summary, the penitentiary was used by the MEDC for Penitentiary Tours, Haunted House, and other revenue producing ventures.

<http://www.nonprofitfacts.com/WV/Moundsville-Economic-Development-Council-Inc.html>

<https://www.bizapedia.com/wv/moundsville-economic-development-council-inc.html>

<http://www.wvpentours.com/history.htm>

<https://gotowv.com/company/moundsville-economic-development-council/>

None of these funds generated were for the benefit of the Division of Corrections (DOC).

On January 29th, 2004, DOC Commissioner Jim Rubenstein entered into a 25-year Lease Agreement with the MEDC and the National Corrections and Law Enforcement Training and Technology Center for a sum of \$10.00. The National Corrections and Law Enforcement Training and Technology Center interest in the facility was to conduct an annual mock prison riot for training purposes.

On July 23rd, 2013, a new Memorandum of Understanding was entered into by Commissioner Rubenstein.

Current Situation

Since at least June 14th, 2016, the DOC has been requesting copies of the insurance policies, as required in the lease. Counsel Stacy Nowicki, and Assistant Commissioner Paul Simmons have both, on multiple occasions asked for these, and no one has ever provided these coverage documents to the DOC. The lease requires that MEDC procure and maintain the insurance for the term of the 25-year lease, through the State Board of Risk, a policy of general liability insurance with the limits of liability in an amount of one million dollars (\$1,000,000.00) for each occurrence for all coverage provided in the policy including bodily injury, personal injury, or death to any one person, and twenty-five million dollars (\$25,000,000.00) in the aggregate and for property damage.

Further, MEDC was to carry a policy fire or extended policy coverage in an amount to cover the cost of replacement of all fixtures, equipment, business and or personal property attached to the demised premises. There is no documentation of this policy.

DMAPS has been advised that there has been a great deal of vandalism that has occurred to the facility, and to state owned equipment during non-DOC events which are supposed to be supervised by MEDC staff. Fixtures have been removed from the premises, damage has been done to the property, and fiber optic cable has been cut by a film crew.

The DOC has asked repeatedly to be included on the release of liability that the MEDC has every person execute. Because of the state of disrepair in the building, DMAPS is greatly concerned that the State of West Virginia could be subject to substantial liability from accidents. This is especially dangerous since overnight events occur at the facility with no supervision

DMAPS has determined that DOC has paid **\$190,828.82** to AEP for electric service for the property since July 1st, 2013. Further, the DOC has been paying for the entire amount of natural gas consumed at the facility totaling **\$7,124.15**. Both the lease and the MOU are silent on the responsibility to pay for the natural gas, however electric is clearly the responsibility of MEDC.

Based on a 2010 IRS Form 990, Return of Organizations Exempt from Income Tax, MEDC had over ½ million in revenue. No other form 990 were available for review.

Page | 2

Prior to the 2017 Mock Prison Riot, the DOC granted a limited license to MEDC for the purpose of allowing the DOC logo to appear on T-shirts sold at the mock prison riot. The logo, however, was printed onto other, not permitted, items such as drink cozies and hats. This was done so without DOC permission, and in violation of the limited use license agreement executed.

Additional Information

Former DOC Commissioner Rubenstein and the President and CEO of PsiMed, Terrence Rusin formed "Corrections Training Foundation" a Nonprofit Corporation with a principal office in Moundsville, West Virginia in 2012.

<http://www.nonprofitfacts.com/WV/West-Virginia-Corrections-Training-Foundation.html>

<http://www.westvirginiacorps.com/corp/343361.html>

<https://www.bizapedia.com/people/west-virginia/moundsville/james-rubenstein.html>

The purpose of the nonprofit was to assist on the funding of the "Mock Prison Riot" at the Moundsville Penitentiary. According to PsiMed's website:

<https://www.psimedinc.com/>

"Terrence Rusin, President and CEO, first joined PSIMED as a marketing and sales director in 1991. He became the Chief Operating Officer and a partner in 1993, the controlling partner in 2000 and became the sole owner in January, 2006. Mr. Rusin was instrumental in developing OASIS, the rehabilitation Division of PSIMED as well as securing the mental health services contract for the WV Division of Corrections Mount Olive Correctional Complex. PSIMED was able to expand this contract to include statewide mental health services. In addition to this contract, in 2007, Mr. Rusin was successful in obtaining mental health contracts to service the West Virginia Division of Juvenile Services and the West Virginia Regional Jail Authority."

Conclusion

As Cabinet Secretary, I am concerned that prior DOC leadership has placed the current administration in a position that could be costly to the state of West Virginia.

- I have been advised that large pieces of stone have fallen from the structure that was built between 1867 to 1876 that would have resulted in death or serious injury. It appears that no insurance has been obtained for the facility.

- I have been advised that during overnight tours the public is left unattended to visit parts of the facility that are closed to even DOC personnel.
- Since at least July of 2013, MEDC has failed to pay electric bills over \$190,000.00. The electric has been paid by DOC during this time period. I have asked for records going back to at least 2004.
- Misuse and vandalism has occurred at the facility
- At this time is has not been fully documented, but it appears that DOC provided labor, building materials, and other items of value to a nonprofit organization.
- There could be valid concerns that a former Commissioner of Corrections may have inappropriately been a Director of a nonprofit while employed as a state of West Virginia employee.
- DOC employees have expressed concern that bringing this matter to the attention of the Cabinet Secretary or others would cause political harm by Marshall County Delegates and Senators to DOC funding.
- Finally, the DMAPS Cabinet Secretaries for at least the past decade had no knowledge of the agreements that DOC had with the MEDC.

If you have any questions, do not hesitate to contact me. I recommend that we turn this matter over to Post Legislative Audit.

Sealed - Copy

Letter of Understanding
Between
West Virginia Division of Public Safety
Division of Corrections
and the
Moundsville Economic Development Council

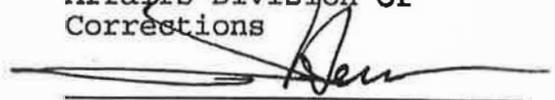
The Moundsville Economic Development Council hereby agrees to assume all liability for any injuries, damages, or losses of any kind or nature, resulting or arising from tours of the former West Virginia Penitentiary at 818 Jefferson Avenue, Moundsville, West Virginia, undertaken by the Moundsville Economic Development Council.

The Moundsville Economic Development Council further agrees to assume all costs of keeping the penitentiary open for such tours, such costs to include, but not limited to, utilities, trash disposal/grounds cleanup, and other damages or costs which may be incurred or result from such tours.

The Moundsville Economic Development Council further agrees to provide a minimum of two (2) tour guides for each tour group of fifty persons, such tour guides to be former employees at the West Virginia or current employees at the Northern Regional Jail and Correctional Facility who were employed at the West Virginia Penitentiary, to ensure an appropriate number of tour guides familiar with the physical layout of the West Virginia Penitentiary.

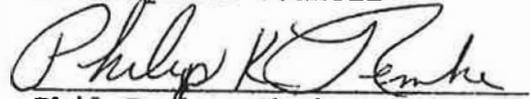
This agreement shall remain in effect until terminated, in writing, by one of the parties thereto.

Department of Military
Affairs Division of
Corrections



Nicholas J. Hun, Commissioner

Moundsville Economic
Development Council


Phil Renke, Chairman

Signing this contract, with the understand that
this will be amended in the near future.

