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VIA HAND DELIVERY AND E-MAIL

COVID-SOP@doj.state.wi.us

Attorney General Josh Kaul
Wisconsin Department of Justice
17 W. Main St.
Madison, WI 53703

Re: Request for Quo Warranto Action, Wis. Stat. § 784.04(1)(a), Regarding
Dr. Frederick Prehn

Dear Attorney General Kaul:

On behalf of the Humane Society of the United States and the Center for Biological Diversity, I write pursuant to Wis. Stat. § 784.04(1) to complain that Frederick Prehn, D.D.S., is unlawfully occupying and exercising the powers of a public office, and to respectfully request that you take prompt action to remedy this situation in a *quo warranto* action.

I. Background

Members of the Wisconsin Natural Resources Board (“NRB”) are nominated by the Governor and appointed with the advice and consent of the Senate for staggered six-year terms. Wis. Stat. §§ 15.07(1)(a), 15.34(2)(a). Dr. Prehn was appointed to a seat on the NRB in May 2015 and his six-year term expired on May 1, 2021.¹ The Governor announced the appointment of his successor, Sandra Dee Naas, on April 30, 2021.

In public statements, Dr. Prehn does not contest that his six-year term expired on May 1, 2021. Nevertheless, he has openly continued to occupy and exercise the authority of the

¹ See Wisconsin Department of Natural Resources, “Board Member Information,” <https://dnr.wisconsin.gov/about/NRB/members.html> (last visited July 19, 2021).

office – not only as a member of the NRB, but as its Chair. As described in Section II below, this is unlawful. From his unlawfully held position, Dr. Prehn has already presided over and cast votes at two NRB meetings, the most recent on June 23, 2021, where more than twenty official actions were taken on matters ranging from air quality and community drinking water standards to hunting and fishing regulations.² He has indicated his intent to again preside over the NRB’s August 10-11 meeting.³

The NRB exercises ultimate policymaking authority over Wisconsin’s wildlife, air and water resources, and public lands. Dr. Prehn’s continued presence on the NRB undermines the integrity of the succession process and harms the interests of individuals and organizations concerned with the sound, responsible, and accountable management of natural resources held in the public trust. More fundamentally, allowing Dr. Prehn to hold a public office to which he is no longer legally entitled runs contrary to basic norms of governance, at a time when faith in public institutions is already being eroded to dangerous effect.

The Humane Society of the United States (“HSUS”) is a non-profit organization founded in 1954 dedicated to protecting all animals, including wolves and other wildlife. The HSUS is the nation’s largest animal protection organization and has regional offices and state directors located throughout the country, including a Wisconsin State Director working exclusively on issues that impact the organization’s thousands of members and supporters in Wisconsin. The HSUS works on behalf of its members and supporters to ensure that Wisconsin’s wolves and other wildlife are responsibly, humanely, and scientifically managed for its constituents, other members of the public, and many future generations to enjoy.

The Center for Biological Diversity is a nonprofit organization with more than 1.7 million supporters – including about 20,000 in Wisconsin – concerned with the increasing rate of extinction and loss of biological diversity in the United States. For more than 30 years, the Center has advocated for science-based conservation of imperiled wildlife and plants, including gray wolves and other rare animals that live in Wisconsin. Both HSUS and the Center for Biological Diversity routinely appear before the NRB and the Department of Natural Resources in the course of their work.

² See Wisconsin Natural Resources Board, Minutes for May 26, 2021 meeting (*available at* <https://widnr.widen.net/view/pdf/uwgbplci32/2021-05-APPROVED-May-26-2021-Brief-of-Action.pdf?t.download=true&u=2ge66j>); Wisconsin Natural Resources Board, Agenda for June 23, 2021 meeting (*available at* <https://dnr.wisconsin.gov/About/NRB/2021/23-June>).

³ See Milwaukee Journal Sentinel, “Calls have come for Frederick Prehn to vacate his Natural Resources Board seat. Here’s why he says he isn’t going anywhere,” (June 25, 2021) (*available at* <https://www.jsonline.com/story/news/politics/2021/06/25/wisconsin-natural-resources-board-chair-why-he-isnt-stepping-down-frederick-prehn/5323445001/>).