STATE OF WEST VIRGINIA
DEPARTMENT OF MILITARY AFFAIRS & PUBLIC SAFETY
DIVISION OF CORRECTIONS
NICHOLAS J. HUN, COMMISSIONER

CECIL H. UNDERWOOD
GOVERNOR

OTIS G. COX, JR.
SECRETARY

OFFICE OF THE COMMISSIONER
112 CALIFORNIA AVE
STATE CAPITOL COMPLEX, BLDG 4, ROOM 300
CHARLESTON, WV 25305-0280
(304) 558-2036 Telephone
(304) 558-5934 Fax

March 19, 1997

Mr. Phillip K. Remke, Chairman
Moundsville Economic Development Council
P.O. Box F
800 6th Street
Moundsville, West Virginia 26041

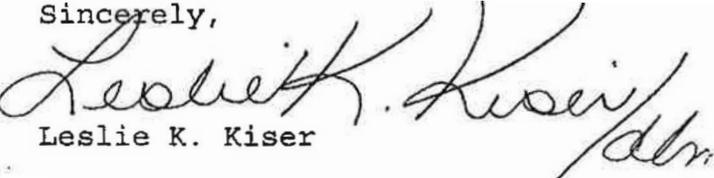
Re: Former West Virginia
Penitentiary Lease
Agreement Economic Development

Dear Mr. Remke:

Enclosed herewith please find one of the original properly signed and executed Lease Agreement on the above mentioned property.

If you have any questions, please do not hesitate to contact my office.

Sincerely,


Leslie K. Kiser

LKK:dln
enc. (1) original Lease

LEASE AGREEMENT

THIS AGREEMENT OF LEASE, made as of the 5th day of February , 1997, by and between the STATE OF WEST VIRGINIA, DEPARTMENT OF PUBLIC SAFETY, DIVISION OF CORRECTIONS, (hereinafter referred to as Lessor) and the MOUNDSVILLE ECONOMIC DEVELOPMENT COUNCIL, INC., (hereinafter referred to as Lessee);

W I T N E S S E T H:

WHEREAS, the Lessor is the owner of that certain real estate located at 818 Jefferson Avenue, Moundsville, West Virginia, formerly operated by the Lessor, and known as the West Virginia Penitentiary; and

WHEREAS, the Lessee desires to occupy the old main prison complex for use in the advancement of tourism, promotion of the general economy of Marshall county and to conduct the general business affairs of the Council; and

WHEREAS, the Lessor is willing to grant the Lessee permission to occupy and utilize the old main penitentiary complex; however, there is excepted from this Lease those four back buildings and the Warden's home along with the land generally associated with them as is more specifically set out on the attached map of the leased premises marked as Exhibit A with the area of this lease highlighted in pink thereon.

NOW, THEREFORE, and in consideration of the sum of TEN DOLLARS (\$10.00), cash in hand paid, the receipt and sufficiency of which is hereby acknowledged, the State of West Virginia, Department of Public Safety, Division of Corrections, does hereby extend unto the Moundsville Economic Development Council, Inc. permission to occupy and the old main penitentiary property hereafter referred to as the demised premises; located at 818 Jefferson Avenue, Moundsville, West Virginia, as hereinbefore described and as shown and as located on the aforesaid map attached hereto and made a part hereof.

The Lessee hereby accepts possession of the demised premises as is and as they exist at this time of occupancy by Lessee.

The Lessee at its sole expense will operate and maintain the premises hereby leased.

The TERM of this Lease shall be for a period of TWENTY-FIVE(25) YEARS, beginning on February 5, , 1997, at the end of said term this Lease may be renewed for subsequent twenty-five-year terms by the joint written agreement of both parties hereto.

The rent for this lease shall be ONE DOLLAR (\$1.00) for the term herein due and payable on the date of execution of this Agreement by the Lessee.

The parties hereto do hereby further agree as follows:

1) That Lessee shall save harmless and indemnify the Lessor for any and all liability for personal injuries, property damage, or for loss of life or property resulting from, or in any way connected with, the occupancy, maintenance, operation, or condition of the facilities under this permission, or any means of ingress thereto or egress therefrom, except liability for personal injuries, property damage or loss of life or property caused solely by the negligence of the Lessor or any agency, agent, servant, or employee of the Lessor.

2) That Lessee shall not assert any claim against the Lessor or any agency, agent, servant or employee of the Lessor for any damage sustained by said premises occasioned by any act or omission of the Lessor or any agency, agent, servant or employee of the Lessor unless damage was occasioned by the negligence of the Lessor or any agency, agent, servant or employee of the Lessor.

3) The Lessee shall be solely responsible for any and all costs of alterations, renovations, and/or remodeling of the premises hereby

leased; however, there will be no alteration, renovation, or remodeling of the exterior of the main prison structure without the prior express written consent of the Lessor, which will not be unreasonably withheld.

4) The Lessee shall, at its sole expense, maintain the demised premises in a good, decent, safe, and sanitary condition and state of repair which shall include providing containers for trash storage and pick up and to keep the premises free and clear of litter, to mow and trim all grassed areas, and to maintain any trees or shrubs located thereon. It shall be the Lessee's sole responsibility to take all necessary actions to assure such a standard of maintenance and repair. Lessor agrees to allow the Lessee to employ the services of inmates of the Northern Correctional Facility for general labor at the set rate of 38 cents per hour to perform any of the above required maintenance and/or repairs, such employment is conditioned upon the availability of suitable inmates as to be determined by the warden of the Northern Correctional Facility.

5) The Lessee shall purchase and install all fixtures, equipment, and related business and/or personal property necessary to conduct its business, and the same shall not become part of the building and Lessee shall retain full ownership of same. Lessee may at the end of this Lease remove from the demised premises any fixture, equipment, business and/or personal property as long as same can be removed without destruction to the demised premises. If the same cannot be removed without destruction of the demised premises, it shall remain with said premises and become possessed by the Lessor. If Lessee abandons or is evicted from the premises by any law or action, title to any fixtures, equipment, business or personal property belonging to the Lessee and left on the premises ninety (90) days after such abandonment or eviction shall be deemed to have been transferred to the Lessor. Lessor shall have the right to remove and dispose of such property without any liability therefore to the Lessee or any person claiming under the Lessee.

6) During the term of this Lease or any subsequent renewals or carryovers thereof, the Lessee shall be responsible for all utilities and municipal fees incurred by its use and occupancy of the demised premises, except that the Lessor shall provide and pay for electric service necessary for the use and occupancy of the three back buildings and the warden's house, which are not a part of the premises hereby covered by this Lease and the electric service necessary for the purpose of maintaining the security lighting of same and the exterior lighting of the leased premises. Lessor will at its sole expense install separate meters for same.

7) Lessee shall have the right to erect and maintain any signs necessary to conduct its business on the premises covered by this Lease, provided that all laws, ordinances, rules, and/or regulations of all duly constituted authorities are conformed with.

8) Lessee agrees to procure and maintain for the term of this Lease, through the State Board of Risk insurance under a policy of general liability insurance, with limits of liability in an amount of one mill dollars (\$1,000,000) for each occurrence for all coverage provided in the policy including bodily injury, personal injury, or death to any one person, twenty-five million dollars (\$25,000,000) in the aggregate, and for property damage. Such policies shall name both the Lessor and Lessee as the insured. Lessee further agrees to procure and maintain during the term of this Lease through the State Board of Risk fire and extended coverage insurance in an amount adequate to cover the cost of replacement of all fixtures, equipment, business and/or personal property attached to demised premises by Lessee during the term of this Lease and Lessee's chattels in or on the leased premises in the event of damage due to fire, extended coverage hazards, vandalism, malicious mischief, and special extended coverage hazards. Within thirty (30) days after date hereof, the Lessee shall deliver to the Lessor, documents certifying that the above-described insurance is in full force and effect. All like renewal certificates shall also be delivered to Lessor. Should the demised premises be partially or completely destroyed by fire or other casualty during the term of this Lease to the extent that Lessor is unable to repair said damage or the property cannot be restored within ninety (90) days, this Lease shall terminate

as the date when such damage or destruction occurred. Should the destruction or damage to the demised premises be of such character that the property can reasonably be restored by the Lessor within ninety (90) days, the Lessor may continue the Lease and Lessor shall promptly proceed to make such repairs as are necessary to make the property again usable for the business of Lessee, or the Lessor may terminate the Lease at Lessor's sole discretion. Neither party shall be liable to the other, or to any insurer of the other, by way of subrogation or other arrangement, or to any party claiming by or through the other, for loss or damage to the demised premises or the property of either therein, arising from hazards which would have been insured against by a policy insuring against the hazards of fire and extended coverage, or from causes for which such party is reimbursable by other insurance of any kind.

9) Lessee may not transfer or assign this Lease without the prior express written consent of the Lessor, which will not be unreasonably withheld. Lessee may sublease all or part of the demised premises without prior written consent of the Lessor provided that the sole purpose of the granted sublease is a use in accordance and in compliance with this Lease.

10) Lessee agrees to yield and peaceably deliver possession of the property to Lessor on the date of the expiration of this Lease in as good a condition and state of repair as that at the time of entering into this Agreement, with all normally expected aging and depreciation wear and tear expected. Lessor shall have the right to reenter and take possession of the demised premises on the date of the expiration of this Lease unless this Lease is renewed subsequent to the expiration date.

11) Lessor from time to time shall have the right to enter upon and inspect the entire property for complete compliance of the terms and conditions of this Agreement by the Lessee.

12) The terms, covenants and conditions contained herein shall apply to and bind the parties and the successors and assigns of all the parties hereto, all of whom shall be jointly and severally liable hereunder. The failure of Lessor to insist upon strict performance of any of the terms, covenants or conditions of this Agreement shall not be deemed as a waiver of the right to require strict performance of all the terms, covenants and conditions of the Agreement thereof, nor a waiver of any remedy for the subsequent breach or default of any term, covenant, or condition of the Agreement.

13) If any term, covenant, condition or provision of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the provisions hereof shall remain in full force and effect and shall in no way be affected, impaired or invalidated thereby.

14) Any notice to be given to Lessor under this Lease shall be deemed given if mailed to Lessor at West Virginia Division of Corrections, 112 California Avenue, Building 4, Room 300, Charleston, West Virginia 25305. Any notice to be given to Lessee shall be deemed given if mailed to Lessee at 818 Jefferson Avenue, Moundsville, West Virginia 26041. Either party may, by notice given as provided herein, change the address or persons to whom notice may be given.

15) This Agreement sets forth all of the agreements and understandings of the parties and any modification must be written and properly executed by both parties.

16) In the event Lessee shall continue in possession of the property after the term of this Agreement, such possession shall not be considered a renewal of the Agreement, but a tenancy from month to month and shall be governed by the conditions and covenants contained in this Agreement until such time as a renewal of the original Agreement is signed.

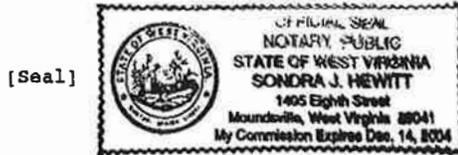
17) The parties agree that the relationship established under this Lease Agreement is one of landlord and tenant, and by virtue of this Agreement, neither party is an employee or agent of the other, nor are the parties engaged in a partnership or joint venture.

STATE OF WEST VIRGINIA
COUNTY OF MARSHALL, To-wit:

I, SONDRA J HEWITT, a Notary Public in and for said County and State, do hereby certify that PHIL REMKE, the DIRECTOR of the Moundsville Economic Development Council inc., a West Virginia corporation, who signed the writing hereto annexed bearing date the 5th day of FEBRUARY, 1997, has this day in my said County and State, before me, acknowledged the said writing to be the act and deed of said Corporation.

Given under my hand this 5th day of FEBRUARY, 1997

My commission expires December 14, 2004.



Sondra J. Hewitt
Notary Public

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, To-wit:

I, Diane L. Moore, a Notary Public in and for said County and State, do hereby certify that Nicholas J. Hun, Commissioner of the Department of Public safety, Division of Corrections, who signed the foregoing and hereto annexed writing bearing date the 5th day of February, 1997, for the State of West Virginia, Division of Corrections, has this day acknowledged before me in my County the same to be the act and deed of said Department.

Given under my hand this 5th day of February, 1997

My commission expires October 10, 2000.



Diane L. Moore
Notary Public

Prepared by:

James H. Jones, Administrator
Office of Real Estate Management
Division of Natural Resources
WV Bureau of Commerce
Charleston, West Virginia 25305-0661

18) The various headings and numbers herein, the grouping of provisions of this Agreement into separate clauses and paragraphs, and the organization hereof are for the purpose of convenience only and shall not be considered otherwise.

19) Lessee agrees not to discriminate against any person or class of persons by reason of sex, race, color, creed or national origin and hereby agrees to comply with Title VI of the Civil Rights Act of 1964 (P.L. 88-352) and the regulations of the State of West Virginia to the end that no person in the State or in the United States shall be denied benefits of or be otherwise subject to discrimination under any program or activity for which Lessee receives any financial assistance or other consideration of value either directly or indirectly from the State or Federal Government and hereby gives assurance that it will immediately take any measures necessary to effectuate this Agreement.

IN WITNESS WHEREOF, the State of West Virginia, Department of Public Safety, Division of Corrections, by the Commissioner of the Division of Corrections, and Moundsville Economic Development Council, Inc., a West Virginia Corporation, have hereunto caused their respective names to be signed and their seals to be affixed hereto, all by proper officer thereunto duly authorized, as of the day and year first hereinabove written.

STATE OF WEST VIRGINIA
DEPARTMENT OF PUBLIC SAFETY
DIVISION OF CORRECTIONS

ATTEST:

[SEAL]

By 
Its Commissioner

MOUNDSVILLE ECONOMIC DEVELOPMENT
COUNCIL, INC.

ATTEST:

[SEAL]

By 
Its Director



LEASE AGREEMENT

This AGREEMENT OF LEASE, made as of the 29th day of January, 2004, by and between the STATE OF WEST VIRGINIA, DEPARTMENT OF MILITARY AFFAIRS AND PUBLIC SAFETY, DIVISION OF CORRECTIONS (hereinafter referred to as the Lessor), the NATIONAL CORRECTIONS AND LAW ENFORCEMENT TRAINING AND TECHNOLOGY CENTER and the MOUNDVILLE ECONOMIC DEVELOPMENT COUNCIL, INC., (hereinafter referred to as the Lessees).

WITNESSETH:

WHEREAS, the Lessor is the owner of that certain real estate located at 818 Jefferson Avenue, Moundsville, West Virginia, formerly operated by the Lessor, and known as the West Virginia Penitentiary and includes a 2.4 acre tract of land that was to be conveyed to the Moundsville Senior Citizens, [Refer to the June 14, 1999 Property Description as outlined by Stegman & Schellhass, Inc. - Exhibit A (highlighted in red).]