II. Dr. Prehn is Unlawfully Occupying State Office

Dr. Prehn occupies the NRB seat and Chair position in violation of state law. Members of most public boards in Wisconsin, including the NRB, are appointed “to serve for terms prescribed by law.” Wis. Stat. § 15.07(1)(a). NRB members are appointed for fixed six-year terms. Wis. Stat. § 15.34(2)(a). Section 15.34 includes no provision extending NRB members’ terms beyond that six-year duration, under any circumstances. By the plain text of these statutes, Dr. Prehn’s statutorily defined term expired on May 1, 2021, and he lacks any legal basis to continue holding office. *See State ex rel. Hamilton v. Krez*, 88 Wis. 135, 59 N.W. 593, 594 (1894) (“[T]he incumbent had been elected to and was serving a term of two years... His election was for that term, and had no force or validity beyond it.”). Because “the meaning of the statute is plain,” the inquiry should end here. *State v. Grunke*, 2008 WI 82, ¶ 21, 311 Wis. 2d 439, 752 N.W.2d 769 (2008) (quoting *State ex rel. Kalal v. Circuit Court for Dane County*, 2004 WI 58, ¶ 45, 271 Wis. 2d 633, 681 N.W.2d 110).

Statutes establishing the terms for some *other* government offices provide, in clear and unambiguous language, that an official may lawfully continue in office until their successor is installed. For example, members of the Housing and Economic Development Authority serve “for staggered 4-year terms” and “shall hold office until a successor has been appointed and has qualified.” Wis. Stat. § 234.02(1).⁴ The Wisconsin Supreme Court interprets these statutes to mean what they say – “[w]here the law *expressly provides* that the officer shall continue to hold office until his successor is chosen and qualified, he will not cease to be an officer.” *State v. Nobles*, 109 Wis. 202, 85 N.W. 367, 368 (1901) (emphasis added); *see also State v. Feuerstein*, 159 Wis. 356, 150 N.W. 486, 488 (1915) (school district officer lawfully held over where statutory term limit was “three years *and until their successors have been elected or appointed*”) (emphasis added).

The statute governing appointments to the NRB, by contrast, contains no such “hold-over” provision. Wis. Stat. § 15.34(2)(a). It fixes member terms at “six years,” not “six years and until a successor is confirmed.” *Id.* Accordingly, NRB members may not lawfully occupy their offices beyond the expiration of their fixed statutory term. *See State ex rel. Martin v. Heil*, 242 Wis. 41, 48, 7 N.W.2d 375, 378 (1942) (hold-over was unlawful where “[t]he

⁴ *See also, e.g.*, Wis. Stat. §§ 13.50(2) (members of joint survey committee on retirement systems serve for “4 years and until a successor is appointed and qualified.”), 27.019(4) (county rural planning committee members serve “for a term of 4 years and until a successor is elected and qualified”), 60.75(2)(d) (sanitary district commissioners served for fixed terms and “until a successor takes office” if appointed, or “until a successor is elected” if elected), 63.01(2) (county civil service commissioners serve “for the term of 5 years...and until a successor is elected and qualifies”), 92.06(1)(c) (land conservation committee members serve “for a term of 2 years or until a successor is appointed, whichever is longer”), 247.03(2)(a) (Artistic Endowment Foundation members are “appointed for 7-year terms” and “may hold office until a successor is appointed”), 977.05 (prior to July 1, 1980, state public defender served “for a period of 5 years and shall continue until a successor is appointed”).

constitutional provision is not that the governor shall hold for a period of two years and until his successor shall be elected and qualified. The provision is that the governor shall hold for a term of two years.”); *see also Feuerstein*, 150 N.W. at 488; *Pleva v. Norquist*, 195 F.3d 905, 915 (7th Cir. 1999) (“allowing [Board of Zoning Authority member] to remain...indefinitely would contravene Wisconsin statutory provisions and Milwaukee ordinances providing for a fixed term of 3 years for all Board members”).⁵

Reading the plain language of the NRB statute to permit Dr. Prehn’s hold-over would violate established canons of statutory construction. As discussed above, statutes defining term limits for certain other state boards and commissions *do* contain the express hold-over provisions absent from Section 15.34. *See supra* note 4. This reflects the Legislature’s deliberate choice *not* to allow NRB members to occupy their offices after the expiration of their fixed terms. *See State v. Welkos*, 14 Wis. 2d 186, 192, 109 N.W.2d 889 (1961) (“[W]here a statute with respect to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant in showing that a different intention existed.”). If the Legislature wished to amend Section 15.34 to allow for members to hold over, it knows how to do so; indeed, it is considering just such an amendment to a different statute governing the term of a public office during the current session. 2021 Wisconsin Senate Bill 297 (amending term of office for County and Town Board Supervisors from “2 years” to “2 years and until a successor is elected and qualified.”).