WHEREAS, the Lessees desire to utilize space at the former prison as a National Training Center and occupy the old main prison complex and additional property for use in the advancement of tourism, promotion of the general economy of Marshall County, and to conduct business affairs of the Lessees;

WHEREAS, the Lessor is willing to grant the Lessees permission to occupy and utilize the old main prison complex, there is excepted from this Lease the former Boiler House and the Warden's Residence along with the land generally associated with them, as is more specifically set out on the attached map of the leased premises marked as Exhibit B with the area of this lease highlighted in blue thereon.

NOW, THEREFORE, and in consideration of the sum of TEN DOLLARS (\$10.00), cash in hand paid, the receipt and sufficiency of which is hereby acknowledged, the State of West Virginia, Department of Military Affairs and Public Safety, Division of Corrections, does hereby extend unto the National Corrections and Law Enforcement Training and Technology Center and the Moundsville Economic Development Council, Inc. permission to occupy the old main prison property and adjacent property as depicted in Exhibits A & B hereinafter referred to as the demised premises, located at 818 Jefferson Avenue, Moundsville, West Virginia; as herein before described and as shown and located on the aforesaid map attached hereto and made a part hereof.

The Lessees hereby accept possession of the demised premises as is and as they exist at this time of occupancy by the Lessees.

The Lessees at their sole expense will operate and maintain the premises hereby leased.

The TERM of this Lease shall be for a period of TWENTY-FIVE (25) YEARS, beginning on 29 January, 2004. At the end of said term, this Lease may be renewed for subsequent twenty-five (25) year terms by the joint written agreement of all parties hereto.

The rent for this Lease shall be ONE DOLLAR (\$1.00) for the term herein due and payable on the date of execution of this Agreement by the Lessees.

The parties hereto do hereby further agree as follows:

- ▶ That Lessees shall save harmless and indemnify the Lessor for any and all liability for personal injuries, property damage, or for loss of life or

property resulting from, or in any way connected with, the occupancy, maintenance, operation, or condition of the facilities under this permission, or any means of ingress thereto or egress therefor, except liability for personal injuries, property damage or loss of life or property caused solely by the negligence of the Lessor or any agency, agent, servant, or employee of the Lessor.

▶ That Lessees shall not assert any claim against the Lessor or any agency, agent, servant or employee of the Lessor for any damage sustained by said premises occasioned by any act or omission of the Lessor or any agency, agent, servant or employee of the Lessor unless damage was occasioned by the negligence of the Lessor or any agency, agent, servant, or employee of the Lessor.

▶ The Lessees shall be solely responsible for any and all costs of alterations, renovations, and/or remodeling of the premises hereby leased. The Lessees shall do no major modifications, alterations, or remodeling throughout the internal structure of the facility without the consent of both Lessees. There will be no alteration, renovation, or remodeling of the exterior of the main prison structure without the prior express written consent of the Lessor, which will not be unreasonably withheld.

▶ The Lessees shall, at their sole expense, maintain the demised premises in a good, decent, safe, sanitary condition and state of repair. The aforementioned shall include the following: providing containers for trash storage and pick up, keeping the premises free and clear of litter, mowing and trimming all grassed areas, and maintaining any trees or shrubs located thereon. It shall be the Lessees' sole responsibility to take all necessary actions to ensure such a standard of maintenance and repair. Lessor agrees to allow the Lessees to employ the services of inmates of the Northern Regional Jail and Correctional Facility for general labor at the set rate of one dollar fifty cents (\$1.50) per hour to perform any of the above required maintenance and/or repairs. Such employment is conditioned upon the availability of suitable inmates as determined by the Warden of the Northern Regional Jail and Correctional Facility.

▶ The Lessees shall purchase and install all fixtures, equipment, and related business and/or personal property necessary to conduct its business, and the same shall not become part of the building and Lessees shall retain full ownership of same. Lessees may at the end of this Lease remove from the demised premises any fixture, equipment, business and/or personal property as long as same can be removed without destruction to the demised premises. If the same cannot be removed without destruction of the demised premises, it shall remain with said premises and become possessed by the Lessor. If Lessees abandon or are evicted from the premises by any law or action, title to any fixtures, equipment, business or personal property belonging to the Lessees and left on the premises ninety (90) days after such abandonment or eviction shall be deemed to have been transferred to the Lessor. Lessor shall have the right to remove and dispose of such property without any liability therefore to the Lessees or any person claiming under the Lessees.

▶ During the term of this Lease, or any subsequent renewals or carryovers thereof, the Lessees shall be responsible for all utilities and municipal fees incurred by its use and occupancy of the demised premises. The Lessor shall provide and pay for electric service necessary for the use and occupancy of the Warden's Residence, which is not a part of the premises hereby covered by this Lease.

▶ The Lessees share access to any and all buildings on said property. Consideration must be given to both Lessees for use, sharing of space, special events, or development of any future events.

▶ Lessees shall have the right to erect and maintain any signs necessary to conduct its business on the premises covered by this Lease, provided that all laws, ordinances, rules, and/or regulations of all duly constituted authorities are conformed with.

▶ Lessees agree to procure and maintain for the term of this Lease, through the State Board of Risk Insurance, under a policy of general liability insurance, with limits of liability in an amount of one million dollars (\$1,000,000.00) for each occurrence for all coverage provided in the policy including bodily injury, personal injury, or death to any one person, twenty-five million dollars (\$25,000,000.00) in the aggregate, and for property damage. Such policies shall name both the Lessor and, during the term of this Lease through the State Board of Risk, fire and extended coverage insurance in an amount adequate to cover the cost of replacement of all fixtures, equipment, business and/or personal property, attached to the demised premises by the Lessees during the term of this Lease and Lessees' Chattels in or on the leased premises in case of damage due to fire, extended coverage hazards, vandalism, malicious mischief, and special extended coverage hazards. Within thirty (30) days after date hereof, the Lessees shall deliver to the Lessor, documents certifying that the above-described insurance is in full force and effect. All like renewal certificates shall also be delivered to Lessor. Should the demised premises be partially or completely destroyed by fire or other casualty during the term of this Lease, to the extent that Lessor is unable to repair said damage or the property cannot be restored within ninety (90) days, this Lease shall terminate as the date when such damage or destruction occurred. Should the destruction or damage to the demised premises be of such character that the property can reasonably be restored by the Lessor within ninety (90) days, the Lessor may continue the Lease and Lessor shall promptly proceed to make such repairs as are necessary to make the property again usable for the business of Lessees, or the Lessor may terminate the Lease at Lessor's sole discretion. Neither party shall be liable to the other, or to any insurer of the other, by way of subrogation or other arrangement, or to any party claiming by or through the other, for loss or damage to the demised premises or the property of either therein, arising from hazards which would have been insured against by a policy insuring against the hazards of fire and extended coverage, or from causes for which such party is reimbursable by other insurance of any kind.

▶ Lessees may not transfer or assign this Lease without prior discussion on details of who, where, or when, and must be in total agreement along with the express written consent of the Lessor, which will not be unreasonably withheld. Lessees may sublease all or part of the demised premises without prior written consent of the Lessor provided that the sole purpose of the granted sublease is a use in accordance and in compliance with this Lease.

▶ Lessees agree to yield and peaceably deliver possession of the property to Lessor on the date of the expiration of this Lease in as good a condition and state of repair as that at the time of entering into this Agreement, with all normally expected aging and depreciation wear and tear expected. Lessor shall have the right to reenter and take possession of the demised premises on the date of the expiration of this Lease unless this Lease is renewed subsequent to the expiration date.

▶ Lessor from time to time shall have the right to enter upon and inspect the entire property for complete compliance of the terms and conditions of this Agreement by the Lessees.

▶ The terms, covenants and conditions contained herein shall apply to and bind the parties and the successors and assigns of all the parties hereto, all of whom shall be jointly and severally liable hereunder. The failure of Lessor to insist upon strict performance of any of the terms, covenants, or conditions of this Agreement shall not be deemed as a waiver of the right to require strict performance of all the terms, covenants and conditions of the Agreement thereof, nor a waiver of any remedy for the subsequent breach or default of any term, covenant, or condition of the Agreement.

▶ If any term, covenant, condition or provision of this Agreement is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remainder of the provisions hereof shall remain in full force and effect and shall in no way be affected, impaired, or invalidated thereby.

▶ Any notice to be given to Lessor under this Lease shall be deemed given if mailed to the Lessor at the West Virginia Division of Corrections, 112 California Avenue, Building #4, Room 300, Charleston, West Virginia 25305. Any notice to be given to the Lessees shall be deemed given if mailed to the Lessees at 901 8th Street, Moundsville, West Virginia 26041 and 818 Jefferson Avenue, Moundsville, West Virginia 26041. Any of the aforementioned parties may, by notice given and provided herein, change the address or persons to whom notice may be given.

▶ This Agreement sets forth all of the agreements and understandings of the parties and any modification must be written and properly executed by both parties.

▶ In the event the Lessees shall continue in possession of the property after the term of this Agreement, such possession shall not be considered a renewal of the agreement, but a tenancy from month to month and shall be governed by the conditions and covenants contained in this Agreement until such time as a renewal of the original Agreement is signed.

▶ The parties agree that the relationship established under this Lease Agreement is one of property owner and tenants, and by virtue of this Agreement, neither party is an employee or agent of the other, nor are the parties engaged in a partnership or joint venture.

▶ The various headings and numbers herein, the grouping of provisions of this Agreement into separate clauses and paragraphs, and the organization hereof are for the purpose of convenience only and shall not be considered otherwise.

▶ The Lessees agree not to discriminate against any person or class of persons because of sex, race, color, creed, or national origin and hereby agree to comply with Title VI of the Civil Rights Act of 1964 (P.L. 88-352) and the regulations of the State of West Virginia, to the end that no person in the State or in the United States shall be denied benefits of or be otherwise subject to discrimination under any program or activity for which the Lessees receive any financial assistance or other consideration of value either directly or indirectly from the State or Federal Government and hereby gives assurance that it will immediately take any measures necessary to effectuate this Agreement.

IN WITNESS WHEREOF, The State of West Virginia, Department of Military Affairs and Public Safety, Division of Corrections, by the Commissioner of the Division of Corrections; the National Corrections and Law Enforcement Training and Technology Center and the Moundsville Economic Development Council, Inc., a West Virginia Corporation, have hereunto caused their respective names to be signed and their seals to be affixed hereto, all by proper officer thereunto duly authorized, as of the day and year first herein above written.

ATTEST:

[SEAL]

STATE OF WEST VIRGINIA
DEPARTMENT OF MILITARY AFFAIRS
AND PUBLIC SAFETY
DIVISION OF CORRECTIONS

By *J. Rubaste*
Its Commissioner

ATTEST:

[SEAL]

NATIONAL CORRECTIONS AND LAW
ENFORCEMENT TRAINING AND
TECHNOLOGY CENTER

By *Stoneman*
Its Executive Director

ATTEST:

[SEAL]

MOUNDSVILLE ECONOMIC
DEVELOPMENT COUNCIL, INC.

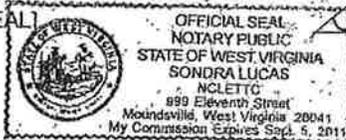
By *Andrew Small*
Its President

STATE OF WEST VIRGINIA
COUNTY OF MARSHALL, TO-WIT:

I, Sondra Lucas, a Notary Public in and for
said County and State, do hereby certify that Sidney Grisell, the
President of the Moundsville Economic Development Council, Inc., a West
Virginia Corporation, and Gordon Morrison, the Executive
Director of the National Corrections and Law Enforcement Training and
Technology Center, who signed the writing hereto annexed bearing date
the 29th day of January, 2004, has this day in my said
County and State, before me, acknowledged the said writing to be the act
and deed of said parties.

Given under my hand this 29 day of January, 2004.
My Commission expires Sept. 5, 2011

[SEAL]



Sondra Lucas
NOTARY PUBLIC

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, TO-WIT:

I, Quinn Coleman, a Notary Public in and for
said County and State, do hereby certify that Jim Rubenstern
Commissioner of the Department of Public Safety, Division of Corrections,
who signed the foregoing and hereto annexed writing bearing date the
10th day of February, 2004, for the State of West Virginia,
Division of Corrections, has this day acknowledged before me in my County
the same to be the act and deed of said Department.

Given under my hand this 10th day of February, 2004.
My Commission expires 10-10-10

[SEAL]



Quinn Coleman
NOTARY PUBLIC

Recd. 11/13

**MEMORANDUM OF UNDERSTANDING BETWEEN THE DOC AND THE MEDC
CONCERNING JOINT USE OF THE WEST VIRGINIA PENITENTIARY**

THIS MEMORANDUM OF UNDERSTANDING, made this 23rd day of July, 2013, by and between the WEST VIRGINIA DIVISION OF CORRECTIONS (hereinafter called "DOC") and the MOUNDSVILLE ECONOMIC DEVELOPMENT COUNCIL, a domestic non-profit corporation with a principal place of business located at 818 Jefferson Avenue, Moundsville, West Virginia 26041 (hereinafter called the "MEDC"):

WHEREAS, by Lease dated January 29, 2004, the MEDC along with the National Corrections and Law Enforcement Training and Technology Center entered into a lease for the property known as the West Virginia Penitentiary (hereinafter called "WVP"):

WHEREAS, the National Corrections and Law Enforcement Training and Technology Center was succeeded as a co-tenant with the MEDC by the West Virginia High Technology Consortium Foundation; and

WHEREAS, the West Virginia High Technology Consortium Foundation has assigned its interest in the lease and to its personal property to the DOC; and

WHEREAS, the DOC is the owner and Lessor of WVP; and

WHEREAS, the DOC and the MEDC each have certain activities and uses that are conducted on a year-round basis at the WVP; and

WHEREAS, among the various activities and uses the DOC has for the WVP include, but are not limited to, the annual MOCK PRISON RIOT (hereinafter called "MPR"), training center operations for corrections, law enforcement, military and other public safety personnel, and other activities and uses related to the DOC's operations; and

WHEREAS, among the various activities and uses the MEDC has for the WVP include, but are not limited to, group and individual (historic) tours, paranormal events, media related activities, community festivals, facility rentals and special events; and

WHEREAS, the MEDC and DOC find it in their common interest to establish the Memorandum of Understanding to memorialize their mutual and respective use, possession, and operation of the property known as the WVP;

NOW, THEREFORE, WITNESSETH: That for and in consideration of the mutual covenants, promises, and Agreements herein contained, the parties agree as follows:

I. TERMS: Both DOC and MEDC shall use and occupy WVP according to the terms of the January 29, 2004 lease unless otherwise modified by the terms set forth in this Agreement.