Dr. Prehn may point to *State ex rel. Thompson v. Gibson*, but that case does not change the analysis. 22 Wis. 2d 275, 125 N.W.2d 636 (1964). Before the *Thompson* court was the validity of several recess appointments made by the Governor using a statutory procedure for filling vacancies under Section 17.20. 125 N.W.2d at 642. The court held that those recess appointments were ineffective because the incumbents’ holding over after the expiration of their terms did not create a “vacancy” allowing for appointments under that section. *Id.* at 643.

The *Thompson* opinion does not address the statutory scheme discussed above *at all*, let alone rebut the Legislature’s crystal-clear directive that state board members “serve for terms

⁵ In limited circumstances, Wisconsin courts have held that incumbents had the right to remain until their successor is confirmed, even in the absence of a holdover clause. *Morris v. Employee Tr. Funds Bd. of State of Wis.*, 554 N.W.2d 205 (Ct. App. 1996); *State v. Johnson*, 186 N.W. 729 (1922). These decisions were driven by the need to avoid interrupting government functions until a successor is qualified to take office, and should be confined to their facts. *Johnson*, 186 N.W. at 730. These concerns do not apply to the NRB or the office at issue. The NRB consists of seven members serving staggered six-year terms. WIS STAT. § 15.34(2)(a). Under state law, “a majority of the membership of a board” constitutes a quorum that “may act in any matter within the jurisdiction of the board.” Wis. Stat. § 15.07(4). Thus, the NRB can continue to function despite the temporary absence of one member. In any case, a replacement has already been named to succeed Dr. Prehn.

prescribed by law,” which terms are fixed at six years for NRB members. Wis. Stat. §§ 15.07(1)(a), 15.34(2)(a). Nor could it: *Thompson* was decided before the 1967 executive branch reorganization law that overhauled Section 15, including by adopting Sections 15.07 and 15.34, and created the NRB as it exists today. Chapter 327, Laws of 1967, § 13. Even if the judge-made rule in *Thompson* were applicable, it cannot supersede clear and later-in-time statutes that speak directly to the issue.⁶ In any case, *Thompson* is simply inapposite. The court’s holding was limited to the validity of the Governor’s recess appointments, and did not pass on the lawfulness of incumbents’ decisions to hold over. 125 N.W.2d at 645.⁷ In fact, the only holdover incumbent that the *Thompson* court remarked *did* have a legal right to remain in office served on the Investment Board, whose organic statute included an express holdover clause at the time. *Id.*

At most, *Thompson* speaks to whether the Governor may replace Dr. Prehn using Section 17.20’s procedure for filling certain defined vacancies. But that is not the question here. Rather, it is a more fundamental one: whether Dr. Prehn may lawfully continue to occupy a position on the NRB in the first instance, irrespective of when or through what process his successor may be appointed. The *Thompson* opinion does not squarely address this question, let alone stand for the remarkable proposition that appointed officials may *always* hold their offices past the expiration of their terms, without regard to the text of the statutes establishing those terms.

III. Conclusion

The Attorney General may bring a *quo warranto* action “in the name of the state...[w]hen any person shall usurp, intrude into, or unlawfully hold or exercise any public office” within the state of Wisconsin. Wis Stat. § 784.04(1). Dr. Prehn is occupying a state office of extraordinary public significance many months after his statutory term expired, in plain contravention of state law. For these reasons, we respectfully urge your office to take prompt action to remove Dr. Prehn from office before the NRB’s August 10-11 meeting. Swift action is necessary to restore the integrity of the NRB’s succession process and prevent

⁶ This is especially true in light of recent case law providing that courts should “narrowly construe imprecise delegations of power to administrative agencies,” limiting them to only the “explicit authority” granted by statute. *Wis. Legislature v. Palm*, 2020 WI 42, ¶ 52, 391 Wis. 2d 497, 942 N.W.2d 900. Inferring a hold-over provision not present in the text of Section 15.34 means reading the statute as granting implied or non-explicit authority to individuals to continue taking official actions past the expiration of their legally defined terms. See Wis. Stat. § 227.01(1) (defining “agency” to include an “officer in the state government”).

⁷ Indeed, the issue of whether those incumbents’ holdovers were themselves lawful does not appear to have been disputed by the parties. See *Thompson*, 22 Wis. 2d at 290 (“The attorney general contends that there can be no vacancy when there is an incumbent *lawfully holding over* after expiration of his term, while the appointees argue that a vacancy does exist *under such circumstances.*”) (emphasis added).

any further NRB actions from being compromised by Dr. Prehn's continued and unlawful presence.

Sincerely,

PINES BACH LLP

A handwritten signature in cursive script, appearing to read "Christa O. Westerberg".

Christa O. Westerberg

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