- A. The building on the North Yard of the WVP formerly and variously known as the Industries Building, the Alan B. Mollohan and/or ABM Building shall be referred to as the Moundsville Center (hereinafter "Center").
- B. The MPR is traditionally scheduled in late April or early May each year depending on several factors. DOC agrees to provide the date for the MPR to the MEDC at least 180 days prior to the event each year. MEDC agrees that it will not schedule any activities in the Center building one week prior to the MPR, the week of the MPR and agrees to obtain the approval of DOC for any event it seeks to schedule in the period one week following the MPR. DOC agrees not to unreasonably withhold approval for such event during the one week period following the MPR. Further, DOC shall have exclusive use of the WVP during the week of the MPR due to security and liability concerns and MEDC will not schedule or conduct any activities during MPR week at WVP. DOC reserves the legal right to remove persons from the property due to the inherent dangers involved in the final pre-event set-up and execution of the MPR, provided that the parties agree that MEDC will be permitted to operate the gift shop and museum so long as members of the public enter and exit the property through the main entrance on Jefferson Avenue and are not permitted in or upon any other locations on the property.
1. Further MEDC and DOC agree that their Executive Director and Designee respectively, shall, on or before the 15th day of each month, share scheduling information for the upcoming month regarding their ongoing activities throughout the year. Neither party will undertake any activity that disrupts the other's right to possession and use of the property without the advance approval of the other except as herein specified.
- C. In relation to the MPR, the MEDC agrees to provide supplies, support, and assistance for the MPR in certain areas as it is able to do so. Such areas may include, but are not limited to:
1. Providing portable toilets, disposable trash receptacles, and restroom supplies during MPR week.
 2. Providing maintenance personnel to clean training scenario areas after each scenario.
 3. Working with DOC Maintenance personnel concerning electrical and other issues relative to executing the MPR.
- D. The DOC and MEDC agree to the following terms related to the operation of the Center building:
1. Utilities in the Center shall be provided and paid for as follows:
 - a. DOC will provide connectivity hardware including servers, switches, and wireless access points to provide access to internet, VOIP telephone and WIFI access in the Center. DOC and MEDC will pay for specific networking

and telephone services they may opt to use. MEDC retains the right to continue telephone service with their current provider.

- b. DOC will provide for cellular telephone signal enhancement.
 - c. MEDC will pay for electric service to the Center.
 - d. DOC will pay for water and sewage service to the Center.
2. The MEDC shall have exclusive use of the following offices in the Center: Room 158, Room 164, Room 171, Room 172, Room 173, Room 174, and Room 175 (See Attachment A).
 3. The MEDC shall be permitted to expand and remodel Room 164 and DOC agrees to provide assistance of the Inmate Crew to facilitate this completion of this work.
 4. The MEDC agrees to make the Kitchen available to the DOC's food service vendor during the MPR and during training activities.
 5. The DOC shall have exclusive use of the following offices in the Center: Room 112, Room 113, Room 114, Room 115, Room 125, Room 126, Room 127, Room 135, Room 136, and Room 138. (See Attachment A).
 5. The DOC shall maintain operational control of the Server Room (Room 128) and will provide the MEDC access to the Server Room upon request.
 6. Classrooms:
 - a. The MEDC shall have the exclusive use of Room 158 (Classroom 1) and Room 148 (Classroom 2). T
 - b. The DOC shall have exclusive use of Room 104 (Classroom 5 - the former Simulator Room).
 - c. Rooms 101 (Classroom 3), 103 (Classroom 4) and 121 (Classroom 6 - the former technology showcase room) shall be shared spaces with scheduled coordinated between the DOC and MEDC. The DOC owns and shall retain ownership of all classroom furnishings and equipment contained in all of said classrooms and shall be responsible for replacement of same, as needed, as of the date of this Agreement.
 7. The DOC shall have the exclusive use of Room 112 (former MPR Supply room) and Room 131 (the former Arms Room).
 8. The MEDC shall have exclusive use of Rooms 117, 118 and 119 (Maintenance Office and Tool Rooms) and Room 162, provided that DOC shall have access to Room 162 to use the PA system as needed.

9. The MEDC shall have exclusive use of the maintenance bay and shelving contained therein and also the small storage rooms located on the south side of the bay provided that the DOC-owned forklift and golf cart may be parked there. The DOC shall have exclusive use of the locked storage room located on the north side of the bay.

- E. The MEDC agrees that it will obtain approval from the DOC prior to any future new construction, demolition or additions to the property. DOC and MEDC agree to work together towards construction of a second picnic shelter on the North Yard and a structure outside the South Wagon Gate for Special Event Registration.

- F. The DOC agrees to provide an Inmate Community Service Crew with a Correctional Officer to provide supervision. The Crew Supervisor will report to a DOC Manager specified by the DOC's Director of Security. The scope of work the inmates will be permitted to perform shall be limited and governed as follows:
 1. Inmates are permitted to perform the following duties under general supervision:
 - a. Cutting, raking, and removing grass and weeds. This includes using riding mowers and tractors for which the inmate is trained to operate.
 - b. Sweeping and mopping walkways and common areas.
 - c. Removing snow from walkways and common areas.
 - d. Manual labor that does not require a special license to perform and for which the inmate has been trained or can perform under supervision and on-the-job training such as painting, light carpentry, etc.
 - e. Assisting with the set-up of pipe, drape, tables, etc.
 - f. Operating a forklift for which the inmate is trained to operate.
 - g. Provide other assistance as authorized by the DOC for any MEDC special event including, but not limited to, the annual Elizabethtown Festival, Dungeon of Horrors, etc.

The DOC Manager and/or Crew Supervisor shall, to the extent reasonably practicable, consult and confer with MEDC personnel regarding any maintenance, light construction, and cleaning issues.

2. Inmates are prohibited from:
 - a. Operating any motor vehicle for any purpose.
 - b. Performing any labor requiring a special license such as, but not limited to, a Master Electrician's License.
 - c. Using a chain saw unless the inmate has completed a documented safety training program as approved by the DOC Safety Director.
 - d. Entering any DOC office unless under the direct supervision of DOC personnel.
 - e. Entering any MEDC office unless under the direct supervision of DOC personnel and MEDC has granted authorization to the DOC personnel.
 - f. Performing any work at WVP during MPR week.

- G. The building located to the north of the Center building formerly known as the WVP Old Men's Colony now houses the Marshall County Adult Education Building under an Agreement with the MEDC which the MEDC and the DOC agree to continue, provided that the requirements of Section I, subsection B regarding the closing of the property during the MPR final setup and execution shall be applicable.
- H. The DOC may construct a kennel structure for the housing of DOC Special Operations K-9 Unit dogs or dogs belonging to other corrections/law enforcement agencies training at the Center. DOC shall be permitted to install such fencing or other security measures related to the kennel as it deems appropriate. This kennel will be constructed behind the Center building in the northeast corner of the property.
- I. The parties agree that as between them, the DOC has sole ownership and control of all tangible and intangible personal property and assets previously owned by the West Virginia High Technology Consortium foundation, Inc. and its ancestor entities whether or not specifically enumerated herein including intellectual property. The DOC, at its sole discretion, may make certain of these assets available to the MEDC under specific conditions. Examples include, but are not limited to:
1. All rolling stock including motor vehicles, lawn tractors, forklift, and golf cart. The MEDC will contribute to the cost for maintenance of noted shared equipment. In no event shall parties cost exceed fifty percent (50%) of the total repair fees.
 2. The DOC owns and controls the Indoor Firing Range located on the North Yard.
 3. The DOC owns and controls the Shoot House located on the Second Floor of the north end of WVP above the old Commissary Warehouse.
 4. All classroom, office, and MPR furnishings, fixtures, supplies, and equipment.
 5. The Obstacle Course located on the South Yard.
 6. The "Confined Space Training Area" adjacent to the Area for Practical and Realistic Training (APARTment) on the Second Floor of the north end of WVP above the old Commissary Warehouse.
- J. All parties shall be responsible for their own liability arising from any claim regarding injury to person, property, or otherwise. Neither part agrees to defend, indemnify, or hold the other harmless.
- K. Pursuant to the West Virginia Constitution, the State cannot enter into any contract or Agreement which would obligate the Legislature beyond the current fiscal year. This Agreement shall be in effect through the end of the current fiscal year and shall be automatically renewed for one (1) year periods in each subsequent year unless cancelled by either party. Therefore, obligations to be performed under this Agreement are to be continued in succeeding fiscal years for the term of the

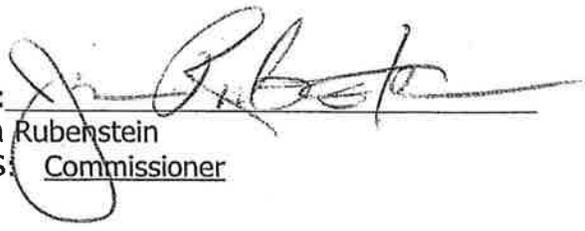
Agreement contingent upon funds being appropriated by the Legislature for the services which are the subject of this Agreement. In the event of non-appropriation of funds for said services, the payments, including any interest thereon, shall be canceled in whole without penalty to the State and the end of the then current fiscal year this Agreement shall become null and void after June 30th of such year. The DOC shall make reasonable efforts in each fiscal year to obtain the funds necessary to avoid cancellation of this Agreement and will provide written notice to the MEDC in the event of non-appropriation of not less than 30 days prior to the end of the fiscal year in which such non-appropriation of funds for the next fiscal year occurs.

- L. Each party hereto shall have the right to terminate this Agreement by giving the other party 30 days written notice of such termination.
- M. This agreement constitutes the entire written agreement between the parties hereto and it shall not be modified or altered without the written consent of both parties herein.
- N. Legal title to, or ownership of, all real and personal property including any improvements or fixtures regardless of the party making the improvement or fixture, except for such personal property belonging to the MEDC which is not an improvement or fixture to the real property, and which has been clearly marked by the MEDC, is vested in the DOC, subject to the lease interest vested in MEDC by virtue of the January 29, 2004 lease.
- O. Nothing in this Agreement shall be deemed to be a waiver of any right or immunity that DOC may have or be entitled to under the laws of the United States or the State of West Virginia.
- P. Any matter not specified in this instrument shall be governed according to the January 29, 2004 lease to the extent such terms are binding upon the state or otherwise according to the laws governing co-tenants of leased property in West Virginia.
- Q. Payment of all utilities not specified above shall be the responsibility of the MEDC which shall include all utilities for the Penitentiary building at 818 Jefferson Avenue, Moundsville, WV 26041.
- R. All disputes arising under this agreement shall be brought in the West Virginia Court of Claims.
- S. The DOC shall provide a representative to serve in an ex officio capacity, attending all MEDC Board Meetings in order to provide updates on plans, events, and activities that affect the day to day operations conducted by the MEDC.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, and have hereunto affixed their respective signatures the day and year set forth above. By signing below, each attests that I have the authority to bind their respective organizations to this Agreement.

**MEMORANDUM OF UNDERSTANDING BETWEEN THE DOC AND THE MEDC
CONCERNING JOINT USE OF THE WEST VIRGINIA PENITENTIARY**

WEST VIRGINIA DIVISION OF CORRECTIONS

BY: 
Jim Rubenstein
ITS: Commissioner

MOUNDSVILLE ECONOMIC DEVELOPMENT COUNCIL

BY: 
Sidney E. Grisell
ITS: President

LEGISLATIVE SERVICES

MEMORANDUM

TO: Stan Lynch
Nicholas Hamilton

FROM: Doren Burrell, Attorney

SUBJECT: Evaluation of Lease Documents for Moundsville Penitentiary Property.

DATE: October 24, 2018

At your request, I have reviewed several legal instruments relating to leasing of the property of the former West Virginia Penitentiary by the Division of Corrections (“DOC”) to the Moundsville Economic Development Council (“MEDC”). I find that these legal instruments contain errors, ambiguous language, and omissions of important provisions, which in my legal opinion, put the State at significant risk. It appears to me that, in the drafting and entry of these instruments, the Division of Corrections did not do enough to protect the State’s interests.

Documents Reviewed

For this analysis, I focused my review on the Lease Agreement (“2004 Lease”), dated January 29, 2004, between the DOC, the National Corrections and Law Enforcement Training and Technology Center, and the MEDC, and upon the Memorandum of Understanding (“2013 MOU”), dated July 23, 2013, between the DOC and the MEDC. For background information, I have also reviewed a Letter of Understanding, dated November 13, 1995, a Lease Agreement, dated February 5, 1997, between the DOC and the MEDC, as well as a draft Agreement of Lease from 1995, proposed between the State of West Virginia and the MEDC.

Leasing History

The principal instruments show that the DOC entered into a twenty-five-year lease of most of the property of the former West Virginia Penitentiary in Moundsville, West Virginia, to two co-tenants: the National Corrections and Law Enforcement Training and Technology Center, and the MEDC. At a later time, the West Virginia High Technology Consortium Foundation (“High Tech Consortium”) was substituted as a lessee for the National Corrections and Law Enforcement Training and Technology Center. Subsequently, the High Tech Consortium assigned its interest

in the lease back to the DOC. As there were now just two parties to the lease, the DOC and the MEDC entered into the 2013 MOU. This document outlined the history of the parties, specified the respective uses of the facilities by these two parties, and made modifications to the terms of the 2004 Lease.

Issues of Concern

Provisions for the duration and termination of the lease do not appear to be well thought out.

The first issue of concern lies in the term of the lease, 25 years. It is quite uncommon for the State or agencies of the State to enter into a legal commitment of this duration. During such a length of time, physical, economic, and political circumstances may change, any of which could require the State to seek release from the long-term obligation to another party. Although there is no specific legal bar to leasing the property for this duration, basic prudence dictates that an agency give careful consideration to likely circumstances that would justify the termination of the lease and to account for those circumstances in the lease conditions.¹

It is understandable that the MEDC would want a long-term lease. This organization seeks to utilize a significant, historical asset as the centerpiece of its tourism campaign and, therefore, desires the commitment and assurance that they will not lose this asset in the near future. The length of the 2004 Lease is a benefit to the MEDC, but a risk to the State. There is no clear reason why the DOC finally agreed to a term of twenty-five years.²

By contrast, the terms of the 2013 MOU go to an opposite extreme. Although there is no language in the 2013 MOU about the term of the lease, there are two new provisions that allow the DOC to end the lease far in advance of the end of the original term. Paragraph K in the 2013 MOU permits the early termination in the event that the Legislature does not appropriate sufficient funds for the DOC to carry out its obligations. Paragraph L allows the DOC to terminate the lease without any reason so long as the DOC provides written notice to the MEDC thirty days prior to

¹ The 2004 Lease also lacks any terms regarding occupancy of the property beyond the end of the lease term. Such terms, called "holdover provisions," describe the rights and responsibilities of the parties when the term ends and the lease is not formally renewed. Under common law, the tenant who is not ejected from the property could claim continued occupancy for an additional, equivalent term (i.e. 25 years). In modern practice, this typically becomes a month-to-month tenancy, but it is a standard of legal practice to include a holdover provision in every lease of commercial property.

² Prior records show that the DOC originally sought to make the term much shorter. In one document, a request was made to draft a five-year lease.

the DOC's desired date of termination. This thirty-day provision is standard in state contracts for goods and services, but in a lease of such a substantial asset of real property, it is questionable. With this thirty-day termination clause, the lease has now effectively become a month-to-month tenancy.

The 2013 MOU eliminates the hold harmless and indemnification provisions of the 2004 Lease, thereby increasing the risk to the State.

The very first of the listed terms in the 2004 Lease is what is known as a "hold harmless and indemnification clause:"

"Lessees shall save harmless and indemnify the Lessor for any and all liability for personal injuries, property damage, or for loss of life or property resulting from or in any way connected with, the occupancy, maintenance, operation, or condition under this permission, or any means of ingress thereto or egress therefor, except liability for personal injuries, property damage or loss of life or property caused solely by the negligence of the Lessor or any agency, agent, servant, or employee of the Lessor."

This is a standard provision in many contracts between two or more parties and is an essential provision in a lease agreement where one party will carry out its operations on the property of another. Here, the Lessees (the MEDC) agree to "save harmless" and indemnify the Lessor (DOC) for any damages or losses resulting from the condition of the facility or from the MEDC's use of it. This means that the MEDC will not hold the DOC responsible for those damages and that if the DOC is found liable, perhaps to a third party, the MEDC will pay for the claims against the DOC. The only exception is in a case where liability is determined to be the exclusively due to the DOC's negligence.

Thus, if a visitor is injured while attending an event or program at the West Virginia State Penitentiary, the MEDC would not try to blame the DOC or bring the DOC into a resulting claim for damages. If the injured party were to file suit against the MEDC and the DOC and both of these parties were found to be liable, the MEDC would have to pay the entire amount of the damages.

This provision in the lease is an important protection when a private entity conducts regular operations on the State's property. Because the MEDC regularly brings visitors onto the property, the State is exposed to risks that it might otherwise not have. The "hold harmless and

indemnification” provision shifts the risk from the State to the MEDC, the entity conducting operations on the site.

For reasons that are not shown in records from the Division of Corrections, this provision was overridden by the following language in the 2013 MOU:

“J. All parties shall be responsible for their own liability arising from any claim regarding injury to person, property, or otherwise. Neither part [sic] agrees to defend, indemnify, or hold the other harmless.”

It may be argued that this language is simply a different way of stating the relative responsibilities of the DOC and the MEDC, but this is not equivalent to a hold harmless and indemnification provision. This language allows the MEDC to pursue claims against the DOC for liability and does not require the MEDC to indemnify (reimburse) in the event that a person incurs damages while participating in an MEDC event on the property. Thus, the language in 2013 MOU is a major change from the original lease language. This shifts significant risk back to the DOC and the DOC records do not show that the State gained anything in return.

The insurance requirements in the 2004 Lease were poorly drafted and potentially unenforceable; then these requirements were voided by language of the 2013 MOU.

Another means through which the State may limit its risk from MEDC’s operations at the Penitentiary is through insurance. The 2004 Lease required the Lessees (MEDC and the High Tech Consortium) to procure and maintain separate policies of insurance to cover “bodily injury, personal injury, or death”, property damage and “fire and extended coverage in an amount adequate to cover the cost of replacement of all fixtures, equipment, business and/or personal property attached to the demised [sic] premises . . .” The 2004 Lease also goes on to state that, “Neither party shall be liable to the other, or to any insurer of the other, . . . or to any party claiming through the other, for loss or damage to the demised premises or the property of the other, for loss or damage , , , arising from hazards which would have been insured against by a policy insuring against the hazards of fire and extended coverage . . .” By requiring the MEDC (and the High Tech Consortium) to obtain insurance to cover most types of loss, the DOC reduced the risk of expensive litigation and it assured that, in the event of an accident or claim, there would be money to reimburse the State even if the MEDC had no money of its own.

The enforceability of these requirements is questionable, however, because of errors in drafting the original terms in the 2004 Lease and because of language in the 2013 MOU implying that insurance is no longer required.

The 2004 Lease suffers from what appears to be bad editing. Key words are absent from the paragraph on insurance. One sentence begins, "Such policies shall name both the Lessor and, during the term of this Lease through the State Board of Risk, fire and extended coverage insurance in an amount adequate to cover the cost . . ." Clearly there are words missing after the first "and" in this sentence. Based upon a similar provision in the February 5th, 1997 lease between the DOC and the MEDC, it appears that the missing words should have been "and Lessee as the insured." This would make the full sentence read as, "Such policies shall name both the Lessor and the Lessee as named insureds." Then a new sentence should have started with a description of a separate policy for fire and other hazards. The missing wording would have made it clear that the MEDC was obligated to buy insurance to protect the DOC. As a result of this omission in the insurance paragraph, the intention of the parties was not clearly stated and, at the very least, this could have resulted in unnecessary litigation if the DOC had need to enforce the insurance requirement. In the worst-case scenario, the insurance provision may have been completely unenforceable.

To date, it has not been necessary to make a claim under such insurance and since 2013, it appears that the DOC has, intentionally or inadvertently, waived the requirement for insurance altogether. There is no language in the 2013 MOU that specifically mentions the requirement for insurance and, presumably, the original requirements (such as they may have been) would carry forward. However, the language in Paragraph J of the 2013 MOU strongly implies that policies of insurance are no longer required.

"J. All parties shall be responsible for their own liability arising from any claim regarding injury to person, property, or otherwise. Neither part [sic] agrees to defend, indemnify, or hold the other harmless."

With this language, the 2013 MOU indicates that the DOC will expect the MEDC to cover its own liabilities without any assurance that the MEDC will have the financial resources to do so or that the DOC will have any other recourse. This language merely declares that each party will "be responsible" for its own liability without any express mechanism to make this happen. Was this the parties' intention? Just how will the DOC make a claim and receive payment if the MEDC is negligent? How will the MEDC come up with the money?

As with the abrogation of the hold harmless and indemnification provision, this language in the 2013 MOU gives up some important protections for the State and subjects it to risks without any corresponding benefit.

The 2013 MOU is ambiguous in its language and structure.

It is not clear why the 2013 document was titled a “Memorandum of Understanding” when it would have been more appropriate to call it an amended lease and to structure it as such. Rather than crafting a new lease or an amended lease that includes all the terms between the parties, the DOC and MEDC took a shortcut. The 2013 MOU states that the parties are to follow the “terms of the January 29, 2004, lease unless otherwise modified by the terms set forth” in the 2013 MOU. This document then recites a number of specific terms, some of which imply, but do not explicitly spell out, changes to key provisions in the 2004 Lease. The most significant of these ambiguities is the paragraph J previously cited, which clearly removes the hold harmless provision, but indirectly abrogates the insurance requirement.

Conclusion

Based upon my review of the 2004 Lease Agreement and the 2013 MOU, as well as some correspondence and other records provided by the DOC, I believe that the DOC entered into an unusual, long-term agreement without full consideration of terms or conditions that would protect the State’s interests. Bad editing of the 2004 Lease resulted in insurance requirements that would likely have been unenforceable and inadequate to cover the risk to the State. Subsequent modification of the lease through 2013 MOU further removed key provisions that have shifted the risk away from the tenant and onto the State. Had these documents been reviewed by an independent authority, these issues could likely have been spotted and addressed.



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